

# FIRST LENIENCY APPLICANT FINED DUE TO NEGLIGENT NON-COOPERATION

On April 14, 2010 the Austrian Cartel Court released a decision<sup>1</sup> imposing an overall fine of EUR 1.52 million on four companies participating in a cartel in the printing chemical sector. The investigation of the cartel by the Austrian Federal Competition Authority was triggered by a leniency application. As in other jurisdictions, if all requirements are fulfilled no fine will be imposed on the first leniency applicant for his cooperation. However, in this particular case, the first leniency applicant *negligently* failed to fulfil its obligation of full cooperation. Consequently, the Austrian Federal Competition Authority requested the Austrian Cartel Court to impose a fine on the first leniency applicant.

The first leniency applicant had submitted evidence of the cartel covering a certain period of time (period A). During the investigation of the Austrian Federal Competition Authority a second leniency applicant provided the authority with evidence covering a period of time right before the already known facts (period B). For this newly uncovered period of the cartel, the Austrian Federal Competition Authority granted the second leniency applicant immunity. This is in line with paragraph 26 of the European leniency program, which states that *[i]f the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point (25) which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting any fine to*

*be imposed on the undertaking which provided this evidence.* In addition, for period A, the second leniency applicant received a reduction of the fine, which amounts to the maximum possible reduction, namely 50%, for its cooperation.

Regarding the first leniency applicant the Austrian Federal Competition authority granted full immunity for period A, but concluded that due to *negligently* not having provided the authority with all the evidence to present the complete infringement it had violated its obligation of full cooperation according to section two of the Handbook of the Federal Competition Authority on the Implementation of Section 11 para. 3 of the Austrian Federal Competition Act, which states that a leniency applicant *consequently [has to] cooperate with the Federal Competition Authority promptly and without restrictions in order to fully clarify the matter.*<sup>2</sup> As a result, the first leniency applicant was subject to a fine for period B. However, as during the course of the proceedings in front of the Austrian Cartel Court the first leniency applicant almost entirely admitted its involvement in the infringement for the newly discovered period, such admission outside of the leniency program was considered as a mitigating circumstance according to § 30 KartG and a reduction of 25 %<sup>3</sup> of the fine for period B was granted. The Austrian Cartel Court, which is the authority to impose a fine in Austria, completely followed the motion of the Austrian Federal Competition Authority to impose such fine on the first leniency applicant.



It has to be pointed out that the infringement taking place in both periods of time was one single infringement. Also, in line with the practice of the European Commission the Austrian Federal Competition Authority would not simply penalize a company for not disclosing the entire period of time of the infringement if unknown to the company. However, in this particular case it made a point to punish negligent non-cooperation of a company.

If such case had been subject to an investigation by the European Commission, conditional leniency of the first leniency applicant probably would have been withdrawn completely, and a maybe reduction of the fine outside of the leniency program granted instead.<sup>4</sup> Consequently, the Austrian Federal Competition authority found an interesting solution by providing full immunity for period A and a reduction of the fine for the period B. As this cartel case is only the fifth cartel case prosecuted and punished with a fine under the new regime coming into force in 2002, and as its leniency program was only introduced in 2006, the authority wanted to avoid to deter potential future leniency applicants, but at the same time pointed out that one should take such cooperation as a leniency applicant seriously.

The overall outcome, namely that the first leniency applicant ended up with the highest fine imposed on all companies involved in the cartel, is unfortunate, but simply the result of a fair calculation, for which the Austrian Federal Competition Authority used the main principles of the Fine Guidelines of the European Commission<sup>5</sup> as a basis.

*Remark by the author:*

*This decision is definitely a landmark decision regarding a negative outcome for a first leniency applicant. However, such result was based on the specific circumstances of the negligent non-cooperation of the first leniency applicant and thus should not deter other companies to go forward with a leniency application in Austria.*

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<sup>1</sup> KG 14.4.2010 29 Kt 5/09.

<sup>2</sup> See at [http://www.bwb.gv.at/NR/rdonlyres/0FFD1CE9-6A5E-4AF5-8775-E1F13DA7376A/35907/Handbookleniency\\_englishversion.pdf](http://www.bwb.gv.at/NR/rdonlyres/0FFD1CE9-6A5E-4AF5-8775-E1F13DA7376A/35907/Handbookleniency_englishversion.pdf).

<sup>3</sup> Such reduction of 25 % was due to the special circumstances exceptionally high. So far, only in one case, the lift cartel (OGH 8. 10. 2008, 16 Ok 5/08), a mitigating circumstance led to a reduction of 5 %.

<sup>4</sup> See e.g. Case COMP/C.38.281/B.2 - Raw Tobacco Italy.

<sup>5</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 19.2.2006 C 210/2.

