



AUSTRIAN ANTITRUST LAW GOES EUROPEAN - New Cartel Act

A new Cartel Act (KartG 2005) and an amendment to the Unfair Competition Act (WettbG-Nov 2005) will enter into force on 1 January 2006. The reform is intended to harmonise the Austrian substantive law on cartels with the competition rules of the European Union.

The key change is in the **ban on cartels**. The wording of the new KartG 2005 regulation is almost identical with the EU provisions: arrangements between entrepreneurs, mergers and harmonised procedures that aim at or act to prevent, limit or distort competition (i.e. cartels) are prohibited except to the extent as expressly exempted in the law. Previously, companies could (and had to) obtain an approval from the Austrian Cartel Court for arrangements that might fall under the cartel ban, and through this gained legal certainty. As of 1 January 2006, the legal exception principle also applies in Austria: the enterprises need to assess on their own whether any competitive restrictions envisaged by them come under the legal exemption from the cartel ban. Such exemptions are essentially designed to ensure that consumers will adequately share in the gain from improvements in product manufacturing and the promotion of technical and economic progress. It is only when such a macro-economic justification can be furnished that restrictions on competition are permitted. The self-assessment is facilitated by a legal tool available to the Federal Minister of Justice in

conjunction with the Federal Minister of Economics and Labour, who can decree (and have done so in the past) that certain groups of cartels are exempt from the ban. This ordinance provides concrete terms for the abstract criteria set out in the law. Now that the Austrian anti-trust legislation is harmonised with the European cartel law, it is possible to apply the large field of rulings issued by the EU Commission and the European Court of Justice in judging competitive restrictions. Nevertheless, compared to the past situation, the legal uncertainty has grown when it comes to the need for enterprises to perform their own assessments either directly or through their legal advisers.

As to the **control of concentrations**, this extends to so-called co-operative joint ventures which lead to the harmonisation of competitive behaviour between companies, as is specified in Community law. The workload of the cartel authorities is slightly reduced by an increase in two of the three revenue thresholds above which it is necessary to report a merger. The report becomes mandatory only when the enterprises involved together reported domestic



revenues of more than € 30 million (up from € 15 million) and at least two enterprises posted more than € 5 million (up from € 2 million) in global revenues in the last business year prior to the merger. The third threshold, setting global revenues of the companies involved at a total of € 300 million, was not changed. In the future, mergers are to be reported to the Bundeswettbewerbsbehörde (Federal Competition Authority, BWB) rather than the Cartel Court, which should shorten the first phase (which previously took some six weeks) by a few days. The fee was raised from a mere € 75 to € 1,500. Immediately upon receipt of the application, the BWB must notify it; enterprises affected by the merger (e.g. competitors) are then granted a two-week period for their comments. If the BWB or Federal Cartel Office files an application for a review, this launches a second phase where the merger is submitted to the Cartel Court. With the start of the five-month decision period delayed, this second phase will be prolonged by up to one month.

In order to effectively implement the cartel law, Austria introduced **regulations for a leniency program**, in line with the European model. Under this new rule, the BWB can refrain from demanding to impose a fine against enterprises which (a) stopped their participation in an infringement of the cartel ban; (b) informed the BWB of their infringement before the BWB gained knowledge of it; (c) co-operate with the BWB in order to fully clarify the facts of the case; and (d) have not forced any other enter-

prise to participate in the infringement. If the facts of the case are already known to the BWB, it may demand a reduced fine, provided that the other prerequisites have been met.

For **law enforcement**, the Cartel Court can order that infringements against the Cartel Act be stopped, find whether and to what extent a case violates the Cartel Act and impose fines. The scope of fines was harmonised with the Community law: it is now 10% of the total revenues achieved in the previous business year for infringements of the Cartel Act; and 1% for wrong information given in merger applications or non-observance of rulings or orders of the Cartel Court. There are no longer any lower limits for fines.

Harmonised with the European standards and implemented by very active authorities (BWB, Federal Cartel Office and Cartel Court), the new Austrian cartel law is indubitably gaining in importance for almost all enterprises in Austria.



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