

Deadline (narrowly) missed!

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Introduction

Overview

Comment

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The EU Cartel Damages Directive (2014/104/EU) was passed on November 26 2014 and should have been transposed into national law by December 27 2016. However, its implementation in Austria was somewhat delayed, as was the case in other European countries.

On February 28 2017 the Council of Ministers approved the bill to amend the Cartel Act and the Competition Act. Once it is passed by the federal Parliament, the bill will enter into force on May 1 2017. The law will significantly amend Austrian cartel law, primarily facilitating private enforcement of cartel damages for consumers and enterprises alike. While Austrian law has included some of these elements since 2013, the implementation of the directive goes far beyond those implemented.

Overview

The most important points introduced by the directive are as follows:

- Every (natural and legal) person will be entitled to full damages after a cartel infringement, including abuse of a dominant market position. This includes the actual financial damage as well as lost profit and interest from the occurrence of damage.
- A statutory – although rebuttable – presumption that cartel infringements cause harm has been introduced.
- A minimum five-year limitation period has been set and will be extended by certain procedures while investigating infringements. Consequently, such limitation periods will end, at the earliest, one year after the respective procedures are closed.
- The national courts will be able to grant (and enforce) access to evidence to defendants, third parties and competition authorities if the plaintiff submits a sufficiently argued motion. Certain rules aim to protect legal privilege and certain categories of document (eg, leniency declarations).
- The rules for the entry into force of these provisions could create quite interesting situations. The substantive provisions apply to damages caused after December 26 2016. The provisions on limitation periods apply to all claims which on December 26 2016 are not yet time-barred – and, obviously, have come into existence earlier. The procedural rules, such as on legal effects of decisions by cartel authorities and the rules on discovery of evidence apply to court procedures that started after December 26 2016.

There are also new interesting developments outside the implementation on the Cartel Damages Directive:

- In a 2015 decision, the High Administrative Court clarified that the Federal Cartel Authority may search and copy electronically stored documents which are physically stored outside the premises covered by the search order if they normally can be accessed from such premises. To enforce this policy, the Cartel Court can now impose fines up to 5% of the average daily turnover of the last business year for each day that a defendant/searched party delays in

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providing access.

- A special exemption for agreements relating to the distribution of newspapers which are potentially limiting competition has been introduced for the Austrian market, to the extent that such agreements are necessary for the distribution of newspapers on an area-wide and non-discriminatory basis.
- In relation to merger control, a new consideration threshold of €200 million will be introduced as of November 1 2017 if the (joint) Austrian turnover is below the former threshold of €30 million but above €15 million. In addition, the target must perform a significant amount of Austrian activity. The new provision will cause more mergers to be caught by the merger control system. The reason given by lawmakers is that enterprises in the digital area are less defined by turnover than by value of data.
- The filing fee for mergers has been raised from €1,500 to €3,500 and the Cartel Act now contains provisions that a minimum of €1.5 million earned by fines each year must be used for financing the Federal Cartel Authority and the Association for Consumer Information.
- The Federal Cartel Authority must publish final decisions on its website. Such publication can name the affected parties and the industry they are active in, including leniency applicants.

Comment

The legal framework in cartel law – in particular relating to cartel damage cases – will be changed considerably both for potential plaintiffs and defendants. The number of cartel damage cases is expected to rise. However, legal problems will not necessarily be reduced. Further, the number of mergers requiring notification will potentially increase. Although the new threshold is aimed at digital industries, the wording covers all areas and the criteria of "significant Austrian activity" remains somewhat ambiguous.

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