

Gerhard Fussenegger

2.1 SMEs in Context

2.1.1 SMEs' Economic Context and Legal Definition

2.1.1.1 Legal Definitions of SMEs

SMEs are not legally defined in Austria in the Austrian legislation on the protection of competition. Therefore, also in accordance with practice in Austria, the answers in Table 2.1 refer to the definition of SME as defined by the European Commission.¹

2.1.1.2 The Economic Perspective

Concerning the number of employees, 403,601 in a total of 404,690 undertakings in Austria are SMEs in the meaning of the above-mentioned definition. In other words, more than 99.7 % of all undertakings in Austria are SMEs. Within these SMEs, more than 92 % of the undertakings are so-called micro undertakings with less than ten employees.²

¹ Recommendation 2003/361/EC.

² See Wirtschaftskammer Österreich (Austrian Economic Chambers), “KMU-Daten für Österreich” available at <http://wko.at/Statistik/KMU/WKO-BeschStatK.pdf>.

G. Fussenegger (✉)

bpv Hügel Rechtsanwälte OG, Brussels, Belgium

e-mail: Gerhard.Fussenegger@bpv-huegel.com

Table 2.1 Definition of SME

Company category	Employees	Turnover or Balance sheet total
Medium sized	< 250	≤ EUR 50 m or ≤ EUR 43 m
Small	< 50	≤ EUR 10 m or ≤ EUR 10 m
Micro	< 10	≤ EUR 2 m or ≤ EUR 2 m

2.1.1.3 Relevant Cases

Driving Schools

To date, the Cartel Court has issued two decisions regarding SMEs. Both decisions related to regional driving schools, the first concerning the area of Graz³ in 2005/2006 and the second with regard to Innsbruck⁴ in 2008.

In the first decision of 2005/2006, six local driving schools in Graz fixed prices for driving licenses. One of the driving schools was granted full leniency status; the aggregate fine for the other schools amounted to EUR 80,000. Similarly, in Innsbruck, seven driving schools fixed prices for driving licenses. Two driving schools applied for and obtained a leniency status. One of them was exempted from fines, and the remaining six schools were fined by the Cartel Court, with a total amount of EUR 70,000.

The size of the SMEs was taken into account in imposing relatively low fines; for instance, two driving schools concerned got a fine of EUR 12,500 each. However, it is unknown whether this amount was solely based on the (low) turnover of the SMEs or whether the Cartel Court additionally took as a mitigating factor the fact that the undertakings were small and regional driving schools.

Plumbers

The Austrian Federal Competition Authority (hereafter referred to as “Bundeswettbewerbsbehörde” or “BWB”⁵) has currently opened proceedings at the Cartel Court with regard to an alleged bid-rigging cartel of plumbers in Vienna. According to BWB, more than 40 plumber undertakings in Vienna participated in a price and market allocation cartel in the context of bids to the City of Vienna in relation to its community-subsidised tenement buildings. The allegations are fiercely contested by the plumbers concerned.

Shopping Centres

There is also some case law in Austria with regard to clauses in leasing agreements of shopping centres prohibiting the tenants to open further shops in other shopping

³ Judgment of the Cartel Court of 28 October 2005, case number 25 Kt 30/05-18, ‘Grazer Fahrschulen’. The judgment is not published. Graz is the second biggest city in Austria with approximately 260,000 inhabitants.

⁴ Judgment of the Cartel Court of 29 August 2008, ‘Innsbrucker Fahrschulen’. The judgment and its case number is not published. Innsbruck is the fifth biggest city in Austria with approximately 120,000 inhabitants.

⁵ See <http://www.bwb.gv.at/Seiten/default.aspx>.

centres within a special radius.⁶ Based on a wide relevant market, including all shopping possibilities within the respective radius, and not only shopping centres, the Supreme Cartel Court decided that the clause does not have any effect and therefore does not infringe competition law. However, these cases are not considered to be covered by the scope of the report, as the parties involved are not SMEs but major players like Spar or internationally active Outlet Centres. Furthermore, the Court decided exclusively on the basis of EU and not national competition law.

2.1.2 Specific Treatment of SMEs Under Competition Law

2.1.2.1 The Nature and Scope of Specific Treatment for SMEs

In general, there are neither specific public or private enforcement rules nor specific programmes (such as compliance, information policies, enhancement of competition enforcement) in Austrian competition law directly addressing SMEs. Therefore, the general approach in Austria is quite clear: each undertaking, regardless of its size, falls under the same substantive and procedural rules.

However, as outlined below in detail, there are some substantive rules that indirectly address SME issues in particular.

