

The European Antitrust Review

2009

Published by Global Competition Review
in association with
bpy Hügel Rechtsanwälte

GCR

GLOBAL COMPETITION REVIEW

Austria

Astrid Ablasser-Neuher and Florian Neumayr

bpv Hügel Rechtsanwälte

Regulatory framework

The main Austrian antitrust law is the Cartel Act 2005, which came into force on 1 January 2006. The Cartel Act contains the rules on cartels, vertical agreements, abuse of dominance, mergers and enforcement procedure. The Competition Act contains provisions relating to the Federal Competition Authority (FCA) and its powers, and the Commission on Competition.

Apart from the Cartel Act and the Competition Act, further rules on competition are set out in various other statutes such as the Neighbourhood Supply Act, which governs the relationship between suppliers and retailers. Other important rules covering areas such as de-monopolisation in formerly protected sectors have been brought about through several statutes, including the Telecom Act 2003 and the Postal Services Act 1997.

Authorities – institutions involved in enforcement

Cartel Court

The main competition authority is the Viennese Court of Appeals sitting as Cartel Court. The Cartel Court has the sole right to issue binding decisions and is responsible for administering all competition proceedings provided for in the Cartel Act. (The only remaining criminal law aspects of cartel behaviour, namely bid rigging and fraud, are not dealt with by the Cartel Court but by the ordinary criminal courts.) Appeals from the Cartel Court go to the Austrian Supreme Court sitting as Cartel Court of Appeals, which is the second and last instance in competition matters.

The Cartel Court sits in panels consisting of two professional judges and two expert lay judges, with the presiding professional judge having the casting vote. The Cartel Court of Appeals sits in panels of three professional judges and two expert lay judges. Thus, the Cartel Act ensures that the professional judges on a panel always have the decision-making power.

The Official Parties

The FCA is formally part of the Federal Ministry of Economic Affairs and Labour. In fulfilling its duties, the FCA is independent and not bound by any government instructions. It is headed by the director general for competition, who is appointed for a term of five years upon nomination by the federal government. The term of the first director general, Professor Barfuss, ended on 30 June 2007. The new director general, Dr Thanner, took office on 1 July 2007. The FCA currently has a staff of about 30 people (including around 20 case handlers).

The main task of the FCA is the investigation of possible restrictions of competition and prosecution of such violations by bringing actions before the Cartel Court. As one of the two Official Parties, the FCA has locus standi in all proceedings before the Cartel Court. The FCA shall also assist other agencies and cooperate with the European Commission in individual cases. It can, furthermore, inquire into certain sectors of the economy where restrictions of competition are suspected and render expert opinions regarding competition policy. Since 1 January 2006, it has also administered merger control proceedings in Phase I (Phase II proceedings are still handled by the Cartel Court).

In order to fulfil the tasks assigned to it by the Competition Act, the FCA is provided with far-reaching powers of investigation. In particular, it has the right to inspect all business documents, to question witnesses and parties involved and to oblige undertakings to provide all required information. With authorisation from the Cartel Court, the FCA also has the right to conduct dawn raids.

The Cartel Act further provides for a federal antitrust prosecutor (FAP) who is, together with his or her deputy, located at the Cartel Court and is, in theory, subject to instructions issued by the federal minister of justice. As the second Official Party, the FAP has the right to bring actions before the Cartel Court, replacing the Court's power to open proceedings *ex officio*. The FAP cooperates closely with the FCA.

Commission on Competition

The FCA is advised by the Commission on Competition, which consists of eight ordinary members. In merger control proceedings, the Commission on Competition can issue recommendations regarding applications for an in-depth examination to the FCA. Such recommendations must be issued upon request and only one member of the Commission is needed to make a recommendation. The FCA may decide not to act on a recommendation, but not without giving sufficient reasons, which also have to be made public.

Social partners

The 'social partners' (the Federal Chamber of Commerce, the Federal Chamber of Labour, the presidential conference of the Austrian Chambers of Agriculture) are granted certain rights concerning individual applications for the prohibition of cartels, vertical agreements and abuses of dominant positions. The Cartel Court may also refer to the social partners' expertise by requesting the social partners to render an expert opinion in certain cases. In addition, the social partners have the right to deliver comments in all competition proceedings. Moreover, the lay judges are appointed upon suggestion by the social partners.

