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Austria: New competition rules – Take one

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On 12 June 2012, the Austrian council of ministers has adopted a proposal for an overhaul of the Austrian Cartel Act and of the Competition Act. If passed by parliament, which is likely, the amendment will become law on 1 October 2012.

This post considers the proposed key changes. (Once the bill has been duly adopted, the intention is to have a "take two" follow-up.)

De minimis – now the same as at EU level?
The proposed new Austrian de minimis exception looks like it is taken from the Commission's de minimis Notice: The prohibition of cartels does not apply where the undertakings involved have a (joint) market share of no more than 10% or, in vertical arrangements (i.e. between undertakings on different market levels), of no more than 15%. The market is now foreseen to be also in geographic terms the relevant one (currently, it's 5% market share in Austria, regardless as to whether the Austrian territory forms a market or not). Hard core infringements shall henceforth be exempted from the exception i.e. they cannot benefit from it.

The latter is well known from the Commission's de minimis Notice. However, whether it makes sense for a national piece of legislation is questionable. First, the Commission's de minimis Notice is soft law whereas national legislation is clearly not. For good reason, the ECJ has held (though quite some time ago) that where the parties have a very weak market position, even absolute territorial protection does not amount to an infringement of what is now Article 101 TFEU. Under the proposed Austrian de minimis rule, also an agreement of two insignificant entrepreneurs (given the Austrian background, think of two out of 20 skiing instructors) to allocate markets (one the slope on the right hand side of the lift, the other on the left hand side) infringes the national prohibition of cartels. Second, EU law only steps in where there is an inter-state element. The application of Austrian law is not subject to this significance test either. Third, the Austrian de minimis rule is clearly an exception (to be construed narrowly and its application is to be proven by the undertaking concerned).

New provisions on collective market dominance and specific dominance rules
The proposed rules on collective market dominance are partly informed by the German GWB (Act Against Restraints of Competition). According to the proposal, two or more undertakings are to be considered market dominant if there is no significant competition amongst them and they do not face significant external competition. Further, there is a (rebuttable) presumption of market dominance if two or three undertakings (together) have a market share of 50% or up to five

undertakings (together) have a market share of 66,66%. This is regardless of the market share of the individual undertaking within such group, i.e. even a very small undertaking can be presumed market dominant if the market is rather concentrated.

The catalogue of abusive behaviors known from Article 102 TFEU provides for the imposing of unfair trading conditions. The current proposal foresees a re-draft of the well known text to extend to the request (Forderung) of conditions, which differ from those that would likely persist under effective competition. Again, the German GWB is cited as having informed the proposal.

Further, market dominant electricity and gas utilities must, pursuant to the proposal, not request terms and conditions that are less favorable than those of other utilities on comparable markets or prices that unduly exceed costs. It is for the market dominant utility to prove that any deviation is objectively justified. The sector specific regulator is given standing also to initiate fine proceedings before the Cartel Court (normally, only the Federal Competition Agency and the Federal Cartel Prosecutor may do so).

Merger control – extension of review phases

It is foreseen that, upon application by the notifying parties, phase I may be extended to six weeks (currently, phase I lasts four weeks). Also phase II (in-depth investigation before the Cartel Court) may be extended upon request by the notifying parties; namely to six months (currently, phase II lasts five months). The travaux preparatoires somewhat misleadingly speak of “stop the clock” in this context.

Extended scope for actions for finding

Court decisions have narrowly construed the current provisions on actions for finding or establishment. The proposal now makes it clear that an action for finding may be brought against the leniency applicant as well as in preparation for private damage claims.

Fine proceedings – more transparency

The statement of objection shall, according to the proposal, particularly set out the infringement and the evidence to be heard as well as the results of the Federal Competition Agency’s investigation in more detail.

At the same time, the proposal contains additional fining guidelines.

A further step to more transparency is that decisions by the Cartel Court shall henceforth always be published (currently, only decisions by the Cartel Court of Appeals typically are). While the draft foresees that the Cartel Court shall protect business secrets, it expressly stipulates that the undertakings concerned have no enforceable right in this regard. This is one of the proposed provisions that have attracted heavy criticism and may well be revisited.

Leniency – more time to come forward

Even if the authority already knows about the infringement, the proposal foresees that an immunity from fines may be granted if the leniency applicant provides enough evidence to enable a dawn raid or even a direct fine application to the Cartel Court.

Strengthening both public and private enforcement

In practice, the Federal Competition Agency encountered some difficulties in having its information requests duly answered. The proposal foresees that the Federal Competition Agency can itself enforce information requests (rather than only through Cartel Court proceedings).

Further, the proposal makes it clear that, during dawn raids, the Federal Competition Agency, can directly request information concerning documents. The Federal Competition Agency shall, inter alia, also be entitled to seal premises. The search can only be objected to (claiming that they fall outside the scope of the dawn raid) with regard to individually specified documents.

Last but not least, the proposal aims at strengthening private enforcement. It foresees a limitation on the passing on defence (a private damages claim by the direct purchaser is not excluded by the fact that goods or services have been sold on). Further, it clarifies that interest may be claimed as at the moment of the damaging event (which may well lead to more than "just" treble damages). Moreover, the proposal also provides for a binding effect of cartel decisions finding an infringement as well as an interruption (Hemmung) of the limitation period for the time of the duration of cartel proceedings plus 6 months.

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