2.1.2.2 Size and Economic Power in Decisions of the National Competition Authorities and Courts

The size and economic power of the undertakings concerned are reflected, if even, within the sanctions imposed, mainly as a mitigating factor. Therefore, reference is made to Sect. 2.1.4 of this chapter.

2.1.3 The Role of Trade Associations

With regard to trade associations, there are neither specific rules nor specific programmes (compliance, information policies, enhancement of competition enforcement) in Austrian competition law directly addressing SMEs.

2.1.4 Policy Recommendations

In the author's view, every natural and legal person, regardless of economic size, should have the same rights concerning access to justice or remedies. Thus, SMEs should not have any special rights in Austrian competition law.

⁶ Cf. judgment of the Cartel Supreme Court of 12 December 2011, case number 16 Ok 8/10, '*Radiusklausel II*'.

2.2 Public Antitrust Enforcement and SMEs

2.2.1 Substantive and Procedural Rules Applicable to SMEs

2.2.1.1 Introduction

There are no specific rules that aim to protect SMEs. However, the Austrian competition law provides far-reaching substantive rules with regard to undertakings that are confronted with dominant undertakings (see section ‘Far-Reaching Definition of “Abuse of Dominance”’) or strong suppliers (see section “Regulation on Local Supplies”). Therefore, again, also SMEs can profit from these far-reaching rules.

2.2.1.2 Substantive Rules Applicable to SMEs

Far-Reaching Definition of “Abuse of Dominance”

In Austria, the legal wording of dominance in Section 4 of the Cartel Act⁷ not only includes undertakings that are “not or only marginal exposed to competition”⁸ but also encompasses an “outstanding” position compared to other competitors or its suppliers or buyers.

Therefore, the term “dominance” in Austrian competition law is far reaching. Undertakings claiming that other undertakings are dominant do not have to prove that there is no competition on the market but can demonstrate that they are economically dependent on the business relationship on the alleged dominant undertaking.

Furthermore, Section 6 of the Cartel Act prohibits any retaliatory measures of dominant undertakings in relation to complaints against an alleged abuse of dominance.

Regulation on Local Supplies

Besides the general abuse of dominance rules (see Section 4 of the Cartel Act), the Austrian legal regime includes the Act on Local Supplies (“Nahversorgungsgesetz”, “NahVersG”), a far-reaching legislation protecting SMEs.

Section 2 of the Act on Local Supplies provides that suppliers that offer different conditions to its resellers that operate under the same conditions and without objective justifications can be addressees of an injunctive relief. Dominance of the supplier is not a precondition for submission of such a claim.

By including all undertakings which resell their (**also processed**) goods under the term “reseller”, the scope of Section 4 of the Act on Local Supplies is widely defined. Based on this legal clause, there had been an (in)famous decision of the

⁷ Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen, BGBl. I Nr. 61/2005, available at <http://www.bwb.gv.at/Fachinformationen/rechtlicheGrundlagen/Seiten/Kartellgesetz.aspx>.

⁸ Referring to EU law, which defines dominance as “the power to behave independently of its competitors, customers and consumer”; see, e.g., ECJ case C-27/76, *United Brands Company and United Brands Continentaal BV v Commission*, ECR 1978, p. 207, pt 65.

Cartel Supreme Court in 2008,⁹ following which the Bavarian state forests had to terminate long-term supply agreements with Bavarian sawmills on the basis of a price level that was more than 5 % under the price that other buyers, amongst them Austrian sawmills, had to pay. The jurisdiction of the Austrian courts was, *inter alia*, reasoned by the fact that the given supply agreements impeded competition, also for Austrian undertakings.

Similar to Section 6 of the Cartel Act, Section 3 of the Act on Local Supplies prohibits any refusal to supply if it constitutes a retaliatory measure in response to an injunctive relief claim of the discriminated reseller.

2.2.1.3 Safe Harbours for SMEs

De Minimis Rule

So far, the Austrian *de minimis* rule, as stated in Section 2 (2) (1) of the Cartel Act, provides a specific safe harbour for SMEs in so far as cartels are completely excluded from the scope of competition law, if the combined market share of the participant does not exceed 5 % on a national basis or 25 % on a regional market.

Therefore, if trade between Member States is not affected and if thresholds are not met, SMEs are free to agree on prices and to allocate markets.

However, with the current reform of the Austrian Cartel Law, which comes into force on 1 March 2013, the clause will be deleted and replaced by a new provision that reflects the EU's *de minimis* rule.