Anti-competitive agreements

The Cartel Act has brought about far-reaching changes to the substantive and procedural rules on anti-competitive agreements and concerted practices. The traditional distinction of Austrian cartel law between various types of cartels and vertical agreements to which a variety of different rules were applicable has been abolished and replaced with three provisions which are – *mutatis mutandis* – in substance (almost) identical to article 81 EC.

Definition of 'cartels'

Under the heading 'cartels', section 1(1) Cartel Act prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition. According to section 1(2), the following practices in particular are prohibited:

- directly or indirectly fixing purchase or selling prices or any other trading conditions;

- limiting or controlling production, markets, technical development, or investment;
- sharing markets or sources of supply;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Further, section 1(4) also outlaws cartels by recommendation, comprising recommendations to observe specific prices, price limits, rules of calculation, trade margins or rebates that restrict or are intended to restrict competition. If, however, the recommendation explicitly states that it is non-binding and is not enforced by social or economic pressure, it will not constitute an illicit practice within the meaning of the Cartel Act (but may do so under article 81 EC).

Consequences of illicit conduct

Agreements and decisions prohibited by section 1(1) are void pursuant to section 1(3). Further, the undertakings involved can be subject to fines (for further details, see below). Under certain circumstances (in particular, in bid-rigging cases), criminal law sanctions may be imposed against individuals as well as undertakings. It should also be mentioned that anti-trust laws are generally considered to be protective provisions, the infringement of which may trigger (civil law) damage claims. Further consequences can be the exclusion from public tendering procedures, damage to reputation and, for involved employees, loss of jobs.

Exemptions

Like article 81(3) EC, section 2(1) exempts cartels that, while allowing consumers to receive a fair share of the resulting benefit, contribute to improving the production or distribution of goods or to promoting technical or economic progress and that do not:

- impose restrictions that are not indispensable to the attainment of these objectives; or
- afford the possibility of eliminating competition in respect of a substantial part of the products in question.

Section 2(2) contains a list of cartels that are exempted from the prohibition of section 1 in any case, in particular:

- de minimis cartels, the participants of which have an aggregate market share of no more than 5 per cent of the entire domestic market, and, if a narrower (regional or local) geographic market can be defined, no more than 25 per cent of the relevant local market at the time of implementation;
- certain agreements on retail prices in the book and press sector;
- restrictions of competition between members of a cooperative insofar as they are justified by the aim of the cooperative;
- restrictions of competition within the 'decentralised banking sectors'; and
- certain restrictions of competition within the agricultural sector.

It has to be noted, however, that even though there may be an exemption under Austrian law, a behaviour may still fall foul of article 81(1) EC.

In line with the concept of EC Regulation No. 1/2003, the former

notification system for all types of anti-competitive agreements and decisions has been abolished by the Cartel Act.

On the basis of section 3(1) of the Cartel Act, the minister of justice can issue regulations stating that certain groups of cartels are exempt from the prohibition of section 1(2). The Act explicitly provides for the possibility that these notified regulations may refer to regulations issued pursuant to article 81(3) EC.

Abuse of dominant position

The rules on the abuse of a dominant market position under the Cartel Act are largely identical to those of article 82 EC.

Definition of a dominant position

According to section 4(1) of the Cartel Act, an undertaking holds a dominant position if it either:

- is exposed to no or only insignificant competition; or
- holds a predominant market position in relation to other competitors. In this regard, financial strength, relationships with other undertakings, access to suppliers and markets, as well as entry barriers for other undertakings shall be considered when assessing market power.

Pursuant to section 4(3), an undertaking shall also be deemed dominant if it has a predominant position in relation to its customers or suppliers. This is particularly the case if customers and suppliers are obliged to maintain business relations with the dominant company in order to avoid serious economic disadvantages.

