

Fundamental Reform of Austrian Cartel and Merger Control Law as of 1 January 2006

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On 1 January 2006, a substantial reform of the Austrian competition Law has come into force, the central element of this revision being a new Cartel Act ("Cartel Act 2005"). The reform includes, *inter alia*, the approximation of the provisions on cartels to the provisions of EU competition law, the introduction of a leniency programme and the increase of merger control thresholds.

Please find below an overview of the most important aspects of the reform:

Prohibition of Cartels

As of 1 January 2006, a general prohibition of cartels for vertical and horizontal restraints of competition is applicable in Austria. According to Section 1 of the Cartel Act 2005, as laid down in Article 81 of the EC Treaty ("EC"), all agreements and concerted practices as well as decisions of associations of undertakings which have as their object or effect the restraint or distortion of competition are prohibited. The prohibition thus includes all forms of co-operation between undertakings, insofar as they have as object or effect the restriction of competition.

The distinction between different forms of horizontal agreements or concerted practices will no longer be valid. Thus, vertical distribution agreements are no longer privileged and may only be implemented if they are exempted by way of a block exemption regulation or if they fulfill the criteria for "justification" under Section 2 of the Cartel Act 2005 (please see details below).

Exemptions

By analogy to Article 81 (3) EC, Section 2 of the Cartel Act 2005 introduces a system of legal exception. This means that anti-competitive agreements can no longer be notified in order to obtain clearance; however, they may be implemented if they fulfill the criteria of Section 2 of the Cartel Act 2005 (which are similar to Article 81 (3) EC) or if they are exempted under a block exemption regulation. According to Section 2 of the Cartel Act, the restraint of competition has to contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, without a) imposing on the undertaking concerned restrictions which are not indispensable to the attainment of these objectives and b) affording the possibility of eliminating competition in respect of a substantial part of the products in question.

In principle, it is planned to introduce block exemption regulations which reflect the EU block exemption regulations, although it is yet unclear as to when this will happen. Strictly speaking,

it can be argued that the block exemption regulations which had been enacted on the basis of the of Cartel Act 1988 will no longer apply after 31 December 2005. However, it seems fair to assume that anti-competitive agreements having no effect on interstate trade will be exempted under Section 2 Cartel Act 2005, if they comply with the substantive provisions of the corresponding EC block exemption regulations.

As regards an exemption for working groups / consortia, which have been exempted so far by a specific block exemption regulation under Austrian competition law, it is not clear how they will be treated in the future. Most likely, the former block exemption regulation will not be applicable anymore and it seems that the enactment of a new block exemption on the basis of the Cartel Act 2005 is currently not foreseen.

Leniency Programme

Following the international trend, as of 1 January 2006, a so-called leniency programme is operational in Austria. According to Austrian law, undertakings may be fined with an amount of up to 10 per cent of their annual group turnover. The leniency programme provides for a reduction or even a non-imposition of fines for undertakings which voluntarily cease their unlawful conduct and assist the Federal Competition Authority ("FCA") in investigating the facts of the case on a comprehensive basis. If the FCA has already come to know about the facts of the case (be it because of the information provided by the first "whistle blower" or from other sources), a reduction of up to 50 per cent is possible. "Ringleaders", i.e. undertakings which have coerced others to participate in the infringement are explicitly excluded from the programme. Since only the first whistle blower may claim full immunity from fines and many undertakings will consider to "confess" to the FCA, we advise all undertakings which might be involved in anti-competitive conduct to consider a leniency application to the FCA and to other competition authorities, if need be. According to officials at the FCA, some leniency applications have already been made.

Revision of Merger Control Rules

As of 1 January 2006, cooperative joint ventures will fall within the scope of Austrian merger control as well. Co-operative JVs will therefore be subject to "double" control under the provisions of both cartel and merger control law.

Most importantly, the thresholds triggering Austrian merger control have been increased. Concentrations have to be notified if the following turnover thresholds are exceeded (conditions have to be fulfilled cumulatively; turnover figures relate to the preceding business year):

- aggregate worldwide turnover of all undertakings involved of more than € 300 million;
- aggregate Austrian turnover of all undertakings involved of more than € 30 million;
- turnover of each of at least two undertakings involved of more than € 5 million.

However, even when these thresholds are fulfilled, the transaction does not have to be notified, if

- only one of the undertakings concerned achieves a turnover of more than € 5 million within Austria
- all other undertakings concerned achieve a worldwide turnover of no more than € 30 million.

When calculating the turnover, the turnover of the whole group of undertakings, *i.e.* all affiliated undertakings, has to be taken into account (regardless of which goods or services contributed to the turnover). In Austrian merger control, affiliated undertakings are also undertakings which are connected via an at least 25 per cent shareholding (directly or indirectly, up- or downstream, regardless of whether control is given).

As of now, notifications of concentrations are no longer to be filed with the Cartel Court but rather with the FCA. The FCA forwards a copy of the notification to the Federal Cartel Prosecutor. Thereby, the so-called Phase I is shortened: The Cartel Court deals with concentrations only if one of the Official Parties (FCA or Federal Cartel Prosecutor) requests an in-depth investigation of the case. The Official Parties may request such an investigation within four weeks, this period running from the day on which the notification together with the confirmation of payment of the fees for Phase I is received by the FCA. The fee is € 1.500 in all cases and may only be made by cash payment at the Austrian post office savings bank (Postsparkasse).

If a request for in-depth investigation is made and thus Phase II (conducted by the Cartel Court) commences, the Cartel Court has five months from the day on which the first request for in-depth investigation has been made to decide on the clearance or prohibition of the concentration. Thus, this phase of the proceedings is potentially longer compared to the proceedings under the predecessor rules (which provided for 5 months commencing from the date of filing with the Cartel Court).