First, the market share thresholds will be adapted to the EU's *de minimis* approach, i.e. the *de minimis* exception will only apply if the respective market shares of the undertakings concerned are not more than 10 % (if competitors are involved) or 15 % (concerning non-competitors).

Second, and this will be of essential importance to SMEs' hard-core cartel infringements, price fixing, limit or control production, and market allocation will not be exempted anymore from the scope of the Cartel Act, whether the market shares are met or not. Hence, the safe harbour for SMEs, as currently reflected in the *de minimis* rule of the Austrian Cartel Act, will be abolished once the adapted Austrian Cartel Act will come into force.

National Regulation to Austrian Cartel Act 1988

Until 2005, there had been a national regulation in force, which excluded certain forms of cooperation from the scope of competition law.¹⁰ Based on this far-reaching regulation, e.g. purchasing groups under certain circumstances, common R&D projects and consortiums were exempted from the scope of the Austrian Cartel Law. With regard to SMEs (based on a market share threshold of below 5 %), the regulation allowed common advertising, even with regard to coordinated prices.

⁹ Judgment of the Cartel Supreme Court of 16 July 2008, case number 16 Ok 3/08, '*Bayrische Staatsforste*'.

¹⁰ Reg. BGBl 1989/185.

However, with the reform of the Austrian Cartel Act in 2005, the regulation was abolished.

2.2.2 Fundamental Rights of SMEs as Infringers and Victims

2.2.2.1 Complaints

SMEs do have the same rights as any other undertaking, independently of their size and turnover.

In the author's view, a mechanism to protect SMEs in the form of leniency applications would, on the one side, surely help in enabling SMEs to inform the national competition authority about alleged infringements.

However, on the other side, also an undertaking that is allegedly abusing its dominance in the market should be able to defend itself by getting access to file or cross-examining the complainant. It should be also noted that in Austria only courts are legally allowed to impose fines, while the competition authorities can exclusively submit an application before the court for a fine. Hence, especially in proceedings in front of courts, the "defendant" should be protected by wide-ranged rights of defence.

Therefore, in balancing the rights of SMEs and defending undertakings, it seems difficult to consider a system in practice where the SME is protected without infringing the rights of defence of the undertaking indicted.

In general, the Austrian Cartel Supreme Court¹¹ always avoided clarifying whether the abstract threatening of a fine according to Section 29 of the Cartel Act results in a direct application of Art 6 ECMR, which applies to criminal fines.

However, the Cartel Supreme Court follows the ECJ's approach that certain legal clauses of the ECMR do apply in cartel proceedings, for instance:

- Art 6 (2) ECMR, with regard to its principle of presumption of innocence¹²;
- Art 6 (3) lit d ECMR, with regard to right to be heard.¹³

The Cartel Supreme Court furthermore confirmed that the decision and the calculation of the fine must be revisable on appeal.¹⁴

2.2.2.2 Access to File

According to Section 39 (2) of the Austrian Cartel Act, access to file in cartel proceedings can only be provided to third parties if all parties to the proceedings agree. This rule is a special rule in the Austrian Cartel Law, as opposed to civil and

¹¹ Judgment of the Cartel Supreme Court of 4 October 2010, case number 16 Ok 5/10, '*Printing Chemicals*'.

¹² Judgement of the Supreme Court of 6 November 2011, case number 5 Ob 154/07v.

¹³ Judgements of the Cartel Supreme Court of 12 September 2007, case number 16 Ok 4/07 and of 15 July 2009, case number 16 Ok 6/09, '*Pressegrosso I*'.

¹⁴ Judgment of the Cartel Supreme Court of 4 October 2010, case number 16 Ok 5/10, '*Printing Chemicals*'.

criminal procedural laws, which empower courts to grant access to file following a balancing of opposing interests.

On 12 October 2011, the Vienna Higher Regional Court sitting as Cartel Court referred a case¹⁵ on the right of access to a cartel file to the Court of Justice of the European Union. The Cartel Court was seeking guidance as to whether the above-mentioned Section 39 (2) of the Cartel Act banning access to cartel files unless all parties to the cartel procedure have consented to such access is in line with EU law, particularly in light of the ECJ's recent judgment in the *Pfleiderer* case.¹⁶

The reference for preliminary ruling is based on a national proceeding, in which an association representing companies in the printing sector filed a damage claim. The claims follow an infringement decision adopted by the Cartel Court against companies active in the wholesale trade for printing chemicals.

2.2.3 Leniency, Settlements, and Commitment Decisions for SMEs

Compared to other undertakings, no different rules apply for SMEs in connection with settlements and commitment decisions in Austria.

