

Competition - Austria

Dominant undertakings must sometimes support competitors

Contributed by [Preslmayr Attorneys at Law](#)

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On October 11 2012 the Higher Cartel Court⁽¹⁾ ruled on the obligation of dominant undertakings to contract with other market participants, including competitors, under specific circumstances. The decision provides interesting clarifications on the applicability of the 'essential facilities' doctrine in such cases.

Facts

The action was initiated by a new Austrian railway company, Westbahn, which recently entered the market for railway passenger transport. The defendant, the formerly state-owned incumbent ÖBB, is by far the biggest player in this market. ÖBB also provides information on Austrian railway schedules via its information system (internet, hotline or print media). After ÖBB ignored a request by Westbahn that it include information on the rail services provided by Westbahn in this information system, Westbahn filed a motion with the Cartel Court for a preliminary injunction that would oblige ÖBB to do so.

ÖBB argued that:

- Westbahn had failed to provide the necessary technical and legal information in order to allow it sufficiently to evaluate whether the details of Westbahn's rail services should be included in its information system; and
- according to the principles of the essential facilities doctrine, abuse of a dominant position on the market would occur only if access to ÖBB's information system were essential for Westbahn to provide services. ÖBB argued that this was not the case.

First instance decision

The Cartel Court found that ÖBB allowed other private rail companies to include details of their rail services in its information system for a price. However, the court also found that the ÖBB's information system was not the only such service available in Austria. From a legal point of view, the court decided that ÖBB had a market share of at least 30% and a dominant position on the market for railway information systems.

The Cartel Court stated that the fact that the other private railway companies with which ÖBB already contracted for its information services were not direct competitors of ÖBB did not justify its refusal to contract with Westbahn. Consequently, the court ruled that ÖBB was discriminating against Westbahn. It therefore ordered ÖBB to include Westbahn's railway services in its information system for the cost stated in ÖBB's price list.

ÖBB appealed the Cartel Court's decision to the Supreme Court, acting as the Higher Cartel Court; however, its appeal was unsuccessful.

Appellate decision

The Higher Cartel Court stated that although neither Austrian nor European cartel law provides for a general obligation to contract, dominant undertakings must not refuse to supply other market participants unless such refusal is objectively justified. The refusal of a dominant undertaking to contract with another undertaking, where it has already contracted with other market participants, may constitute an infringement of the general prohibition against abuse of a dominant market position (Article 102 of the Treaty on the Functioning of the European Union and Section 5 of the Austrian Cartel Act).

The Higher Cartel Court decided that Westbahn was not obliged to create its own

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information system, as its competitiveness depended on potential passengers' knowledge of the existence of its rail services; potential passengers must also be able to identify interchange possibilities to Westbahn trains when using their favourite information medium (ie, ÖBB's information system).

The Higher Cartel Court also rejected ÖBB's defence under the essential facilities doctrine, clarifying that the doctrine applies only in cases for which there is not yet open competition on the market to which the undertaking is seeking access. Since ÖBB had already contracted with other market participants, the Higher Cartel Court found it irrelevant whether ÖBB's information system was absolutely necessary for Westbahn to enter the market.

Consequently, the Higher Cartel Court confirmed the Cartel Court's decision.

Comment

Dominant undertakings must be very careful to avoid discriminating against other undertakings by refusing to enter into a contract with them, especially where they already contract with other market participants. In such a scenario it is irrelevant whether an undertaking is actually dependent on the contract with the dominant undertaking. Rather, the dominant undertaking must treat each market participant - even direct competitors - on a non-discriminatory basis and provide objective justifications for any different treatment.

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Endnotes

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