Private enforcement in Austria

The national competition legislation has been amended – again

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On 1 May 2017, amendments to the Austrian Cartel Act as well as to the Austrian Competition Act came into force. This article highlights the most significant recent changes to Austrian competition law.

Strengthening of private enforcement

As with the preceding major competition law amendment (see "New rules in Austria" *CLI* 14 May 2013), the legislator undertook further efforts to promote private enforcement. This was triggered by the EU Cartel Damages Directive 2014/104/EU requiring an implementation by 26 December 2016. As a consequence, this date is relevant for the application of the rules forming the core element of the new piece of legislation.

Apart from the binding effect of fining decisions by competition authorities on civil courts (an element that has made Austria an attractive forum already since the last competition law amendment), the new law foresees a rebuttable presumption that "cartels between competitors" which have occurred as of 26 December 2016 cause harm. Particularly in combination with a provision in the Austrian Code of Civil Procedures, which empowers judges (under certain conditions) to ascertain damages by discretion, this can mean in practice that the defence has to prove that no harm has been caused (rather than, as under general tort law, the burden being on the claimant to prove damages).

While the amendment clarifies that co-cartelists are jointly and severally liable vis-à-vis the injured party, it also sets out a privilege for immunity recipients (ie undertakings successfully collaborating under the leniency regime). They are, in principle, only liable to their (direct and indirect) purchasers or suppliers (as the case may be). This aims to safeguard leniency programmes, which are an important tool in public antitrust enforcement. However, if an injured party cannot obtain (full) compensation from the other infringers, the immunity recipient can be held liable.

Passing-on continues to be a hot topic in private enforcement. Under certain circumstances, the new rules provide for a rebuttable presumption that damages have been passed on – ie conferring standing on the indirectly harmed. Passing-on can, however, also be used by the defendant(s) as a "shield", ie arguing that any damages of the claimant have been passed-on to other market levels.

Further, the ordinary limitation period has been extended from three to five years for any damage claim that was not already time barred on 26 December 2016. In addition, the new law foresees that the limitation period does not start before the injured party has knowledge not only about the cartelist(s) and the harm caused but also that the conduct inflicting the harm constitutes a competition law offence. In practice, as has been held by the Austrian Supreme Court twice prior to the amendment, the limitation period will in most cases not start running prior to the publication of a decision finding an antitrust infringement. That is also why the new 10-year absolute limitation period from the occurrence of the harm may well play an important role. For infringements happening prior to and not time barred on 26 December 2016, the old rules apply if more beneficial for the injured party (that may be the case where no or limited knowledge about a cartel exists and the absolute limitation period would otherwise bite).

One of the most far-reaching changes in connection with the implementation of the Damages Directive from the perspective of a civil law jurisdiction such as Austria is the introduction of disclosure rules. A court, following a summary claim received as of 26 December 2016 and upon reasoned request, can order not only the opposing party but also third parties to disclose relevant evidence. It can be expected that such disclosure requests from claimants will mostly concern documents which (further) prove any competition law infringement and, in particular, how harmful such infringement was. Requests from defendants will typically concern the (potential) passing-on to customers of claimants.

To the extent that documents in the files of a competition authority are concerned, the balancing of interests to be carried out prior to ordering any disclosure also has to take into account the effectiveness of public enforcement. In addition, leniency statements and settlement submissions are expressly protected from disclosure, while certain other documents may be disclosed only after the proceedings before the competition authority have ended. It may be noted in this context that, in Austria, leniency is available also in vertical cases (eg resale price maintenance). However, given that the new rules on disclosure are based on a more restrictive definition of leniency, leniency statements and settlement submissions in vertical cases may not enjoy the above-mentioned special protection.

Strengthening of the BWB's powers

Not only private, but also public enforcement has been strengthened again. The recent amendment has clarified that the Federal Competition Agency (BWB) can in the course of dawn raids inspect any documents and data accessible from the undertaking's premises subject to the search warrant, irrespective of the actual place of storage (location of the server).

The Bundeswettbewerbsbehörde now also has the power to enforce access to electronic data by means of requesting the Cartel Court to impose periodic penalty payments (in the amount of 5% of the average daily turnover in the last business year for every day of delay).

The recent amendment also empowers the BWB to set up an internet-based whistleblower system (on an anonymous basis) with a view to discover cartels.

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Further, as with private enforcement, the general limitation period is five years. Under the new rules, every investigative act by the BWB against one (suspected) cartelist (and not only an application for fines with the Cartel Court) interrupts the limitation period, with the consequence that it starts running again. However, there is an absolute limitation period of 10 years after the infringement has ended.

