1993 Amendment to the Kartellgesetz

1993 Amendment to the Kartellgesetz (Austrian Cartel Law)

By means of the Amendment, Federal Law Gazette No. 693/1993, the Kartellgesetz (Austrian Cartel Law) 1988 was amended in a number of points, of which we shall select the following as being the most important.

1. The scope of application of the Cartel Law has been extended. By contrast with the previous situation, the forestry sector is no longer excluded. The previous exclusion for co-operatives was restricted to those restraints of competition which are justified by the fulfillment of the promotional tasks of co-operatives.

2. Such restraints of competition now also constitute contravention's of the Cartel Law which may only exert an effect abroad, but which also impair commercial transactions between the member states.

3. The procedure is rendered considerably by the provision that the Cartel Court can now rule, on application, whether and to what extent a factual situation is subject to the Cartel Law. Hitherto, no provision was made for an application of this nature, and the question of whether a cartel pertained could therefore only be resolved if the parties submitted an application for approval on their own initiative, or if criminal proceedings were initiated.

4. The right to submit an application under the Kartellgesetz and under the Nahversorgungsgesetz (Austrian Food Supply Law) has also been entirely reformulated. While it was the case hitherto that applications which might bear on the prohibition of the abuse of a dominant market position, or the prohibition of types of behavior which infringed commercial good conduct, could only be submitted by what were referred to as "official parties" (the *Finanzprokuratur* or major Chambers), the right to submit applications now pertains to every entrepreneur whose legal or economic rights are affected. This can be any person who, for example, has been affected by the abuse of a dominant market position or by an infringement of commercial good conduct; in other words, possibly a customer, a supplier, or a competitor of the defendant in the application.

5. The "vertical market links" (e.g. specialist trade links) the regulation of which had not proved satisfactory hitherto have also been subjected to new regulations. In future, vertical market links are to be notified to the Cartel Court before their implementation, in which situation a model text of the agreements with the individual members is to be submitted. The Cartel Court can, under certain preconditions, prohibit these.

6. Hitherto, approval could only be sought in respect of what are known as "effective cartels", "procedural cartels", or "petty cartels", if the Cartel Court had instructed the parties to do so. This instruction procedure has been done away with. For petty cartels, there is no longer any possibility of implementing a prohibition. Effective and procedural cartels may, however, be prohibited on application, if they are not justified from the point of view of the national economy, or if some other grounds for prohibition pertain.

7. The provisions relating to entrepreneurs who hold a dominant market position have been replaced by special regulations for media. In particular, the Cartel Court will in future be entitled, under certain preconditions, to apply measures to media companies by means of which the predominant market position will be weakened or eliminated.

8. The core of the Amendment may be seen as the new provisions relating to mergers. It was true that the Cartel Law could previously impose a notification

obligation on mergers, but there was no real "merger control", because no provision was made for an inspection of content and, if necessary, prohibition.

With the new legal situation, the first change is an amendment to the definition of a merger. By contrast with the previous arrangement, it is no longer an issue as to whether the partners in the merger together have a share of the domestic market of at least 5 %. What has been clearly established is that even the establishment of a joint company can constitute a merger; on the other hand, a merger does not pertain if all the companies participating belong to the same group.

In addition to this, a distinction is now drawn between mergers which are subject to "mandatory notification" and "required notification". An obligation to effect notification pertains if the companies involved in the merger had a total turnover yield during the last fiscal year of at least ATS 150 million. Such "mandatory notification" mergers cannot, as hitherto, be inspected by the Cartel Court in terms of content; they are to be entered in the Cartel Register without further ado.

The Law speaks of "required notification" mergers if the participating companies achieved total turnover yield in the last fiscal year of at least ATS 3.5 billion, of which at least two companies accounted for at least ATS 5 million in each case. The intention behind this restriction is intended to exclude petty cases from the obligation to effect notification. According to a decision of the Austrian Cartel High Court of end of 1996, only the domestic turnover has to be taken in to account. The turnover from associated companies is to be added together.

If a required notification merger is notified to the Cartel Court, the official parties (the *Finanzprokuratur* or major Chambers) are entitled, within four weeks, to apply for the investigation of the merger. The Cartel Court is therefore entitled to prohibit the merger within five months at the latest, if it is to be anticipated that the merger will incur or strengthen a dominant market position. In the event of legal proceedings being incurred, the period of grace indicated will be increased by a further two months.

The Cartel Court shall, however, refrain from prohibiting the merger if:

> a) It is to be expected that the merger will incur improvements in the competitive conditions which will outweigh the disadvantages of market predominance, or
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> b) The merger is necessary in order to maintain or improve the international competitiveness of the participant companies, and is justified in terms of the national economy.

Instead of prohibiting the merger, the Cartel Court shall also be entitled to rule that it is only permissible under certain restrictions.

Special provisions are also provided for mergers in respect of media companies.

9. The organization of the Cartel High Court has also had to be reviewed, since its previous composition was unconstitutional.

10. Finally, the Amendment makes provision for a system of fines, which replaces the previous administrative penalty provisions. In future, entrepreneurs who infringe their obligations under the Cartel Law may be subject to fines of up to ATS 500,000. The forfeiture of enrichment, provided for hitherto, remains unaffected by this.

11. The Amendment essentially came into effect as from 1.11.1993. It does not apply to mergers which came about prior to that date.