

# Kluwer Competition Law Blog

## **Austria: New competition rules – Take two**

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The Austrian Parliament has passed a bill amending the Austrian competition law rules. On March 1, 2013, significant changes will enter into force. These include the following:

This is the follow-up to the post “Austria: New competition rules – Take one”.

### **Strengthening of private enforcement**

The legislator made efforts to promote private enforcement. This is demonstrated, e.g. by a new provision in the Austrian Cartel Act exclusively dedicated to compensation for damages as a result of infringements of competition law. The new law makes it clear that anyone guilty of committing such a violation is obliged to compensate the resulting damages.

In addition, it states that a private claim for damages by the direct purchaser is not excluded by the fact that the goods or services have been sold on. Notably, the new legislation expressly allows the claiming of interest from the moment of the occurrence of the damaging event onwards.

Moreover, the law sets forth that decisions by the Austrian Cartel Court as well as by any national competition authority of a Member State and the European Commission are binding for Austrian civil courts.

The amendment brings about a specific statute of limitation: The limitation period for cartel damage claims is suspended for the time of the duration of respective cartel proceedings and 6 subsequent months after the final cartel decision or other termination of the proceedings.

A further advantage for potential claimants is that, according to the new law, a legal interest (the necessary condition for an action for finding before the Cartel Court) is also given if the finding is requested in order to seek later on compensation for damages.

### **Strengthening of the Federal Competition Agency’s powers**

Second, the amendment brings about increased powers for the Federal Competition Agency (BWB). It now has the possibility to enforce information requests itself by issuing binding decisions and by imposing fines if such decisions are not followed. This will guarantee that such requests are duly answered in the future.

The Federal Competition Agency has now also extensive rights to ask questions during dawn raids.

So far, it could only ask for information related to the whereabouts of documents. According to the amendment, the Federal Competition Agency can request from all representatives and employees of the undertaking “elaborations regarding fact or documents which are related to the subject and the purpose of the investigation”. Apart from that, the Federal Competition Agency is now entitled to seal rooms. In practice, the absence of such possibility has led to non-stop (overnight) dawn-raids that could last several days. The Federal Competition Agency also has the possibility to garrison documents during dawn-raids.

So far, it was possible in cases where it was unclear whether documents are covered by the subject of the investigation, to seal all documents and to have the Cartel Court decide this issue. This right has been significantly reduced: The new provision stipulates that the undertaking affected can only object to the inspection or seizure of (i) certain, individually described documents and let the Cartel Court render a decision in this regard. This procedure is only available, if (ii) a legally recognized confidentiality obligation or a right not to testify as stipulated by the Austrian Criminal Procedure Act. This new rule is to be seen critically in the context of the concerned undertaking’s exercise of its rights of defence.

### **The new de minimis rule**

The new de minimis rule can apply where the combined market-share threshold does not exceed 10% on the relevant market. With regard to non-competitors, the individual market-shares are relevant and the threshold is 15%. Hardcore restrictions such as for example price fixing or market allocation agreements now fall outside the de minimis exemption all together.

Doubts have been raised as to whether such on the face alignment to EU rules is appropriate for national competition law. Reasons asserted in this context were that the Commission’s de minimis Notice is soft law as opposed to national legislation being actual binding law. EU law only steps in if there is a cross-border element, whereas the application of Austrian law does not depend on such a significance criterion. Hence, also a cartel between two most insignificant undertakings is caught by the Austrian prohibition of cartels. Further, already the fact that the Austrian de minimis rule is laid down under the heading “exceptions” in the Cartel Act makes it clear that it has to be construed narrowly and the burden of proof rests on the undertaking invoking its application.

### **Enhanced transparency**

Revised Section 30 of the Cartel Act on the relevant criteria that must be taken into account in the course of the determination of the fine contains now more aligned to the Commission’s notice on the method for setting fines in addition also aggravating and mitigating circumstances that should be considered in addition to the duration of the infringement, the achieved enrichment, the degree of fault and the economic strength of the undertaking. Pursuant to this rule, aggravating reasons are repeated violations of cartel law or a leader or instigator position within a cartel. On the contrary, mitigating circumstances are the fact that the undertaking was only to a limited extend involved in the infringement, it stopped the infringement itself or it significantly helped to clarify the facts concerning the violation.

