

Austria

Rainer Roniger and Walburga Hemetsberger Haarmann Hügel

This chapter offers a brief summary of the main rules and principles of Austrian competition law.

Regulatory framework

The main Austrian competition law statute is the Cartel Act of 1988 (*Kartellgesetz* 1988—‘the Cartel Act’), which came into force in 1989 and has been amended several times, most recently with the amendments that came into force on 1 July 2002. The Cartel Act contains all the rules on cartels, vertical agreements on distribution, abuse of dominance, mergers and enforcement procedure. The latest revision included several substantial changes, especially regarding the enforcement agencies and procedure.

Furthermore, the Competition Act (*Wettbewerbsgesetz*) contains provisions relating to the Federal Competition Agency and its powers, and the Competition Commission.

Apart from the Cartel Act and the Competition Act, further rules on competition are set out in various other statutes such as the Neighbourhood Supply Act 1977, which governs the relationship between suppliers and small retailers. Other important rules covering areas such as de-monopolisation in formerly protected sectors have been brought about through several statutes, including the Telecom Act 1997 and the Postal Services Act 1998.

Cartels

Definition and types of cartels

The Cartel Act does not make a general distinction between horizontal and vertical restrictions on competition. Most prohibited restrictions on competition fall within the definition of a cartel and are therefore dealt with under the rules on cartels. However, special rules apply to certain vertical agreements on distribution (see ‘Vertical agreements on distribution’ below).

The Cartel Act identifies several types of cartels, which are subject to different rules. These are cartels by agreement, cartels by conduct and cartels by recommendation. The admissibility of a cartel, however, does not depend upon the specific type of cartel but rather upon whether the restriction of competition is the intended purpose of the cartel (cartels by intent) or, absent such intention, only an unintended effect of it (cartels by effect).

The different types of cartels can be classified as follows:

- Cartels by agreement (Section 10 of the Cartel Act) are either contracts or informal arrangements enforced by economic or social pressure. Cartels by agreement can be either cartels by intent or cartels by effect (see above).
- Cartels by conduct (Section 11 of the Cartel Act) are defined as concerted practices which are neither accidental nor determined by the market, and where, in the absence of contractual, economic or social pressure, the criteria for cartels by agreement are not met. Analogous to cartels by agreement, cartels by conduct can be either cartels by intent or cartels by effect (see above).

- Cartels by recommendation (Section 12 of the Cartel Act) comprise recommendations to observe specific prices, price limits, rules of calculation, trade margins or rebates, which restrict or are intended to restrict competition. If, however, the recommendation explicitly states that it is non-binding and is not enforced by social or economic pressure, it will not constitute a cartel.

The Cartel Act further defines de minimis cartels (Section 16 of the Cartel Act) as cartels with a market share of less than 5 per cent of the entire domestic market, and, if a narrower (regional or local) geographic market can be defined, less than 25 per cent of the relevant local market at the time of implementation.

Notification and clearance

Cartels by intent, regardless of whether they qualify as cartels by agreement or cartels by conduct, and cartels by recommendation are prohibited per se if they do not fall under the de minimis rule. This means that they may only be implemented if notified and approved by the Cartel Court. In the absence of notification or approval, such cartels are void. All other cartels, ie cartels by effect and de minimis cartels, may be implemented without prior approval unless the Cartel Court has issued an individual prohibition.

The intentional or negligent abuse of a cartel or the implementation of a prohibited cartel may be punished by fines (see ‘Sanctions’ below).

Submission cartels

The purpose of the so-called ‘submission cartels’ is to allocate customers in public procurement procedures by agreeing on the ‘best bidder’ prior to the submission of the bid, thereby eliminating all competition in the bidding process. Collusive tendering constitutes a criminal offence under Section 168b of the Criminal Code. It is punishable by imprisonment of up to three years.

Vertical agreements on distribution

Definition

Vertical agreements on distribution as a special form of vertical arrangement are exempt from the rules on cartels. Such vertical arrangements (Section 30a of the Cartel Act) are defined as agreements between a company (the restricting company) and one or more other companies remaining economically independent (the restricted companies) by which the latter are restricted regarding the purchasing and/or the distribution of goods or the performance of services. If, however, these arrangements contain any recommendations or restrictions regarding prices (resale price maintenance), they will be treated as cartels (Section 30a in conjunction with Section 13 of the Cartel Act).

