Competition - Austria

Publishing Cartel Court decisions and court settlement practices

Contributed by **Preslmayr Attorneys at Law**

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Introduction

During the first quarter of 2014 the Federal Competition Authority (FCA) increased its investigations into the food retail sector, leading to a number of Cartel Court decisions regarding the FCA's applications to impose fines. The applications were based on settlements with companies that had allegedly infringed competition law. As was the case at the end of 2013, the decisions concerned vertical price coordination of food retail companies with their suppliers – this time particularly with breweries.

Although the FCA's settlement practice often speeds up cartel proceedings, it leads to rather opaque decisions, with very short reasoning that shed little light on a company's infringing activity and the legal limits of its conduct.

Regularly, due to difficulties in determining the relevant turnover achieved by the alleged infringement, the FCA and the company which allegedly infringed competition law come to a mutual agreement. In doing so, the company must acknowledge the FCA's accusation and waive its right to pursue any legal remedy against the fine imposed by the Cartel Court. Accordingly, the court's reasons for imposing fines are restricted to the wording of the respective (and short) acknowledgment and naming the cartel participants. Therefore, the recent fine decisions have been limited to a statement that an inadmissible vertical coordination of prices – in particular, special offer prices – took place.(1)

Not even the March 1 2013 amendment to the Cartel Act – which requires the Cartel Court to publish its legally binding decisions on the court's electronic notice board(2) – has substantially increased transparency. Nonetheless, on January 27 2014 the Supreme Court, acting as the Higher Cartel Court, ruled on the scope of the Cartel Court's obligation to publish its fine decisions and highlighted the importance of transparency as the main goal of Section 37 of the Cartel Act.

Facts

In the case at hand one of the cartel participants (the applicant) was fined for infringing competition law due to vertical price coordination with two food retail companies. The applicant acknowledged the FCA's accusation and waived any legal remedies against the fine decision; however, it also applied for a shorter version of the fine decision to be released to the public. In particular, the applicant claimed that the names of the food retail companies, as well as the fact that they often requested the price coordination by concurrently putting the applicant under pressure, should be removed from the public version of the decision. The applicant argued that it was unnecessary to publish such reasoning and that to do so would put it at risk of retaliation.

Decision

The Higher Cartel Court found that the purpose of Section 37 of the Cartel Act is to present market participants with clear information about cases so that they may evaluate any possible damages claims. Therefore, the court held that naming cartel participants is necessary and admissible in order to achieve the goals of Section 37 of the Cartel Act, provided that the company named has had the chance to defend itself against the allegations.(3) In addition, the court denied the applicant's request to have certain parts of the decision removed from the public version, stating that only a comprehensive decision could ensure the transparency required by the Cartel Act.

In particular, the court held that it was highly relevant that the food retail companies

pushed the applicant to coordinate prices; without such information, the FCA's fine and the turnover achieved by the applicant – which was the FCA's basis for setting the fine, without giving particular reasoning – would be incomprehensible. According to the Higher Cartel Court, it was fundamental to the imposition of a fine of (only) €58,500 that the applicant had participated in the price coordination only to a minor extent and under pressure from the food retail companies.

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Endnotes

(1) See, for example, OLG Wien 29.1.2014, 25 Kt 153/13.

(2) OGH 27.1.2014, 16 Ok 14/13; see also OGH 31.1.2014, 16 Ok 15/13.

(3) See in this regard Article 6 of the European Convention on Human Rights.