

Competition - Austria

Court finds whistleblowers no guarantee for authority

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In a recent decision⁽¹⁾ the Cartel Court rejected a Federal Cartel Authority (FCA) action to fine approximately 50 Austrian plumbers for alleged collusion in a tender procedure initiated by the City of Vienna housing agency in 2007.

Facts

In its motion for the fine, the FCA relied on the witness statements of two plumbers who had been unsuccessful in the bidding process for the tendered framework contract. They reported that almost all of the existing contractors for the City of Vienna housing agency had agreed to allocate the tendered contract across geographic areas and submit bids at respectively discounted prices. One declared that he had participated in such activities and therefore requested the status of a witness for the prosecution. The FCA granted this request.

On the basis of the results of the bidding process, and due to the witness statements of the two unsuccessful plumbers, in June 2009 the FCA filed a motion that they be fined for alleged infringement of both Austrian and EU Cartel Law.

The defendant plumbers contested the FCA's allegations. They submitted in proceedings before the Cartel Court that:

- the alleged collusion had not taken place; and
- the formation of working partnerships was necessary in order to fulfil the strict criteria defined by the City of Vienna housing agency for participation in the tender.

Furthermore, the defendants referred to the low market shares of the undertakings concerned, thus invoking an exception to the Cartel Act 2005.

Decision

The Cartel Court procured an expert opinion on the joint market shares of the defendants. On the basis of this expert opinion, the court ruled that all activities of the defendants - regardless of whether they had actually infringed cartel law - were exempt from the cartel ban under the Austrian *de minimis* regime. The *de minimis* rule applicable in this case is Section 2(2)(1) of the Cartel Act, which is soon to be updated (for further details please see "

[Ministry proposes material changes to competition laws](#)"). Section 2(2) of the act stipulates that any cartel in which the members have a joint market share of less than 5% of the national market and less than 25% of a regional market (where relevant) is exempt from the cartel prohibition.

The court ruled that the defendants' joint market share exceeded neither percentage limit defined by the law. The court stated that even if a market is regional in scope (as in this case), the 5% limit for the (then virtual) national market must also not be exceeded. The court further ruled that European cartel law was not applicable to the case; the mere existence of a European-wide tender procedure did not automatically lead to an applicability of European cartel law.

Unusually, the court elaborated in its decision that the forming of working partnerships was basically admissible in this case, although it ruled that all activities of the defendants were covered by the applicable Austrian *de minimis* rule. Regarding the admissibility of working partnerships by the defendants, the court referred to the 2001 EU Guidelines on Horizontal Cooperations and clarified that most of the cooperating

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plumbers were small and medium-sized undertakings that would not have been in a position to bid at all without the working partnerships. Participation in working partnerships was therefore necessary for them to enter the market.

The Cartel Court decision is not yet final, as it can be appealed to the Supreme Court acting as higher cartel court. However, such court deals only with questions of law; the finding of facts cannot be contested.

Comment

According to the proposed new Cartel Act, such a *de minimis* decision will no longer be possible. The new *de minimis* rule provides that any cartel in which the members have a joint market share of 10%, where they are competitors (ie, have a horizontal connection), or 15%, where they are non-competitors (ie, have a vertical connection), are exempt from the cartel prohibition.

However, this new *de minimis* rule will not cover hardcore agreements, such as those argued for by the FCA in the above case in reference to the alleged agreements on prices and on the allocation of the market. Parliamentary discussions on the new cartel law are still ongoing and, contrary to original plans, are not expected to enter into force until January 1 2013.

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Endnotes

(1) Cartel Court July 13, 2012; 27 Kt 20,21/09.

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