

**bpv** HÜGEL RECHTSANWÄLTE

**COMPETITION LAW ALERT**

**AUSTRIAN COMPETITION  
LAW AMENDED**

**1<sup>ST</sup> MARCH 2013**

## Austrian Competition Law Amended



On 1 March 2013, an important amendment to the main Austrian competition law statutes – the Cartel Act, which contains the substantive

competition rules, and the Competition Act, which governs the enforcement powers of the Federal Competition Authority (FCA) – will come into effect. The amendment, which was adopted by Parliament in December 2012, will bring about significant changes to Austrian competition law enforcement, with the FCA's enforcement powers being strengthened considerably. In addition, it contains a number of small, but practically significant changes to the substantive competition rules of the Cartel Act.

### Substantive competition law

On the substantive side, the amendment builds on the EU and German competition rules, to bring Austrian law more in line with these models:



#### New de minimis exception:

Most notably, the Austrian exception for agreements of minor importance is aligned with the European Commission's De Minimis Notice. Under the previous Austrian rules,

agreements were excepted from the prohibition of sec 1 Cartel Act (the national equivalent of Art 101 TFEU) if the combined market share of the parties did not exceed 5% on the domestic market, or 25% on a domestic sub-market. The new thresholds will be more familiar to businesses and practitioners from other EU Member States: in line with the Commission's Notice, agreements between competitors will be exempt if the combined market share held by the parties does not exceed 10%, while vertical agreements are subject to a 15% market share threshold. In addition, the new exception will not apply to "hardcore restrictions", such as price or quantity fixing and market sharing (which were covered by the old Austrian de minimis exemption).<sup>1</sup>

<sup>1</sup> Pursuant to the case law of the Court of Justice of the EU, even hardcore restrictions may however escape the provision of Art 101(1) TFEU if they do not give rise to appreciable effects on the market (ECJ Case No 5/69 – Völk/Vervaecke). It is arguable that a similar appreciability criterion should apply under Austrian law.



### New presumptions of collective dominance:

Based on corresponding provisions of the German Competition Act<sup>2</sup>, the amendment introduces new market share thresholds at which the existence of a collective dominant position will be rebuttably presumed. In its amended form, the Cartel Act will now contain five different presumptions of dominance, with the relationship between the dif-

ferent thresholds being somewhat unclear. The new presumptions of collective dominance will apply if three undertakings hold at least 50%, or if five undertakings hold at least two thirds of the market. Interestingly, the thresholds do not provide for a minimum market share to be held by each member of the allegedly dominant oligopoly – it is sufficient that the combined market share thresholds are met.

By contrast, Parliament decided to drop an amendment proposed by Government to facilitate excessive pricing cases in the energy sector. This amendment would have made it illegal for dominant utilities to charge higher prices than those prevailing on comparable, competitive markets. The prototype for this intended amendment, sec 29 of the German Competition Act, has been subject to heavy criticism, among others by the German Monopoly Commission (Monopolkommission).<sup>3</sup>

## Competition law enforcement – Investigatory powers of the FCA

The most important changes brought about by the amendment however concern competition law enforcement. The amendment provides for a number of changes intended to bolster the FCA's enforcement powers:



### Revision of the leniency programme:

Like other competition authorities worldwide, the FCA regards leniency as an important tool for the uncovering of secret cartels. The amendment brings the substantive standard for leniency in line with the

European Commission's Leniency Notice. While previously, immunity from fines was not available under Austrian law if the FCA was already aware of the infringement, the first applicant may now qualify for full immunity even after the FCA has carried out a dawn raid, provided that he provides information and evidence allowing the FCA to bring a reasoned application for the imposition of fines in the Cartel Court. (Unlike the European Commission, the FCA doesn't have the power to fine infringers itself, but must apply to the Cartel Court for such fines to be imposed.) Also in line with the Leniency Notice, the evidence provided by later applicants will have to represent "significant added value" in order to qualify for a reduction of the fine.

<sup>2</sup> Sec 19 para 3 subpara 1 and 2 of the German GWB.

<sup>3</sup> See most recently: Monopolkommission, 63. Sondergutachten (2012), para 92ff.

**Direct enforcement of information requests:**

Under the previous Austrian rules, the FCA was entitled to request information from undertakings, but such requests did not carry the risk of fines. Only the Cartel Court was empowered to issue information requests carrying sanctions. The amendment now grants the FCA the power to enforce its own information requests, by way of fines and periodic penalty payments.

**Strengthening of powers in dawn raids:**

Like the European Commission, the FCA will in the future have the power to seal premises. In addition, the Authority's right to ask questions during dawn raids is extended: while previously, the FCA was limited to asking questions regarding the whereabouts and content of documents, it may now ask any representative or employee for explanations on facts or documents relating to the subject-matter and purpose of the dawn raid. Finally, the Authority is also granted the power to seize original documents, to the extent required for the effectiveness of the inspection.