In addition (and unlike the situation under article 82 EC), section 4(2) provides for a rebuttable presumption that an undertaking is market dominant if it:

- has a market share of at least 30 per cent;
- is exposed to competition by not more than two other companies and has a market share of more than 5 per cent; or
- is one of the four largest undertakings, which together have a market share of at least 80 per cent, provided it has itself a market share of more than 5 per cent of the market, regardless of whether the market is to be defined nationally, regionally or locally.

If one of these criteria is fulfilled, the burden of proof is placed upon the undertaking concerned, which may prove this is not the case.

Abuse

As under article 82 EC, the abuse of a dominant position is prohibited per se by section 5 of the Cartel Act. The Official Parties, associations representing the economic interests of companies and any company having legal or economic interests, as well as certain institutions and regulatory authorities, may apply to the Cartel Court to order a company to cease and desist from the abuse in question.

Section 5(1) contains a non-exhaustive list of examples of abusive practices, following the wording of article 82 EC. Thus, an abuse will in particular occur if the dominant company:

- directly or indirectly imposes unfair purchase or selling prices or other unfair trading conditions;
- limits production, markets or technical development to the detriment of consumers;
- discriminates by way of imposing different contractual conditions to similar transactions;
- imposes supplementary obligations unrelated to the subject matter of the contract; or

- without factual justification sells goods below their cost price (predatory pricing). The provision on predatory pricing provides for a rebuttable presumption, leaving it to the dominant undertaking to prove the contrary or to justify its pricing policy.

It should be noted that, according to current case law, anti-competitive practices can also be challenged before the ordinary civil courts. Based on section 1 of the Act Against Unfair Trading Practices (UWG), undertakings may be forced to terminate cartel practices as well as the abuse of a dominant position. In addition, interim relief can be granted through interlocutory injunctions and damages may be awarded.

Sanctions

The intentional or negligent abuse of a dominant position is subject to fines (see below). In addition, section 26 of the Cartel Act empowers the Cartel Court to order measures intended to weaken or even eliminate the dominant position, even for first-time abuse.

Upon application by the Official Parties, the Cartel Court increasingly imposes fines (both in cartel and abuse cases).

In the following, some leading cases are mentioned:

- €75,000 against five (rather small) driving schools in Graz for price fixing;
- €150,000 against Constantin, a vertically integrated film distribution company for abuse of a dominant market position (refusal to supply certain films to competing cinemas);
- €1.5 million against Lenzing, the worldwide market leader in the production of lyocell because of the implementation of a merger that was not cleared;
- €5 million against Europay Austria for abuse of a dominant market position and infringement of the prohibition of cartels (fixing of certain fees in connection with debit cards); and
- €75.4 million against the leading Austrian elevator companies (all part of international groups) for, inter alia, customer allocation – the appeals against the verdict are still pending.

A few minor fines have also been imposed because of infringements of procedural provisions.

Mergers

In the field of mergers, the Cartel Act has brought about a plethora of changes in comparison with the old law, concerning the definition of a merger, the thresholds for merger control to apply, as well as the procedural rules for mergers.

Notion of concentration

According to section 7(1) of the Cartel Act, a concentration is deemed to arise when:

- an undertaking acquires, wholly or to a substantial extent, a business, in particular by merger or change of corporate form;
- an undertaking acquires control of another undertaking by contractual agreement (eg, assignment of the right to use, operate or manage the place of business);
- an undertaking acquires, directly or indirectly, either 25 per cent or more or 50 per cent or more of the shares in another company (regardless of whether this leads to a change of control);
- at least half of the members of the management board or the supervisory board of two or more companies are identical; or
- undertakings are linked in any other way that confers upon one company the possibility of exercising, directly or indirectly, a decisive influence over the other company (general clause).

As under article 3(4) EC Merger Regulation, section 7(2) foresees that the creation of a joint venture constitutes a concentration within the meaning of the Cartel Act, if it performs on a lasting basis all the functions of an autonomous economic entity ('full-function' irrespective of whether or not it is concentrative, cooperative or both).

Intra-group transactions are exempted from merger control (section 7(4) of the Cartel Act).