For the first time, the Cartel Act contains a rule on the content of applications for fines before the Cartel Court. They shall particularly set out the circumstances of the infringement and the evidence to be heard by the Cartel Court as well as the results of the Federal Competition Agency’s investigation. In case of an application for a fine in a particular amount, this must be explained.

This rule is to be welcomed as it enables the undertakings concerned to exercise their rights of defense.

Further, as a general rule, any decision by the Cartel Court will be published. Currently, this is only the case with regard to decisions by the Cartel Court of Appeals. Issues arise, however, in this context as far as the protection of business secrets is concerned. The Cartel Court decides on the version that is ultimately published. Against such a decision, the amendment foresees a possibility to lodge an appeal with the Cartel Court of Appeals within fourteen days.

### **More flexibility in merger control**

Upon application by a notifying party, phase I, consisting of an assessment of the intended concentration by the Federal Competition Agency and the Federal Cartel Prosecutor (together “the Official Parties”) during which they decide whether they lodge an application before the Cartel Court for a further in-depth analysis, may be extended from currently 4 weeks to six weeks. Also phase II of merger control (before the Cartel Court) can now be extended upon request by the notifying parties from currently five to six months.

### **Explicit rule on collective market dominance**

According to the amended law, two or more undertakings are to be considered (collectively) market dominant (i) if there is no significant competition amongst them and (ii) if they do not face significant external competition or if they have vis-à-vis other competitors a superior market position. Further, there is a (rebuttable) presumption of market dominance if two or three undertakings (together) have a market share of at least 50% or up to five undertakings (together) have a market share of at least 66,66%. The rule is applicable irrespective of the individual undertaking’s market share within such a group and henceforth, even small undertakings can be presumed market dominant in concentrated markets. The new rule was inspired by Section 19 of the German Act against Restraints of Competition (GWB).

In this context, it may also be noted that a slight change concerns the practice of imposing unfair trading conditions as the re-drafted provision will also extend to conditions differing from those that would likely persist under effective competition, whereas in particular the behaviour of undertakings on comparable markets with effective competition shall be taken into account. So far, no such comparative aspects were taken into account. The wording was obviously also inspired by Section 19 of the German GWB.

### **Leniency**

A further change introduced by the amendment concerns the leniency program. It is no longer necessary that the infringement is unknown by the Federal Competition Agency in order to be awarded a total immunity from fines. Before the amendment, such total immunity from fines was not possible. The idea was to provide further inducements so that the undertakings cooperate with the agency. The other criteria remained essentially the same (termination of the involvement in the infringement and no forcing of other undertakings to participate in the cartel). Only the wording of the further condition being the obligation to cooperate was slightly changed as it now stipulates that the undertaking must – in addition to fully and promptly – also truthfully cooperate and is obliged to submit all means of evidence concerning the alleged infringement which are in its possession or to which it has access.

Further, it is now explicitly stipulated that a legal interest for an action for finding is also given if it concerns the infringement by an undertaking or associations of undertakings that have been granted leniency status. However, it is clarified that in this particular case, only the Official Parties may lodge such an action for finding. This rule shall enable also heavier fines for leniency applicants in case of repeated infringements.

## Conclusion

Many of the new rules are to be endorsed, but in particular those restricting the concerned undertaking's rights of defense are to be seen critically. It will be interesting to see how the reformed rules will change Austrian competition law enforcement in practice.

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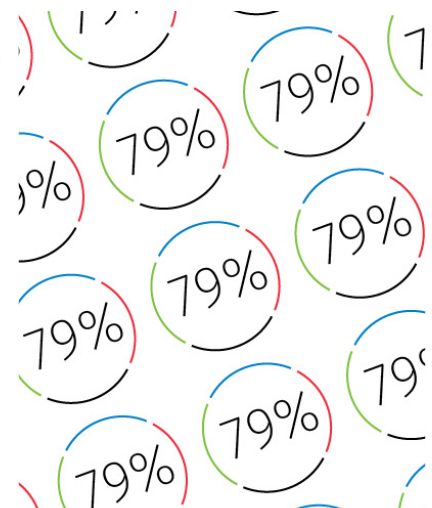
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