**Right of objection curtailed:**

The most important change affecting the conduct of dawn raids by the FCA however relates to the right of the undertakings concerned to object to the inspection of documents. When it was unclear whether documents or data carriers were covered by the subject matter of the inspection order, undertakings previously were entitled to object and seal all documents, which were then sent to the Cartel Court for decision

on this issue. This was of particular relevance with a view to the Authority's practice not to conduct the entire search in situ, but to copy data carriers for review later at its own premises. The amendment significantly curtails the right of undertakings concerned to object to the inspection of documents: Objections will now only lie on the basis of a legally recognized confidentiality obligation, or a right not to testify recognised by the Criminal Procedure Act. In addition, the undertaking will have to individually name the documents in relation to which it raises objections. Given the time constraints and the FCA's practice to copy entire data carriers, it will be difficult to meet these conditions in practice. In such a case, the undertaking concerned may request that certain categories of documents be sealed before being carried off by the FCA. In this case, the Authority will set a time limit of at least two weeks for the undertaking to individually name the documents in relation to which it raises objections. These restrictions of the right to object to the inspections will make it significantly more difficult for undertakings searched to effectively exercise their rights of defence.

## Merger control

With its focus set on antitrust enforcement, the amendment brings no big changes for merger control. In particular, the Austrian merger filing thresholds remain unchanged, despite the fact that they require notification of a large number of transactions with little or no impact on the Austrian market. Similarly, the amendment does not provide for derogations from the standstill obligation inter alia for public bids, which have long been called for by the business community and legal practitioners.



### Voluntary extension of review deadlines:

The only noteworthy change in the merger control field is that the Cartel Act will now provide for voluntary extensions of the Phase 1 and 2 review deadlines. Upon application by the notifying party, the four weeks deadline in Phase 1 may be increased by another two weeks, and the five months deadline in Phase 2 by one additional month. A voluntary extension of Phase 1 may allow undertakings to avoid Phase 2 in cases where the Austrian authorities feel that they still need further information, but do not have serious concerns regarding the transaction.



## Private Enforcement



In addition to bolstering the public enforcement of the competition rules by the FCA, the amendment also contains a number of measures intended to strengthen private enforcement:

### Binding effect of infringement decisions:

Decisions by competition authorities finding an infringement, including findings as to the undertakings' intent or negligence, are explicitly made binding on the Austrian civil courts. This binding effect applies not

only to decisions made by the Austrian Cartel Court, but also to decisions by the European Commission, as well as other national competition authorities within the EU.

### Limitation period stayed:

Furthermore, the limitation of damages claims is stayed for the duration of any such infringement proceedings, and only resumes six months after the conclusion of such proceedings.

### Publication of decisions:

Another change which will be of interest to potential claimants, but also to the wider public, is the increased transparency of decisions rendered by the Cartel Court. The Cartel Court will now be required to publish a summary containing the material reasoning of its decisions. Previously, most decisions remained unpublished; while the FCA provided reports on such decisions on its website, these reports usually were very short and did not allow the reader any detailed insights into the Cartel Court's reasoning.

## Miscellaneous changes

In addition to the above, the amendment contains a number of further changes and clarifications. In particular, the Cartel Act lays down requirements regarding the content of applications for fines by the FCA or the Federal Cartel

Procurator. In addition, the provisions governing the determination of the fine now provide for (non-exhaustive) lists of aggravating and attenuating circumstances.

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## Conclusion

The amendment's clear focus is on strengthening the FCA's enforcement powers, in particular in the context of dawn raids, an instrument which the Authority has relied on heavily in recent enforcement practice. The changes address the concerns voiced by members of the Authority, who repeatedly pointed to "deficits" of its own enforcement powers vis-à-vis those held by the European Commission.

This trend has now been reversed; some changes, in particular the strict limits set for the right to object to the inspection of documents, may even be unduly restrictive of the rights of defence of the undertakings concerned. It will be interesting to see how the reformed rules will change Austrian competition law enforcement in practice.

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## About bvp Hügel

From its three locations in Vienna, Brussels and Mödling, bvp Hügel advises national and international clients in business law. The law firm is a founding member of bvp legal, an alliance of business law firms in Central and Eastern Europe.

A central focus of the firm's activity is on anti-trust and merger control where, according to reputable Chambers Global directory, the firm is ranked in Band 1 and is among to the top 3 teams in Austria.

A team of specialised attorneys advises in all areas of national and European competition law, including representation and defence in

cartel and abuse of dominance cases before Austrian and European competition authorities and courts, advice during inspections and leniency applications, development of defence strategies and representation in damages actions. Another focus is on advice in merger control proceedings at the national and international level (notification to the national competition authority and the European Commission), as well as the establishment of joint ventures, distribution agreements and other co-operation between undertakings in compliance with competition rules.

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