

Expert Opinion

New Cartel Act brings Harmonisation of domestic cartel law with European Law

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On June 18, 2005, the Austrian Parliament adopted a new Cartel Act (Federal Gazette I 61/2005 – Cartel Act 2005) that will come into force on January 1, 2006. The new legislation harmonises the domestic competition regime with European law. Additionally, the new Cartel Act brings about important changes to rules relating to mergers and introduces an Austrian leniency program.

Harmonisation with EC Law and abolition of the notification and exemption system

In line with Art 81 of the EC Treaty, Sec 1 of the Cartel Act 2005 prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition. Sec 2 of the Cartel Act (which partly resembles Art 81 para 3 of the EC Treaty) provides (under certain circumstances) for a legal exemption of the general prohibition of cartels under Sec 1. Furthermore, the new Cartel Act abolishes – in line with the EC modernisation regulation 1/2003 – the "authorisation" regime for cartels. Accordingly, the registration of cartels will no longer be necessary or possible in Austria. Any registered cartel, which is not exempted under Sec 2 of the Cartel Act, will be caught by the prohibition of Sec 1 by December 31, 2006 at the latest.

Uniform concept of "cartels"

The new Cartel Act introduces a uniform concept of cartels, prohibiting all types of anti-competitive restrictions along the lines of Art 81 of the EC Treaty. One of the consequences of this is that the current privileged treatment of vertical anti-competition agreements will cease to exist under the new law (under the current regime a vertical restriction is admissible as long as it is not explicitly declared unlawful by a judicial decision).

Amendments of merger control provisions

The legislator aimed to reduce the number of concentrations that require notification by increasing the relevant turnover thresholds. Another goal of the new legislation was to avoid notification where the transaction would not have any effect on the Austrian market.

Now, a concentration will have to be notified to the Cartel Court only if the combined aggregate worldwide turnover of all undertakings concerned amounts to more than €300m, and more than €30m turnover on the Austrian market *and* if at least two of the undertakings concerned achieve a worldwide turnover of more than €5m. Furthermore, a concentration will not have to be notified if only one of the undertakings concerned achieves a turnover of more than €5m on the Austrian market and the combined aggregate worldwide turnover of the other undertakings concerned does not exceed €30m. With this exception, the legislator particularly aims to exclude those concentrations, where the parties to the transaction are a large Austrian undertaking and multiple small foreign undertakings, from the obligation to notify.

Another important amendment of the merger control provision is the adoption of the EU approach towards full-function JVs. In the future, a concentration within the meaning of merger control law is deemed to arise if the company is under joint control of at least two companies and carries out the function of an independent economic entity on a permanent basis. The prerequisite that the concentration may not lead to a coordination of the parent

companies is no longer applicable. Any anti-competitive effects arising in connection with a potential coordination of the parties to the transaction will have to be assessed in the light of the general prohibition of cartels under Sec 1 of the Cartel Act. A competence to assess such effects within the time limits of the merger control proceedings as provided under Art 2 para 4 European Merger Control Regulation, however, is not provided by the new legislation.

Unfortunately, the legislator did not adopt the concept of control as set out under Art 3 European Merger Control Regulation. Consequently, every transaction which fulfils the turnover thresholds under Austrian law will still have to be notified if it directly or indirectly leads to the acquisition of at least a 25% shareholding in another undertaking (even without the existence of specific control rights).

Leniency programme

The new rules also provide for leniency provisions modelled after the Commission's leniency notice. Pursuant to the new law, the Federal Competition Authority will waive its right to request a fine at the Cartel Court, if

- the undertaking fully and expeditiously cooperates with the Federal Competition Authority in the investigations;
- the undertaking did not take steps to coerce other undertakings to participate in the infringement;
- the undertaking has ended its involvement in the suspected infringement no later than the time at which it submits evidence;
- the Federal Competition Authority had no prior knowledge of the facts underlying the infringement.

If the Federal Competition Authority was already aware of the circumstances, there would only be the possibility of a partial reduction of the fine requested at the Cartel Court. However, ultimately it is up to the Cartel Court to decide whether or not to impose a fine. ■