Notification and clearance

Vertical agreements on distribution do not require the approval of the Cartel Court but must be notified prior to implementation. Fail-

AUSTRIA

ure to notify does not affect the validity of the respective agreement but is sanctioned by fines (see 'Sanctions' below).

The Official Parties (the Federal Competition Agency and Federal Antitrust Prosecutor), associations representing the interests of companies or any company having a legal or economic interest (eg competitors) as well as the Federal Chamber of Commerce, the Federal Chamber of Labour, the Presidential Conference of the Austrian Chambers of Agriculture and the regulatory authorities (such as the Austrian Regulatory Authority for Broadcasting and Telecommunications) may challenge any vertical agreement on distribution and apply for review by the Cartel Court.

The Cartel Court will prohibit and declare void any agreement which is contrary to the law (including EC law, in particular Article 81 EC) or public order incompatible with certain international treaties or not justifiable on economic grounds.

A regulation issued pursuant to Section 30e of the Cartel Act provides that vertical agreements which comply with the provisions set out in the EC block exemption regulation on vertical restraints (Reg. No. 2790/99) or the EC block exemption regulation for the motor vehicle sector (Reg. No. 1400/2002) are generally considered compatible with the Cartel Act.

Abuse of dominant position

Dominant position

According to Section 34(1) of the Cartel Act, an undertaking holds a dominant position if it either:

- is exposed to no or only insignificant competition, or
- holds a predominant market position in relation to other competitors; in this regard financial strength, relationships with other undertakings, access to suppliers and markets as well as entry barriers for other undertakings shall be considered when assessing market power.

In addition, Section 34(1a) provides for a rebuttable presumption that an undertaking is market dominant, if it:

- has a market share of at least 30 per cent; or
- is exposed to competition by not more than two other companies and has a market share of more than 5 per cent; or
- is one of the four largest undertakings which together have a market share of at least 80 per cent, provided it has itself a market share of more than 5 per cent of the market, regardless of whether the market is to be defined nationally, regionally or locally.

If one of these criteria is fulfilled, the burden of proof is placed upon the undertaking concerned, which may provide the court with facts proving the contrary.

Pursuant to Section 34(2) of the Cartel Act, an undertaking shall also be deemed to be dominant if it has a predominant position in relation to its customers or suppliers. This is particularly the case if customers and suppliers are obliged to maintain business relations with the dominant company in order to avoid serious economic disadvantages.

Abuse

As under Article 82 EC, the abuse of a dominant position is prohibited per se. The Official Parties, associations representing the economic interests of companies, and any company having legal or economic interests, as well as the Former Official Parties and regulatory authorities may apply to the Cartel Court to order a company to cease and desist from the abuse in question.

Section 35 of the Cartel Act contains a non-exhaustive list of examples of abusive practices, following the wording of Article 82 EC. Thus, an abuse will in particular occur if the dominant company:

- directly or indirectly imposes unfair purchase or selling prices or other unfair trading conditions;
- limits production, markets or technical development to the detriment of consumers;
- discriminates by way of imposing different contractual conditions to similar transactions;
- imposes supplementary obligations which are not related to the subject matter of the contract; or
- without factual justification sells goods below their cost price ('predatory pricing'); the provision on predatory pricing provides for a rebuttable presumption, leaving it to the dominant undertaking to prove the contrary or to justify its pricing policy.

It should be noted that, according to current case law, anti-competitive practices can also be challenged before the ordinary civil courts. Based on Section 1 of the Act Against Unfair Trading Practices, undertakings may be forced to terminate cartel practices as well as the abuse of a dominant position. In addition, interim relief can be granted through interlocutory injunctions.

The intentional or negligent abuse of a dominant position is subject to fines (see 'Sanctions' below). In addition, the new provision in Section 35(2) of the Cartel Act empowers the Cartel Court to order measures intended to weaken or even eliminate the dominant position for abuse—even for first-time abuse—involving media enterprises (see also 'Media concentrations' below).

