

## Competition & Antitrust - Austria

### Forwarding agencies' cartel and its consequences

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On December 19 2014 the Higher Regional Court, acting as the Cartel Court, imposed a fine of approximately €17.5 million on 30 forwarding agencies for infringing European competition law by agreeing on tariffs regarding collective freight transport between 2002 and 2007. The Cartel Court's decision preceded significant discussions among competition law specialists and several other Austrian and EU decisions clarifying important questions of law.

#### Facts

In 1994 several forwarding agencies requested a permit for their cartel – a collective freight transport association named SSK – in accordance with the law in place at the time (ie, the Cartel Act 1988). The cartel related to the cooperation of its members with respect to transport in Austria. During the ongoing notification procedure, a regulatory body which had been involved in the procedure rendered an expert opinion stating that European law was not affected by SSK's activities.

In 1996, after Austria joined the European Union, the Cartel Court decided that the notified facts amounted to a *de minimis* cartel which had not been captured under the Cartel Act. Subsequently, external lawyers specialising in competition law confirmed that SSK was not caught by the Cartel Act.

However, in February 2010 – after the European Commission had conducted dawn raids – the Federal Competition Authority (FCA) moved to fine the forwarding companies, arguing that the association infringed both Austrian and European competition law. After the Cartel Court dismissed the requested fine for lack of fault, the Supreme Court – acting as the Higher Cartel Court in the appeal procedure – initiated a preliminary ruling procedure with the European Court of Justice (ECJ) to determine whether breaches of Article 101 of the Treaty on the Functioning of the European Union committed by an undertaking may be penalised even if the undertaking erred with regard to the lawfulness of its conduct.<sup>(1)</sup>

#### Decisions

The ECJ took a rather strict position and ruled that companies which directly coordinate their behaviour in respect of their selling prices – as in the case at hand – cannot be unaware of the anti-competitive nature of their conduct. The ECJ held that it was irrelevant whether the company had wrongly characterised its conduct in law and whether the error in law was based on incorrect legal advice given by a lawyer or through a national competition authority decision.<sup>(2)</sup>

Considering the ECJ's ruling, the Higher Cartel Court ruled that the forwarding companies had systematically infringed Article 101 of the Treaty on the Functioning of the European Union (as the cooperation within SSK concerned the entire Austrian territory) for years and sent the case back to the Cartel Court to decide on the fine amounts.<sup>(3)</sup>

On December 19 2014 the Cartel Court imposed a fine of approximately €17.5 million on all cartel members (except the leniency applicant) due to agreements on tariffs regarding the consolidated freight transport and concerted practices.

#### Comment

The forwarding agencies' cartel is of particular interest as – apart from its implications with regard to the applicability of European competition law and the Austrian Cartel Act – it was an officially known cartel, which was notified with the Cartel Court. Moreover, the association of the forwarding companies and the price lists were published and often referred to in the media and were known to customers. Nonetheless, it took several years until the authorities took action.

Now, after several years of price agreements and clarification that the behaviour of the forwarding companies clearly infringed European competition law, customers of the numerous cartel

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participants might soon consider follow-on claims for damages.

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#### Endnotes

(1) Supreme Court, December 5 2011 – 16 Ok 4/11. For further details, please see "Can an error in law protect against competition fines?"

(2) European Court of Justice, June 2013 – C-681/11.

(3) Supreme Court, December 2 2013 – 16 Ok 4/13.

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