Thresholds, notification

According to section 9(1), a concentration must be notified to the FCA if:

- the combined aggregate worldwide turnover of all undertakings concerned exceeds increasingly €300 million;
- the combined aggregate turnover on the Austrian market of all undertakings concerned exceeds €30 million; and
- each of at least two of the undertakings concerned has a worldwide turnover exceeding €5 million.

However, to limit the broad scope of application of Austrian merger control, section 9(2) provides for an exemption to the above rule so that mergers (even though meeting the above criteria) are not notifiable, if:

- only one undertaking concerned has achieved more than €5 million within Austria; and
- all the other undertakings concerned have achieved an aggregate turnover of no more than €30 million worldwide.

Further, section 24(2) explicitly confirms that there is an 'effects doctrine', stating that the Cartel Act only applies to cases having an effect on the Austrian market. Owing to various judgments by the Austrian Supreme Court (sitting as Cartel Court of Appeals) that seem to contradict each other to some extent, the application of the effects doctrine is largely unclear. In the above mentioned Lenzing case, the acquirer of a business located outside Austria was fined €1.5 million for the implementation of a merger before clearance, although the target did not generate any turnover within Austria. On the other hand, a decision of the Cartel Court, by which it held that a large Austrian bank (Erste Bank) had failed to file a notification in Austria for the acquisition of a Czech and Slovakian bank was quashed by the Cartel Court of Appeals. The Cartel Court of Appeals stated in the latter case that an effect on the Austrian market could not be established since the target undertakings were active in a different geographic market (not including Austria) and had no turnover in Austria. The FCA takes a very strict approach to the effects doctrine, construing the exemption very narrowly. Due to this situation, it is highly recommended to clarify in advance whether or not a filing may be avoided in Austria.

Calculation of turnover

Section 22 stipulates that the turnover of all undertakings inter-linked within the meaning of section 7 Cartel Act (see 'Notion of concentration' heading) has to be taken into account. This means, in particular, that, unlike the situation under European law, the turnover of undertakings that are connected only via a non-controlling stake of 25 per cent or more must also be included in the calculation.

It should be noted that certain limits to this rule have been developed in a number of cases. The Cartel Court and the Supreme Court have limited the calculation of 'endless chains' of minority shares. Thus, the turnover of undertakings holding a minority share in another minority shareholder may be disregarded under certain circumstances. The principles are, however, not entirely clear.

Special rules for the calculation of turnover apply in the media, banking and insurance sectors.

Obligation to suspend implementation

Concentrations requiring notification must not be put into effect before clearance. In this context, section 17(1) and (2) list a whole set of various conditions as to when a merger may be implemented. Section 17(3) stipulates that agreements are void insofar as they contradict this prohibition to implement.

Procedure and substantive test

Since 1 January 2006, mergers have had to be notified to the FCA, which forwards the notification to the FAP (section 10(3) of the Cartel Act).

The official parties may request, within four weeks of receipt of the notification, that the Cartel Court opens an in-depth examination of the contemplated concentration (Phase II). If the Official Parties make no such request or (upon reasoned application by the notifying party) waive prior to the elapse of the four weeks their right to make such request, the merger is deemed cleared and may be implemented.

Pursuant to section 10(4) of the Cartel Act, any undertaking whose legal or economic interests might be affected by the planned concentration may, within 14 days of the publication of the merger (on the FCA's website), submit a written comment. Although the submitting undertaking has no right to have its comment taken into consideration, such submissions serve as an additional source of information for the official parties. In Phase II cases, further comments may be submitted without any formal deadline to be observed. However, 'last-minute submissions' only have a small chance of being considered by the Cartel Court.

If an in-depth examination is requested, the Cartel Court must, within five months, assess whether the proposed concentration will create or strengthen a dominant position in the relevant market (the concept of substantial lessening of effective competition known from the EC Merger Regulation is not the substantive test in Austria). If the outcome of this examination is that the merger is expected to create or strengthen a dominant position, the Cartel Court must either prohibit the concentration or grant clearance on special grounds.

Clearance on special grounds will be granted if it can be established that the concentration will improve competition in the market in such a way that the advantages outweigh the disadvantages of the creation or strengthening of a dominant position or if the concentration is indispensable to the international competitiveness of the undertakings concerned and justifiable on macroeconomic grounds.