In principle, the same can be noted with regard to leniency applications; no different levels of severity do apply for SMEs. The BWB, especially for the first leniency applicant, does accept a form with only essential information and therefore a low evidential threshold with regard to the alleged cartel. SMEs can take advantage of the leniency system. Reference in this regard can be made to the BWB's "Leniency Handbook", where the leniency procedure is explained in detail.

According to Section 11 (3) Austrian Competition Act,¹⁷ the BWB can grant full immunity or a reduced fine to a leniency applicant only if the undertaking concerned did not, inter alia, "take steps to coerce other undertakings to participate in the infringement". However, if SMEs are market leaders in their niche and therefore able to coerce other undertakings to participate in a cartel, they might be excluded from applying as leniency applicants.

It appears that mostly leniency applicants tend to be undertakings belonging to major market players and not SMEs. However, there are also some exceptions.

In the *Freight Forwarding Cartel*,¹⁸ the leniency applicant was Schenker. Other undertakings involved were more than 40, also small Austrian freight forwarding companies. In the *Elevator Cartel*,¹⁹ the leniency applicants were Thyssen Krupp and Otis; other undertakings involved were, on the one side, global active

¹⁵ Referral for a preliminary ruling of Cartel Court of 12 October 2012, case number 29 Kt 5/09.

¹⁶ ECJ, case C-360/09, *Pfleiderer AG v Bundeskartellamt*, ECR 2011 I-5161.

¹⁷ Which is the second antitrust law in Austria besides the Cartel Act.

¹⁸ Referral for a preliminary ruling of the Cartel Supreme Court of 5 December 2011, case number 16 Ok 4/11, *Freight Forwarding Cartel*.

¹⁹ Judgment of the Cartel Supreme Court of 8 October 2008, case number 16 Ok 5/08, *Elevator Cartel*.

undertakings Kone and Schindler and also Austrian-based Haushahn Aufzüge GmbH and Doppelmayr Aufzüge AG.

In the Chemical Industry Wholesale Cartel,²⁰ the Donau Chemie Group, which did not apply for leniency, unsuccessfully referred to its minor role compared to the successful leniency applicant Brenntag by arguing that the cartel was based on an initiative of the leniency applicant and that there had been substantial pressure to participate. Furthermore, Donau Chemie Group brought forward that they were substantially smaller than the leniency applicant and argued that this fact should be reflected in the gravity of default. This argument was also rejected.

Contrary to the cases listed above, the leniency applicants in the above-mentioned plumber and in the driving licence cartel proceedings were SMEs involved in the cartels.

2.2.4 Sanctions: Different Penalties for Different Sizes?

SMEs do fall in Austrian competition law under the same sanction regime as bigger market players. Therefore, in general, a fine is based on the turnover in the relevant market. Aggravating and mitigating factors are considered on a case-to-case assessment.

However, based on the following criteria, the size of SMEs will at least indirectly be taken into account:

- As it is the undertaking's turnover in the relevant market in Austria,²¹ SMEs do, in general, profit from their lower turnover.
- Furthermore, an agreement covering the whole of Austria was considered as being aggravating,²² while in *Printing Chemicals*²³ the regional character was taken into account as a mitigating factor.
- In *Europay*,²⁴ the Supreme Cartel Court, in increasing the fine of the Court of First Instance, referred to the profit achieved in the business concerned and the high economic power of the parent companies.
- At last, Section 30 Austrian Cartel Act, in listing the criteria for imposing a fine, also mentions “economic capacity”. In *Chemical Industry Wholesale Cartel*,²⁵

²⁰ Judgment of the Cartel Supreme Court of 25 March 2009, case number 16 Ok 4/09, *Chemical Industry Wholesale Cartel*.

²¹ See, e.g., judgment of the Cartel Supreme Court of 25 March 2009, case number 16 Ok 4/09, *Chemical Industry Wholesale Cartel*.

²² See, e.g., judgment of the Cartel Supreme Court of 8 October 2008, case number 16 Ok 5/08, *Elevator Cartel*.

²³ Judgment of the Cartel Supreme Court of 4 October 2010, case number 16 Ok 5/10, *Printing Chemicals*.

²⁴ Judgment of the Cartel Supreme Court of 12 September 2007, case number 16 Ok 4/07, *Europay*.

²⁵ Judgment of the Cartel Supreme Court of 25 March 2009, case number 16 Ok 4/09, *Chemical Industry Wholesale Cartel*.

the Supreme Cartel Court, in referring to the undertaking's turnover, rejected the argument that the criterion "economic capacity" implies that the fine imposed must be in a certain relation to the missing profit achieved. Whether SMEs, in referring to their small turnover, could apply for a lower fine due to their limited economic capacity seems, to the author's knowledge, so far not issued in Austrian jurisprudence.