In practice, this means that any infringement that had not stopped by 30 April 2012 and in respect of which on 1 May 2017 (or for longer lasting infringements thereafter) an investigative act has been taken, the limitation period is interrupted. Again, the 10-year limitation period will likely be the truly relevant one.

New merger control threshold

A far-reaching change is brought about by the introduction of a new merger control threshold. Austrian merger control now for the first time also takes into consideration the transaction value and not just the parties' turnover. The intention is to cover, in particular, acquisitions in the digital arena where targets' turnover may be low but their value is high.

The new threshold applies to transactions that shall be implemented as of 1 November 2017. This means in practice that the closing date is relevant – ie already now with a transaction, it should be checked whether closing may be in late autumn and hence the new threshold may be relevant.

Under the new regime, a concentration also has to be notified to the BWB if:

- the combined worldwide turnover of the (groups of) undertakings concerned exceeds €300m;
- the combined Austrian turnover exceeds €15m;
- the value of the consideration exceeds €200m; and
- the target is active in Austria "to a significant extent".

The new law neither defines the term "consideration" nor what constitutes Austrian activities "to a significant extent". It is to be expected that the former will be understood broadly and, regarding the latter, the official explanatory notes (travaux preparatoires) make it clear that such activities do not require a physical presence in Austria. Rather, if there is such a presence, then typically the criteria seem to be met. If there is no such presence, regard must be had to "recognised key measures used in the respective industry". As far as the digital economy is concerned, the explanatory notes mention user numbers and website visits, for example.

For merging parties it may therefore be difficult to assess with certainty whether the relevant merger is subject to Austrian merger control. In particular, with regard to multijurisdictional filing checks, one should bear in mind now that not only the respective turnover figures but also the transaction value has to be taken into account.

In the context of merger control, it may also be mentioned that the recent amendment increased the amount of the notification fee payable to the BWB from €1,500 to €3,500 with immediate effect.

Increased transparency

Transparency is also a topic that played a role in the last amendment to Austrian competition law. The current amendment has introduced several provisions with a view to increasing transparency in antitrust proceedings yet further.

Now also Cartel Court decisions rejecting or dismissing applications have to be published in the dedicated database run by the Ministry of Justice (Ediktsdatei). To date, this was the case only for decisions granting an application, for example decisions establishing a competition law infringement.

In addition to that, the operative part of final decisions by the Cartel Court has to be published on the BWB's website immediately. In leniency cases, such publication also has to include the name of the immunity recipient. This is to avoid unsuccessful damages actions, given the above-explained privileged position of immunity recipients with regard to joint and several liability.

In settlement cases (ie cases in which at least one of the undertakings concerned does not deny the BWB's allegations), the Cartel Court's written decision also has to contain a fair reasoning.

Still, there are what may be considered significant gaps on the way to fully transparent antitrust proceedings. Among other things, there is no site (neither online nor at the Cartel Court) where the public can learn about the hearings that are to take place at the Cartel Court; this holds true of all proceedings irrespective of whether or not the public has been excluded. Hence, the public is in practice typically de facto excluded, even though the requirements foreseen in the law for the exclusion of the public may not be met. By way of a side note, it may also be mentioned in this context that it is almost impossible to ascertain a more or less reliable range of the potential fine for a particular infringement based on the law as it stands after the amendment. This opens the door to an opaque setting of fines: by what criteria is Company X fined €y, while Company Z receives a much higher (or lower) fine as the case may be.

Increased possibilities of having decisions reviewed

While the Austrian Supreme Court (sitting as Cartel Court of Appeals) could so far only hear challenges based on alleged errors of law by the Cartel Court, the recent amendment has also made it possible to appeal to the Supreme Court on the grounds that, according to the case files, there is substantial doubt about the correctness of the facts underlying the Cartel Court's decision.

It will have to be seen whether in practice the Supreme Court is open to well-founded arguments that the facts were not correctly established by the Cartel Court. If the Supreme Court does take this approach, it will be the first time there is something like a real appeal process where you can challenge both legal and factual errors by the Cartel Court.

Conclusion

The core of the recent amendment is about facilitating private damage claims. It remains to be seen whether this improvement of private antitrust enforcement, helping to make Austria a yet more attractive forum, will have repercussions on public enforcement (in particular, in the form of a reduced number of leniency applications). In any event, the Austrian legislator has – to the extent that there was room to manoeuvre – attempted to strike a balance between private and public enforcement.

The introduction of a transaction value-based notification threshold in merger control is also highly important in practical terms. This will significantly extend the scope of Austrian merger control.