The Cartel Court may also impose restrictions on and conditions to its clearance in order to prevent the creation or strengthening of a dominant position or to achieve at least one of the compensating improvements mentioned above.

Notification form

Notifications have to be made in quadruplicate. At the end of December 2005, the FCA issued a (slightly revised) form for the notification of mergers which is published on the FCA's website. Although not legally binding, it is highly recommended to use this form in order to avoid incomplete notifications. In the event of an incomplete notification, the Cartel Court may issue a formal decision on incompleteness ordering the applicants to file the missing information; in practice, it more often happens that the official parties use their right to ask for an in-depth examination in order to

gain time for the assessment of the merits of a case. Since the form requires extensive information even in minor cases, it may be advisable to discuss with the FCA up front as to whether certain parts of the notification form can be 'carved out' owing to the specific merits of the case at hand.

Media concentrations

A concentration in the media sector may be prohibited if it is expected that media diversity will be impaired. Section 13(2) of the Cartel Act explicitly defines the term 'media diversity' as the existence of numerous independent media that are not connected within the meaning of section 7(1) and guarantee press coverage reflecting a range of opinions.

Penalties

Fines, criminal charges

The system of fines is similar to that of EC competition law. In 2002, the previous system of criminal sanctions was abolished. However, the criminal sanctions, directed towards the persons responsible, has remained applicable to violations committed before 1 July 2002. Meanwhile, the prosecution of all such offences would appear to be time barred (the relevant limitation period being three years). Nevertheless, criminal sanctions still exist, in particular, for bid rigging and cartel behaviour qualifying as fraud.

Pursuant to section 29 of the Cartel Act, the Cartel Court may, upon the request of the Official Parties, impose fines against undertakings and associations of undertakings of up to 10 per cent of the worldwide group turnover in the preceding business year for serious violations of the Cartel Act, such as:

- violation of the prohibition on cartels;
- abuse of a dominant position;
- infringement of articles 81 or 82 EC;
- prohibited implementation of mergers; or
- non-compliance with orders of the Cartel Court prohibiting or prescribing certain behaviour.

Less serious violations, such as non-compliance with certain procedural rules and decisions of the Cartel Court can trigger fines of up to 1 per cent of the worldwide group turnover in the preceding business year of the undertakings involved.

With regard to mergers, section 16(7) Cartel Act provides for the possibility of measures being imposed in order to reduce or eliminate the negative effects of a concentration approved on the basis of false or incomplete information. The same applies to violations of conditions imposed by the Cartel Court in connection with clearance of a merger. The assessment of the amount of the fine depends upon the seriousness and duration of the violation, the material gain arising from it, the degree of fault and the economic capacity of the undertaking concerned.

Leniency programme

As of 1 January 2006, a leniency programme has been in force in Austria. The scarce statutory rules are contained in section 11(3) to (6) of the Competition Act. These provisions are completed by a handbook published on the FCA's website.

According to section 11(3) of the Competition Act, the FCA can refrain from applying for a fine against undertakings or associations of undertakings, if four conditions are met:

- the respective undertakings or associations of undertakings have ended their involvement in an infringement of section 1 of the Cartel Act or of article 81(1) EC;

- they inform the FCA of this infringement, before the FCA has knowledge about it;
- they cooperate fully and on a continuous basis with the FCA in order to clarify the circumstances of the case completely; and
- they did not coerce other undertakings or associations of undertakings to participate in the infringement.

If the merits of the case are already known to the FCA, it may still award the cooperation by applying for a reduced fine.

At the time when this chapter was prepared, only a few leniency applications were made with the FCA, in one case triggering fine proceedings (with no application for fines against the first leniency applicant and an application for a reduced fine against the second applicant). The proceedings are still pending.