2.2.5 Recommendations

In the author's view, every natural and legal person, regardless of economic size, should be confronted with the same substantive and procedural rules of public antitrust enforcement.

2.3 Private Antitrust Enforcement and SMEs

2.3.1 Substantive Rules, Procedural Aspects for SMEs in Civil Suits

Austrian national legislation does not contain any specific rule to protect SMEs in civil suits for anticompetitive conducts.

So far, there had been uncertainty in Austria as to whether members of a cartel can be held liable in joint severability in compensation for damages proceedings. However, recently, the Austrian Supreme Cartel Court clearly stated that cartel members in general can be held liable for each other.²⁶

Furthermore, the Supreme Cartel Court confirmed in the same decision that based on Art 6 Z 1 Brussels Regulation,²⁷ also 100 % foreign parent companies of cartel members can be sued in the place of jurisdiction of the subsidiary if there is a strong relation between the respective causes of action for damages.

Last, the Supreme Cartel Court also confirmed that a natural person who was, at the time of the cartel, CEO of one of the cartel members can be held jointly and severally liable based on his intentional and tortious behaviour as a CEO within the cartel.

One general procedural difficulty that affects SMEs, in particular, in damage proceedings is the extreme high court fees. In Austria, the fees are determined as a percentage of the amount in dispute, without any cap. Furthermore, following Section 40 Austrian Code of Civil Procedure, it is the defeated party in the procedure that has to bear all costs of the proceedings, including the costs of the lawyers of the winning party. This principle is reasoned by principle of justice; however, this also hinders SMEs to file suits against big market players.

²⁶ Judgment of the Supreme Court of 14 February 2012, case number 5 Ob 39/11p.

²⁷ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

2.3.2 Collective Redress

2.3.2.1 Current Situation

With regard to the Austrian Cartel Act, SMEs do not have legal standing to bring collective legal actions based on anticompetitive conducts.²⁸

Explicitly, the Austrian legislator only provides collective redress mechanisms within the field of consumer protection.²⁹ However, it is accepted that Section 227 Austrian Code of Civil Procedure (“ZPO”) provides an indirect possibility to connect not only different claims but also different claimants under certain circumstances.³⁰

Furthermore, it is also possible and common practice to assign the claims.

2.3.2.2 Policy Recommendations

A possibility of collective redress that is directly stated in the law would surely improve the rights of SMEs. However, as outlined above, the current Austrian law provides SMEs some mechanisms that can be used to act in collective redress.

2.3.3 The Role of Trade Associations

Trade associations do not have any special status in Austrian procedural competition law. In the view of an SME, which is member of an industrial association, a direct collective redress scheme, which could be applied by the association, would be surely appreciated. However, due to the legal standard in Austria, associations can interact for its members by assignments of claims or support in collective redress claims according to Section 227 ZPO.

2.3.4 Policy Recommendations

In the author’s view, every natural and legal person, regardless of economic size, should be confronted with the same substantive and procedural rules of private antitrust enforcement.

²⁸ E.g., in relation to requests for remedy of cartel behaviour according to Section 26 in connection with Section 36 Austrian Cartel Act.

²⁹ See Section 29 Austrian consumer protection act (‘Konsumentenschutzgesetz’).

³⁰ See, e.g., the judgment of the Supreme Court of 31 March 2005, case number 3 Ob 275/04v, according to which different claimants can act within one proceeding if the respective claims issue the same factual or legal issues, which have an effect on the subject (or an essential preliminary question) of the proceedings.

2.4 Conclusions and Policy Recommendations

As outlined above, in the author's view, SMEs should not have any special rights in Austrian competition law.

An effective coverage of SMEs based on actual legal statutes such as appreciability of the restriction of competition, *de minimis* in the current form, collective redress is sufficient. An additional national regulation as it had been in force with regard to former versions of the Austrian Cartel Act or a notice drafted by the national competition authorities, illustrating cooperation between SMEs that are exempted from the scope of competition law (e.g., common market strategies, etc.), will increase legal certainty for SMEs. Such measures are therefore requested.

Antitrust for Small and Middle Size Undertakings and
Image Protection from Non-Competitors

Këllezi, P.; Kilpatrick, B.; Kobel, P. (Eds.)

2014, XIII, 463 p. 3 illus., 2 illus. in color., Hardcover

ISBN: 978-3-642-53999-2