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The Preslmayr Team

Our founding partners, **Karl Preslmayr** and **Florian Gehmacher**, retired on January 31, 2013. We thank them for years of exemplary partnership as well as for the knowledge and experience imparted to us, which we as a proven team will continue to utilize for our clients. Our team comprises both veteran and youngish attorneys, whose work is facilitated by the firm's highly qualified employees. We look forward to furthering the success of our clients.



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RECHTSANWÄLTE

Changes in Austrian Competition Law 2013



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A bill for changes in the Austrian Cartel Act and the Competition Act will enter into force as of March 1, 2013. The proposed changes reflect a longtime discussion and have been influenced by competition cases pending. The recent trend as to increased surprising house searches, so-called “dawn raids”, and other activities fighting anti-trust infringements by the Austrian Federal Cartel Authority (“FCA”) may be accelerated.

1. The *de minimis*-rule will be changed. Contrary to the *de minimis*-regime so far, any agreement on **sales prices, limitation of production or distribution and allocation of market** will be caught now by the law irrespective of the market shares of the undertakings involved.
2. The rules on defining presumptions for a **dominant market position** will be supplemented to the effect that certain forms of **collective dominance** are defined.
3. For **merger control** there will be a possibility for the notifying party to request an extension of the four-week-investigation period to six weeks; this might be useful to avoid full investigation procedures before the Cartel Court.
4. Declaratory antitrust proceedings against the **leniency applicant** – without fining him – will be possible.
5. The **criteria for measuring the fines** shall be amended to more closely reflect the fine policy of the European Commission.
6. The FCA now is obliged to reason in more detail its **complaint for a fine**.
7. Final decisions on the prohibition or establishment of infringements, the adjudication of fines, on mergers and further on measures imposed after clearance of a merger, shall be **published** by the Cartel Court **in a respective public court media**. The names of the parties and the essential contents of the decision as well as the sanctions imposed shall be included in this publication.
8. Requests for Cartel Court decisions establishing past infringements as a **preparation of civil damage proceedings** will be explicitly admissible. This aims to facilitate further private enforcement of competition law.
9. Specific rules for follow-on-**damage claims** shall be enacted. This includes the possibility to interrupt such procedures for the duration of a procedure conducted by the European Commission or a national Competition Authority, the explicit regulation that the **Civil Court is bound to the final decision of Competition Authorities** and, practically quite important, that the limitation period for damage claims is blocked until a Competition Authority’s decision establishing the violation has become final, plus six months.

10. Modification of the **leniency regime** to the effect that leniency requests may lead to full immunity from fines even after the FCA has gained knowledge of an infringement, information and evidence is presented that enables the FCA to immediately file a complaint with the Cartel Court.
11. The FCA shall have an extended right to **interview all employees and representatives** of undertakings – but certainly not the company’s attorneys – upon inspection on matters connected to the subject matter of the investigation.
12. The FCA will get authority **to order the answer to information requests** by own decision and impose fines in case such decisions are not adhered to. An appeal against such decisions has no suspensive effect. This is the first real decision making power allocated with the FCA.
13. Upon **house searches** which still have to be decided on by the Cartel Court, the FCA has for the duration of the search the possibility to **seal rooms** and to even **confiscate evidence**. The latter even exceeds the rights the European Commission has and may have a considerable impact on the business investigated: For example, the possible confiscation of the whole IT infrastructure needs to be considered!
14. The **investigation of documents** is regulated to the effect that unlike in the past **objections to the search are possible only to a very limited extent**, even in cases where electronic data is copied extensively.

Furthermore, it is explicitly provided for that the changes as to the *de minimis*-rule and the provisions affecting damage claims following decisions by Competition Authorities **shall only be applicable on cartels and infringements** that have occurred after February 28, 2013.

Conclusion: From March 1, 2013 by far more cases than in the past will be caught by the Austrian cartel ban and the prohibition of the abuse of a dominant market position; at the same time the powers of the FCA when investigating possible competition infringements are significantly strengthened and follow-on-damage claims are facilitated. Undertakings are therefore even better advised to strongly consider relevant and effective compliance activities to minimize their exposure.



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