



CPI Antitrust Chronicle

October 2012 (2)

There is Always a First Time: Competition Developments in Austria

Astrid Ablasser Neuhuber & Gerhard
Fussenegger

Hügel Rechtsanwälte OG, Vienna

There Is Always a First Time: Competition Developments in Austria

Astrid Ablasser-Neuhuber & Gerhard Fussenegger ¹

I. INTRODUCTION

Within the last couple of months, Austrian competition law has followed new paths. The Austrian Cartel Court, for the first time, imposed fines for vertical infringements. Furthermore, the Austrian Federal Competition Authority: (i) accepted, for the first time, remedies within phase I; (ii) initiated, for the first time, a dawn raid in a private home; and (iii) conducted the longest dawn raid in Austrian competition law history.

These developments will be outlined in more detail in the following.

II. DO-IT-YOURSELF RETAILERS FINED FOR PARTICIPATION IN RESALE PRICE MAINTENANCE

In 2011, the Austrian Federal Competition Authority (“Bundeswettbewerbsbehörde,” “BWB”) conducted dawn raids in the premises of insulation material producers. A few months later, the BWB extended its dawn raids to Do-it-yourself retailers (“DIY-retailers”) which had been active in selling insulation. Insulation is used in the construction industry, *inter alia*, to seal floor pavement and the outer surfaces of buildings and ceilings. According to the BWB’s press release it is a business segment that is subsidized with hundreds of million Euros each year.

The BWB’s allegations focused on a price maintenance system introduced by producers of insulation, whereby retail prices for end-customers (with regard to both regular and promotion prices) had been concerted with DIY-retailers.

Based on the BWB’s investigations, and following a settlement, the Court considered the resale price maintenance as being an infringement of Art 101 TFEU and Section 1 of the Austrian Cartel Act and imposed a fine on the DIY-retailers OBI in the amount of EUR 235,000 (court reference 27 Kt 49/12) and on Hornbach of EUR 100,000 (27 Kt 38/12). The undertaking’s cooperation with the BWB, and the resulting reduced procedural efforts due to these settlements, were considered as mitigating factors. Hornbach got a further reduction due to its leniency status. Further proceedings against one producer and other retailers are still pending.

By fining OBI and Hornbach, the Austrian Cartel Court, for the first time, imposed fines for vertical infringements of antitrust law. However, the respective decisions most probably will not be published, as there is no legal obligation to do so. Therefore, we can assume no further information with regard to details and method of the given retail price maintenance will be made available.

¹Dr. Astrid Ablasser Neuhuber is partner of bpv Hügel Rechtsanwälte OG, Vienna and head of the competition law practice group. Gerhard Fussenegger is attorney at law at bpv Hügel’s Brussels office.

III. FIRST DAWN RAID IN A PRIVATE HOME

Only within the last year, the BWB has conducted approximately 25 inspections of undertakings' premises. In August 2012, it initiated for the first time a dawn raid in the private house of an employee of a suspected undertaking. The BWB, in its press release, only generally referred to the fact that there are no legal barriers in Austria against investigating private houses. It furthermore stated that, for the purposes of an investigation, it is sometimes indispensable to conduct inspections in private houses. However, the BWB provided no reasons why it took the Authority until August of this year to initiate such investigations. Furthermore, the authority did not explain which business area was affected by the respective investigations.

IV. LONGEST DAWN RAID EVER

By finishing its investigation at the premises of Rewe International AG on March 6, 2012, the longest dawn raid in Austrian competition law "history" came to an end. It took the BWB eight (!) days to investigate the Austrian headquarters of the nation's leading supermarket/grocery chain.

The dawn raid itself was accompanied by extensive conflicts between the authority and the undertaking (in the following, all quotes are from published newspaper articles). For example, the Director General of the BWB, Dr. Thanner, complained that he was personally "affected" by the way Rewe dealt with BWB's officials. He was also confronted with the rumor that the authority's dawn raid was initiated for the publicity (and, therefore, to increase Dr. Thanner's chances to extend his expiring contract). The spokesman of the BWB denied all these allegations, and added that the inspections were characterized by "a very aggressive climate," whereby representatives of Rewe allegedly "rushed in the room and took away notebooks and unplugged connectors." Furthermore, following the spokesman of the BWB, Rewe took photos and misled the investigators (e.g., "by referring to copy machines two floors upstairs, while the next copy machines had been next door"). Last, but not least in the authority's view, each investigator of the BWB had been permanently surrounded (partly "by physical contact") by four Rewe representatives/lawyers.

The authority thereby blamed the long duration of the dawn raids on Rewe's non-cooperation. Furthermore, the undertaking requested sealing of all documents seized by the BWB. Following this request, the authority will only get access to the documents after the Cartel Court has examined the documents.

Rewe, on the other side, strongly rejected the BWB's allegations. It referred, *inter alia*, to the fact that the authority was not organized in its investigation and that some documents had to be examined "a number of times." According to Rewe, the undertaking was always concerned to terminate the inspections as fast as possible to get back to daily business.

Against the background of these disputes, the reasons in substance for initiating the dawn raid took a backseat. Allegedly the investigations were not only based on a suspicion of prohibited price retail maintenance, this time between Rewe as a grocery chain and its suppliers, but also alleged horizontal agreements between grocery chains via their suppliers (keyword "hub and spoke"). The BWB did not comment, but only confirmed that the investigations had not been initiated by leniency application(s).

V. BWB ACCEPTS REMEDIES IN PHASE I

At the end of 2011, the dairy undertaking *Berglandmilch eGen*, after acquiring two competitors in the past two years, agreed on commitments to get clearance for its acquisition of *Stainzer Milch*. The acquirer not only agreed to an obligation to buy raw milk (3.3 million kilograms) from third parties, but also to sell raw milk to third-party dairies in an amount which was almost as high as the raw milk collected by the target.²

The commitments, therefore, were not only far-reaching; but it was the first time, ever, that the Official Parties (besides the BWB, the Federal Competition Prosecutor) accepted commitments in Phase I. The BWB stressed that the Authority, in future, will be open to accepting such remedies in Phase I to avoid often long-lasting Phase II proceedings in front of the Cartel Court.

² See

<http://www.bwb.gv.at/Aktuell/Archiv2011/Seiten/ZusammenschlussBerglandmilcheGenundSteirischeMolkereieGenachweitreichender,auchstrukturellerVerpflichtungserkl%C3%A4rungdurchBu.aspx>