



Competition - Austria

Third-Party Contracts Continue Infringement

Contributed by [Preslmayr Attorneys at Law](#)

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Introduction

The Supreme Court, acting as the Higher Cartel Court, recently rendered a new decision⁽¹⁾ on a previous infringement of antitrust law that had ongoing effects. The case involved the allegedly abusive promotion of contracts no longer available on the market by the defendant. The decision differed from the Supreme Court's earlier decision⁽²⁾ on a related topic (for further details please see "[Cartel Court Offers No Simple Way Of Obtaining Damages](#)").

The cases can be compared since the plaintiff in the recent case used nearly the same arguments as the plaintiff in the earlier case. In support of the motion for a cease and desist order, the plaintiff argued that the antitrust infringement had not been finally terminated by the defendant since the illegally concluded contracts – constituting an abuse of a dominant market position – were still running. The plaintiff further sought a declaratory decision and stated that it had a legitimate interest in the declaration of an infringement of antitrust law as:

- there existed the risk of recurrent infringement by the defendant;
- the case raised several new legal questions; and
- the declaration would enable it to assert its claims for damages in the civil law proceedings.

As the Supreme Court had done in the earlier case, the Vienna Higher Regional Court (as the Cartel Court) rejected the plaintiff's motions for cease and desist and a declaratory decision.⁽³⁾ However, the Supreme Court overruled that decision and ordered that the Cartel Court once more decide on the case (thereby following the Supreme Court's view of the case).

Decision

According to the settled case law of the Supreme Court, a cease and desist order can be rendered only if antitrust law is actually infringed at the time of the decision. However, the Supreme Court has not yet explicitly decided whether it has jurisdiction to render a cease and desist order in a case where the actual abuse of a dominant market position is over, but the effects of the infringement are still being felt on the market as a result of long-term contracts. The Supreme Court stressed in its decision that it could not deal with this question in detail in the earlier case, since the plaintiff in the earlier case did not (unlike the plaintiff in the current case) comply with its duty to substantiate sufficiently the facts upon which it based its motion for cease and desist.

Therefore, the Supreme Court found that a cease and desist order can also be justified in the event of continuing obligations stemming from an abuse of a dominant market position in the past. To support this decision, it cited the case law of the European Commission and the European Court of Justice. According to EU law, which is explicitly stated to be the model for Austrian legislation, the European Commission is entitled to take corrective action on illegally concluded long-term contracts. However, the Supreme Court emphasized that the Cartel Court is allowed to take corrective action on the contracts of the defendant by way of a cease and desist order only if (i) this is the only way to re-establish competition in the market reliably, and (ii) the position of the defendant's contractual partners, which benefited from the alleged abuse of the dominant market position because of low-priced contracts, is affected as little as possible.

As regards the plaintiff's motion for a declaratory decision, the Supreme Court once more emphasized that the intention to claim for damages in the civil law proceedings does not in itself constitute the 'legitimate interest' needed for a declaratory decision pursuant to Section 28(1) of the Cartel Act. However, the Supreme Court pointed out that the plaintiff also referred to the risk of recurrent infringements and to new legal questions raised by the case, and that both arguments constitute a legitimate interest under the Cartel Act. With regard to the stated risk of recurrent infringements, the Supreme Court considered that the evidence pointed at a comparable sales promotion by the defendant.

Comment

For the first time the Supreme Court dealt in detail with the preconditions for a cease and desist order in the event of alleged ongoing effects of a past abuse of a dominant market position, and found that the Cartel Court has jurisdiction to take corrective action on consumer-friendly contracts by way of a cease and desist order. However, such action must be the only measure available to re-establish competition on the market. The Cartel Court will now have to decide whether the plaintiff's arguments are sufficiently founded in law and fact.

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Endnotes

- (1) Supreme Court as Higher Cartel Court, January 19 2009, 16 Ok 13/08.
- (2) Supreme Court as Higher Cartel Court, October 8 2008, 16 Ok 8/08.
- (3) Vienna Higher Regional Court as Cartel Court, June 26 2008, 29 Kt 5, 6/08.

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