Mergers

Notion of concentration

According to Section 41(1) of the Cartel Act, a concentration is deemed to arise when:

- an undertaking acquires, wholly or to a substantial extent, a business, in particular by way of merger or change of corporate form;
- an undertaking acquires control of another undertaking by contractual agreement (eg assignment of the right to use, operate or manage the place of business);
- an undertaking acquires, directly or indirectly, either 25 per cent or more or 50 per cent or more of the shares in another company (regardless of whether this leads to a change of control);
- at least half of the members of the management board or the supervisory board of two or more companies are identical;
- undertakings are linked in any other way which confers upon one company the possibility of exercising, directly or indirectly, a decisive influence over the other company (general clause).

Furthermore, the establishment of a concentrative joint venture constitutes a concentration within the meaning of the Cartel Act, if it performs on a lasting basis all the functions of an autonomous economic entity and does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture (Section 41(2) of the Cartel Act).

Intra-group transactions are exempt from merger control.

Thresholds and notification

A concentration must be notified to the Cartel Court if:

- the combined aggregate worldwide turnover of all undertakings concerned amounts to at least €300 million; and
- the combined aggregate turnover on the Austrian market of all undertakings concerned amounts to at least €15 million; and
- each of at least two of the undertakings concerned achieves a worldwide turnover of at least €2 million.

Minor concentrations, where at least one of the above thresholds is not met, do not require any notification or filing. Due to their lack of significant effect on competition (the de minimis rule), they do not fall under any merger or other competition law control.

In exceptional cases, foreign-to-foreign mergers may not be subject to Austrian merger control even if the turnover thresholds are met. This may be the case where the merger has no or hardly any appreciable actual or potential effect on the Austrian market. However, this concept is only accepted by some of the Chambers of the Cartel Court.

Concentrations requiring notification must not be put into effect until the Cartel Court has granted clearance.

Calculation of turnover

Regarding the calculation of turnover, the wording of the Cartel Act stipulates that the turnover of all undertakings linked in the meaning of Section 41 of the Cartel Act (see 'Notion of concentration' above) has to be taken into account. However, certain limits to this rule have been developed in a number of cases. The Cartel Court and the Supreme Court have limited the calculation of so-called 'endless chains' of minority shares. Thus, the turnover of undertakings holding a minority share in another minority shareholder may be disregarded under certain circumstances (cf judgment of the Cartel Court of Appeals of 1 March 1999, Case 16 Ok 16/98). The principles are, however, not entirely clear.

Procedure and substantive test

The Official Parties may request, within four weeks of receipt of the notification, that the Cartel Court open an in-depth examination of the contemplated concentration. If the Official Parties make no such request, the Cartel Court must grant clearance.

Pursuant to Section 42a(3a) of the Cartel Act, any undertaking whose legal or economic interests might be affected by the planned concentration may, within 14 days of the publication of the merger in the Official Journal (*Amtsblatt zur Wiener Zeitung*), submit a written comment on the concentration to the Cartel Court. Although the undertaking has no right to have its comment taken into consideration, such submissions serve as information for the Cartel Court.

If an in-depth examination is requested, the Cartel Court must assess whether the proposed concentration will create or strengthen a dominant position in the relevant market. If the outcome of this examination is that the merger is expected to create or strengthen such a dominant position, the Cartel Court must either prohibit the concentration or grant clearance on special grounds. The Cartel Court therefore disposes of a delay of five months. In such cases the Cartel Court must decide about the case within five months upon receipt of the notification.

Clearance on special grounds will be granted if it can be established that the concentration will improve competition in the market in such a way that the advantages outweigh the disadvantages of the creation or strengthening of a dominant position or if the concentration is indispensable to the competitiveness of the undertakings concerned and justifiable on macro-economic grounds.

The Cartel Court may also impose restrictions on and conditions to its clearance in order to prevent the creation or strengthening of a dominant position or to achieve at least one of the compensating improvements mentioned above.

