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## Competition - Austria

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### Non-discrimination Rule to Apply to Everyone

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In 2008 and 2009 the Supreme Court, acting as Higher Cartel Court, rendered rare decisions on the basis of the Local Supply Act.<sup>(1)</sup> These controversial decisions may have significant consequences for the qualification of undertakings' discriminatory practices.

In 2007 the Austrian trade association of the timber industry initiated proceedings on behalf of Austrian sawmills against the governmental farming institute for the Bavarian forests. The farming institute granted a Bavarian sawmill better price conditions than those granted to the Austrian sawmills. The plaintiff sought a cease and desist order against this preferential treatment and based this motion explicitly on Section 2 of the Local Supply Act. Section 2 prohibits suppliers - even if they are not dominant on the market - from applying discriminatory conditions to comparable resellers authorized by trade law without justified reason. Contrary to the non-discrimination rule under Section 5 of the Cartel Act and Article 82 of the EC Treaty, pursuant to Section 2 of the Local Supply Act, if taken literally, the non-discrimination rule also covers suppliers without a dominant market position.

However, it has been argued in legal literature that the general non-discrimination rule under Section 2 of the act applies only to undertakings with a dominant market position. The Supreme Court clarified that Section 2 is not limited to undertakings with a dominant market position. It stressed that the act aims to complement the provisions of the Cartel Act concerning undertakings with a dominant market position, since these provisions do not sufficiently cover buyer concentrations of power. However, the court left it open as to whether the Local Supply Act applies to all undertakings, irrespective of their market position, or whether a supplier addressed by Section 2 must at least possess certain market power (in this case it was clear that the farming institute for the Bavarian forests had significant market power).

In its first decision the Cartel Court denied the applicability of the act since it did not qualify sawmills as 'resellers authorized by trade law' under the meaning of Section 2. It was argued that the act was implemented in 1977 because supermarkets were displacing small groceries. Therefore, sawmills were not protected by the act. However, the Supreme Court ruled that the scope of application of Section 2 is not limited to trade businesses - the act prohibits discriminatory practices against all undertakings that are not end users.

The Supreme Court further clarified that the act applies to cases involving non-Austrian undertakings only if the case has an impact on the Austrian market. Since the act does not provide for such cases itself, Section 24 of the Cartel Act - stating that the application of the Cartel Act depends on the effects of the case on the Austrian market - must be applied.

These Supreme Court decisions are expected to lead to a revival of the Local Supply Act provisions. In future, undertakings without a dominant market position may also have to deal with discrimination claims.

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## Endnotes

(1) Supreme Court as Higher Cartel Court, July 16 2008, 16 Ok 3/08; March 25 2009, 16 Ok 2/09, 16 Ok 3/09.

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