* * *

The official parties seem more than ever determined to fight against anti-competitive practices. The FCA has performed various sector inquiries, conducted (both alone and in collaboration with the European Commission) several dawn raids and brought in a number of cases applications for fines. The official parties are also very active in merger control and have requested commitments in several cases. It is to be expected that the coming months will see more leniency applications and pending applications and proceedings resulting in (final) fining decisions.

bpv | HÜGEL RECHTSANWÄLTE

ARES-Tower, Donau-City-Strasse 11
1220 Vienna
Austria
Tel: +43 1 260 50 0
Fax: +43 1 260 50 133

Astrid Ablasser-Neuhuber
astrid.ablasser@bpv-huegel.com

Florian Neumayr
florian.neumayr@bpv-huegel.com

www.bpv-huegel.com
www.bpvlegal.com

bpv Hügel is one of the leading law firms in Austria. Its competition law team, consisting of specialised lawyers in Vienna and Brussels, is one of the most experienced and largest in Austria. The practice group has built up a considerable track record in the following core areas:

- Joint ventures, co-operation agreements as well as vertical relationships such as distribution systems
- Advice with regard to all aspects of market dominance and abuse issues
- Representation of undertakings subject to anti-trust proceedings before national as well as European authorities and courts
- Competition litigation and, in particular, defence in private enforcement cases
- Leniency applications
- Austrian and EU merger control as well as co-ordination of multi-jurisdictional filings

bpv Hügel not only offers high-quality services in competition law but also provides premium integrated M&A, corporate, regulatory (including public procurement and state aid), real estate, finance, labour and tax law advice to national and international clients.

bpv Hügel is a founding member of bpv LEGAL, an affiliation of independent law firms in Central and Eastern Europe counselling on cross-border transactions and foreign investments in most CEE countries.

About the Authors



Astrid Ablasser-Neuhuber

bpv Hügel Rechtsanwälte

Astrid Ablasser-Neuhuber is a partner with bpv Hügel Rechtsanwälte and head of the competition law practice group. She has been practising EC competition law in Vienna and Brussels since 1998. She represents national and international clients in antitrust and merger cases before the Austrian and European competition authorities as well as in proceedings before the European Courts.

She graduated from the University of Salzburg, where she also obtained a degree in journalism and French. She gained profound experience in merger control and antitrust law while working with several antitrust authorities (*stage* with the European Commission, Merger Task Force; legal assistant to the president of the Austrian Cartel Court in Vienna). Following her doctoral thesis, she worked in the competition department of Linklaters, London and joined Hügel & Partner in 1998.

Recent work includes advice and representation of OTIS/UTC in the first Austrian leniency case (*Elevator* case), advice and representation of OMV Gas before the European Commission, representation of Telekom Austria with regard to the acquisition of eTel, general legal advice in antitrust matters to OMV, Telekom Austria, Econ-Gas, etc, regular advice and representation of numerous national and international clients with regard to Austrian merger control, and coordination of multi-jurisdiction filings in various other jurisdictions. Other clients include BP, Eaton and Voestalpine AG.

Dr Ablasser-Neuhuber is a frequent speaker at conferences on competition law. Her publications include *Antitrust Law and Trade Regulations*, Austrian section (Matthew Bender & Company), co-authored with Loewenheim, Meessen and Riesenkampff (Hrsg); and *European and German Competition Law* (CH Beck). ■



Florian Neumayr

bpv Hügel Rechtsanwälte

Florian Neumayr is a junior partner with bpv Hügel Rechtsanwälte based in Vienna. He is the most senior member of the firm's competition law practice group following Astrid Ablasser-Neuhuber. He advises on all aspects of Austrian and EU antitrust, abuse of market dominance, merger control and procurement law. A special focus of his is competition litigation and, in particular, defence against private enforcement. He has a considerable track record in representing national and international clients before Austrian as well as European courts and authorities.

Recent work includes representation of incumbent Telekom Aus-

tria in the acquisition of rival eTel as well as in fending off private enforcement claims, advising Otis in Austrian antitrust proceedings following leniency and counsel in the Austrian banks case before the European Court of Justice.

Florian Neumayr is a frequent speaker at seminars. His publications include contributions to the *Public Procurement Law Review*, the Austrian journal *Recht und Praxis der Auftragsvergabe* (Law and Practice of Public Procurement) and *Österreichische Zeitschrift für Kartell- und Wettbewerbsrecht* (Austrian Competition Journal).

He is recognised as one of the leading young competition lawyers in Austria. ■