

IMPORTANT CHANGES IN AUSTRIAN COMPETITION LAW – AN OVERVIEW

On 25 April 2017, important changes ("**Amendments**") to Austrian competition law entered into force (a number of changes will enter into force at different times).

The Amendments transpose the EU Damages Directive (2014/104/EU) into Austrian law. In parallel, a range of other changes are introduced into Austrian competition law, e.g. an additional jurisdictional thresholds test for merger control filings and the Austrian Federal Competition Authority (**FCA**) will have additional enforcement powers during dawn raids (they concern electronic data).

The following provides an overview of the most important changes.

PRIVATE ENFORCEMENT OF ANTITRUST DAMAGES MADE EASIER

Following years of consultations, in 2014, the European Commission published the Damages Directive, which aims at facilitating the private enforcement of claims before national courts for damages after competition law infringements. The enforcement of such claims has gained increasing importance in recent years; this is also the case in Austria, where several cases are pending. We expect that the Amendments will further support the successful enforcement of such claims in the future. The Amendments include the following changes:

Shift of the burden of proof in favour of the injured party

In case of a cartel between competitors, a rebuttable legal presumption is introduced that the cartel caused harm. Consequently the defendant bears the burden of proof (for the contrary).

Limitation period of claims for damages

Damage claims for competition law infringements will only become time-barred after five years (as opposed to three years for regular claims for damages); the new limitation period will only begin when the claimant knows or can be expected to know of the identity of the infringer, the relevant conduct, of the harm being caused by that conduct and of the fact that the conduct constitutes an infringement of competition law.

Regardless of knowledge, an objective limitation period of 10 years as of the occurrence of the damage will apply to these claims.

The limitation periods are suspended when a competition authority takes investigative measures with regard to the respective infringement. The suspension ends one year after the investigation or valid decision by the authorities.

Access to evidence (disclosure)

The Amendments entitle civil courts to order, upon request of the claimant (or the defendant), the disclosure of evidence from anyone who has such evidence.

In contrast to other member states, a request for disclosure can only be filed with or after filing the claim. "Pre-trial discovery" is not admitted in Austria.

Disclosure orders can also concern evidence in files of courts or authorities; leniency applications and settlement submissions are however excluded. In case disclosure obligations are disregarded, courts can impose fines of up to EUR 100,000.

As such disclosure concepts are strange to the Austrian legal system, there is curiosity as to how civil law judges will apply their new powers.

LIMITATION PERIOD IN PUBLIC ENFORCEMENT

The Austrian Cartel Court can only impose fines for an infringement of competition law, provided that the Austrian competition authorities submit (to the Cartel Court) a request to impose a fine within five years of the end of the infringement.

According to the Amendments this limitation period will be interrupted, if at least one undertaking involved in the infringement is informed about investigative measures by the FCA concerning the infringement in question. The limitation period restarts after such interruptions end; it ends, however, after ten years as of the end of the infringement (excluding court proceedings). The Amendments thereby align the Austrian limitation regime to that of the EU (Regulation 1).

FINES FOR FAILURE TO GRANT ACCESS TO ELECTRONIC DATA

The Amendments empower the Austrian authorities to impose fines in case undertakings, in the course of a dawn raid, fail to grant access to electronic data that is accessible from the premises concerned. The fines can amount to up to 5% of the average daily turnover for each day of delay.

ADDITIONAL JURISDICTIONAL TEST IN MERGER CONTROL (AS OF 01.11.2017)

The Amendments introduce an additional jurisdictional threshold test in Austrian merger control. The new test aims at capturing transactions such as Facebook Whatsapp where the value of an undertaking is not (predominantly) based on the turnover the undertaking generates.

In addition to the existing (low) thresholds, concentrations will trigger a merger control filing requirement, if (i) the undertakings' combined worldwide turnover exceeds EUR 300 million, (ii) their Austrian turnover exceeds EUR 15 million, (iii) the value of the consideration for the transaction exceeds EUR 200 million and (iv) the target is active to

a significant extent in Austria (a target may be deemed to have significant activities in Austria if it has a business location in Austria or if the target's services are significantly used (e.g. unique website visits) in Austria).

As a result, the (already rather high) number of mergers notifiable under Austrian merger control law may further increase.

FILING FEE FOR MERGERS

The filing fee for mergers is increasing from EUR 1,500 to EUR 3,500.

WHISTLE BLOWER SYSTEM

Finally, the Amendments provide that a web-based whistle blower tool can be implemented at the Austrian Federal Competition Authority, where anyone can anonymously disclose information on potential competition law infringements.

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