Notification form

In May 2003, the Official Parties issued a form for the notification of mergers which is published on the Federal Competition Agency's website. Although not legally binding, it is highly recommended to use this form in order to avoid incomplete notifications. In the event of an incomplete notification, the Cartel Court may issue a formal decision on incompleteness ordering the applicants to file the missing information; in practice, it more often happens that the Official Parties use their right to ask for an in-depth examination in order to gain time for the assessment of the merits of a case.

Media concentrations

A concentration in the media sector may be prohibited if it is expected that media diversity will be impaired. Section 35(2a) of the Cartel Act explicitly defines the term 'media diversity' as the existence of numerous independent media which guarantee press coverage reflecting a range of opinions.

The Cartel Court may order remedies designed to weaken or eliminate the dominant position held by a media undertaking if it has abused its dominant position (once) in a way likely to affect media diversity.

Enforcement

Institutions involved in enforcement

Cartel Court

The main competition authority is the Vienna Court of Appeals sitting as the Cartel Court (Kartellgericht). The Cartel Court has the sole right to issue binding decisions and is responsible for administering all competition proceedings provided for in the Cartel Act, except for the criminal law provisions for submission cartels. Appeals from the Cartel Court go to the Supreme Court of Austria sitting as the Cartel Court of Appeals (Kartellobergericht), which is the second and last instance in competition matters.

The Cartel Court sits in panels consisting of two professional judges and two expert lay judges, with the presiding professional judge having the casting vote, and the Cartel Court of Appeals sits in panels of three professional judges and two expert lay judges. Thus, the Cartel Act ensures that the professional judges on a panel always have the decision-making power. The power of the Cartel Court to open proceedings ex officio in cases where there is a public interest was abolished by the amendments to the Cartel Act as a consequence of the institutional restructuring.

Federal Competition Agency and Federal Antitrust Prosecutor

The Federal Competition Agency (Bundeswettbewerbsbehörde) is located at the Federal Ministry of Economic Affairs and Labour. In fulfilling its duties, the Federal Competition Agency is independent and not bound by any instructions. It is headed by the Director General for Competition, who is appointed for a term of five years upon nomination by the Federal Government. It currently has 18 employees. The main task of the Federal Competition Agency is the investigation of possible restrictions of competition and terminating such violations by bringing actions before the Cartel Court. As an Official Party, the Federal Competition Agency has locus standi in all proceedings before the Cartel Court. The Federal Competition Agency shall also assist other agencies and cooperate with the European Commission in individual cases. It can, furthermore, inquire into certain sectors of the economy where restrictions of competition are suspected and render expert opinions regarding competition policy.

In order to fulfil the tasks assigned to it by the Competition Act, the Federal Competition Agency is provided with far-reaching powers of investigation. In particular, it has the right to inspect all business documents, to question witnesses and parties involved and to oblige undertakings to provide all required information. With authorisation from the Austrian Cartel Court, the Federal Competition Agency even has the right to conduct dawn raids.

The Federal Competition Agency is advised by the Competition Commission (Wettbewerbskommission), which consists of eight members. In merger control proceedings, the Competition Commission can issue recommendations regarding applications for an in-depth examination of the merger to the Federal Competition Agency. Such recommendation must be issued, upon request, by even only one member of the Competition Commission. In addition, the Federal Competition Agency may not fail to act upon a recommendation without giving sufficient reasons, which also have to be made public.

AUSTRIA

The Competition Act further provides for a Federal Antitrust Prosecutor (*Bundeskartellanwalt*) who is located at the Cartel Court and is, in theory, subject to the directives issued by the Federal Minister of Justice (so far, no formal directive has been issued). The Federal Antitrust Prosecutor has the right to bring actions before the Cartel Court, replacing the Court's power to open proceedings *ex officio*. As an Official Party, the Federal Antitrust Prosecutor has *locus standi* in all proceedings before the Cartel Court. He must cooperate closely with the Federal Competition Agency.

The 'social partners' (the Federal Chamber of Commerce, the Federal Chamber of Labour, the Presidential Conference of the Austrian Chambers of Agriculture) are granted certain rights concerning individual applications for the prohibition of a cartel, vertical agreement or abuse of dominant position. In addition, the Cartel Court may profit from the social partners' expertise by imposing a duty on the social partners to render an expert opinion upon request by the Cartel Court in certain cases. In addition, the social partners have the right to deliver comments in all competition proceedings.

Sanctions

The system of fines is similar to that of EU competition law. The previous system of criminal sanctions has been abolished. However, the criminal sanctions, which are primarily directed towards the persons responsible, remain applicable to violations committed before 1 July 2002. In addition, criminal sanctions exist for submission cartels (see above).

Pursuant to Section 142 of the Cartel Act, the Cartel Court may, upon the request of the Official Parties, impose fines ranging from €10,000 to €1 million or even up to 10 per cent of the worldwide group turnover in the preceding business year of the undertakings involved for serious violations of the Cartel Act, such as:

- prohibited cartels and agreements on distribution;
- prohibited implementation of mergers;
- violation of the prohibition on cartels, vertical agreements on distribution or mergers;
- violation of the rescinding of authorisation for a cartel;

- abuse of a dominant position;
- non-compliance with orders of the Cartel Court regarding divestment measures;
- violation of Article 81(1) or Article 82 EC.

In the case of less serious violations, such as non-compliance with certain decisions of the Cartel Court or with a duty to notify, or submission of incorrect or incomplete statements, fines ranging from €3,500 to €35,000 can be imposed.

With regard to mergers, Section 42b(7) of the Cartel Act provides for the possibility of measures being imposed in order to reduce or eliminate the negative effects of a concentration approved on the basis of false or incomplete information. The same applies to violations of conditions imposed by the Cartel Court in connection with clearance of a merger.

The assessment of the amount of the fine depends upon the seriousness and duration of the violation, the material gain arising from it, the degree of fault and the economic capacity of the undertaking concerned. A reduction of the fine may be granted if there is cooperation in the investigation of a prohibited cartel. The law, however, does not provide for a full remission of the fine.

Practical experience since the establishment of the system in 2002

In cartel cases, the Federal Competition Agency has often tried to settle the competition problems arising informally through discussions with the parties involved. Until now, only one dawn raid has been made by the Federal Competition Agency in a purely Austrian case. Fines have been imposed in various cases, the highest fine amounting to €500,000. In the field of mergers, a practice of pre-notification talks with the Official Parties, similar to those of the European Commission, is developing steadily. The Official Parties expect such contact, especially in difficult cases.

Perspectives

The Austrian competition law statutes will be amended, probably in early 2005.

HAARMANN HÜGEL RECHTSANWÄLTE OEG

ARES-TOWER, DONAU-CITY-STRASSE 11
A-1220 VIENNA
TEL: +43 1 260 50-205
FAX: +43 1 260 50-208

CONTACT:
DR RAINER RONIGER LL.M.
E-MAIL: RAINER.RONIGER@HAARMANNHEMELRATH.COM

WALBURGA HEMETSBERGER
E-MAIL: WALBURGA.HEMETSBERGER@
HAARMANNHEMELRATH.COM

WEBSITE: WWW.HAARMANNHUEGEL.COM

Haarmann Hügel is one of the leading law firms in Austria. Since 2000 the firm has closely cooperated with Haarmann Hemmelrath, an international group of professional advisers with extensive experience in all relevant fields of legal and tax advice.

With 22 offices in 14 jurisdictions in Europe and South-East Asia and almost 600 professionals Haarmann Hemmelrath offers business-oriented and integrated solutions to our clients.

The cooperation of Haarmann Hügel and Haarmann Hemmelrath stands for high-quality advice and a close personal contact between advisers and clients. In addition, clients benefit from the firm's strong international presence comprising a profound knowledge of local law and a deep understanding of the respective culture.

Our main areas of practice:

- Mergers & Acquisitions
- Tax Law
- Competition and Antitrust Law
- EU Law
- Company and Commercial Law
- Distribution and Franchising Law
- Public Procurement Law
- State Aid Law
- Corporate Reorganisations and Restructuring
- Intellectual Property Law
- Telecommunication Law
- Insolvency Law