THE Dominance and Monopolies Review

Eighth Edition

Editors
Maurits Dolmans and Henry Mostyn

THE LawReviews

THE DOMINANCE AND MONOPOLIES REVIEW

EIGHTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2020
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gavin Jordan

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Martin Roach

SUBEDITOR
Sarah Andreoli

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-446-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

© 2020 Law Business Research Ltd

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALLEN & GLEDHILL LLP

ANJARWALLA & KHANNA

ANJIE LAW FIRM

BAKER MCKENZIE LLP

BECCAR VARELA

BERNITSAS LAW

CASTRÉN & SNELLMAN ATTORNEYS LTD

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CMS

DE BRAUW BLACKSTONE WESTBROEK NV

ELIG GÜRKAYNAK ATTORNEYS-AT-LAW

HOMBURGER AG

JONES DAY

KOIKE & KASHIWAGI LAW OFFICE

LANE NEAVE

LEVY & SALOMÃO ADVOGADOS

P&A LAW OFFICES

SK CHAMBERS

SPASOV & BRATANOV LAWYERS' PARTNERSHIP

VINGE

WOLF THEISS

CONTENTS

PREFACE

Even before covid-19 disrupted the world as we knew it, competition law was at a crossroads, facing far-reaching and sometimes contradictory calls for reform – including with respect to monopolisation and abuse of dominance.

Some, such as President Macron and Chancellor Merkel, have argued that there is too much competition from abroad, and advocate for more permissive enforcement to facilitate 'European champions' to emerge: 'We need to adapt the EU competition law: [It's] too focused on consumer rights and not enough on EU champions' rights.'

Others maintain that there is too little competition, enforcement has been too permissive, and the rules should be tightened. Senator Elizabeth Warren, for example, has argued that 'competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere.' Similarly, Professor Joseph Stiglitz contends that 'current antitrust laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive marketplace'.

A third set of commentators believes that competition policy is misdirected, that the historic focus of competition law has been too narrow, and that the consumer welfare standard should be expanded to take account of social, industrial, environmental, and other considerations (sometimes referred to as 'hipster antitrust').

And a fourth critique, voiced by Maurice Stucke and Ariel Ezrachi, maintains that many of today's problems result from too much 'toxic' competition overall, driven by ideologues, lobbyists, and privatisation, and that we need to promote a kind of 'noble competition', where rivals mutually strive for excellence.

To address these challenges, a dizzying array of reports has emerged commissioned by governments in the US, EU, UK, Germany, France, Australia and elsewhere. And from those reports, a constellation of ideas has emerged to overhaul competition law, including: reorientating the goals of antitrust policy away from the consumer welfare standard towards a broader societal test; reversing the burden of proof; per se bans on certain categories of conduct (including prophylactic controls on vertical integration); lowering the standard of judicial review; injecting political oversight into competition law enforcement; loosening the standard to impose duties to share data with rivals; introducing market study regimes; allowing authorities to impose remedies without formally establishing an infringement; and establishing mandatory codes of conduct for digital platforms.

Where does this all leave busy practitioners and businesses that are trying to navigate the complex and constantly-evolving rules concerning abuse of dominance? Helpfully, this eighth edition of *The Dominance and Monopolies Review* seeks to provide some respite, providing an accessible and easily-understandable summary of global abuse of dominance rules. As with

previous years, each chapter – authored by specialist local experts – summarises the abuse of dominance rules in a jurisdiction; provides a review of the regime's enforcement activity in the past year; and sets out a prediction for future developments. From those thoughtful contributions, we identify three notable points from last year's enforcement.

Exploitative abuses pre- and post-covid-19

Exploitative abuses have in recent years enjoyed somewhat increased attention from regulators. The covid-19 pandemic intensifies that trend. It is leading to extreme demand and price volatility for certain products, as well as fluctuations in firms' costs. As firms struggle to manage these changes, agencies are aggressively seeking to show they are preventing consumer exploitation during the crisis. Charging excessive prices or imposing unfair terms and conditions constitutes an abuse of dominance in many countries, including almost all OECD members. In the US, excessive prices are not in and of themselves a matter for competition enforcement at the federal level, but many states have laws that prohibit price gouging and the current administration recently issued an executive order designed to prevent hoarding and price gouging.

Governments across the world have indicated that they will remain vigilant to sudden and significant price hikes during the pandemic. For example, in March 2020 the European Competition Network issued a statement identifying excessive pricing as a particular concern during the outbreak, noting that 'it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g., face masks and sanitising gel) remain available at competitive prices'. In a similar vein, on 27 March, Commissioner Vestager explained that 'a crisis is not a shield against competition law enforcement' and that the European Commission (EC) 'will stay even more vigilant than in normal times if there is a risk of virus-profiteering'. Several national authorities have opened investigations or created task forces dedicated to preventing excessive prices during the crisis.[1]

Even before covid-19, however, EU agencies were increasingly pursuing exploitation theories. In 2016, Commissioner Vestager stressed that the EC would seek to 'intervene directly to correct excessively high prices'. So far, most recent exploitation cases have been in the pharmaceutical sector, but the French and German agencies have pursued exploitative abuse theories in the technology sector. We pick out four developments over the last year.

First, the Court of Appeal judgment in *Pfizer/Flynn*, discussed in the UK chapter of this book, brings helpful clarity to evidence required to bring an excessive pricing case. As a recap: in 2016, the Competition and Markets Authority (CMA) imposed record fines on Pfizer and Flynn for charging excessive prices for phenytoin sodium capsules, an anti-epileptic drug. In July 2018, that decision was quashed by the Competition Appeal Tribunal (CAT) on the basis that the CMA had applied the wrong legal test and had failed to consider appropriately the economic value of the product. In March 2020, the Court of Appeal upheld the CAT's judgment that the case should be remitted to the CMA, though it agreed with the CMA on some issues (which will affect the remitted investigation) and the CMA welcomed the judgment as a 'good result.'

1 For further discussion, see Cleary Gottlieb, *Exploitative Abuse of Dominance and Price Gouging in Times of Crisis*, 31 March 2020.

In a nutshell, the Court of Appeal held that competition agencies have a 'margin of manoeuvre' in deciding how to prove their cases, including the 'Cost Plus' method that the CMA had used. Importantly, though, if a defendant adduces evidence that challenges the agency's methodology (as the defendants did in this case), the agency should consider that evidence. The extent of the agency's duty to consider the evidence adduced by the defendant will depend on the extent and quality of the evidence (i.e., there is no need to investigate each and every claim the parties bring up if those claims are not sufficiently substantiated). On the facts of the case, the Court held that there was an obligation on the CMA to evaluate the defendants' evidence regarding the prices of phenytoin capsules because it was prima facie evidence that prices were fair.

Second, in the *Sanicorse* case, discussed in the France chapter, the Paris Court of Appeal annulled the French Competition Authority's (FCA) decision of imposing a €199,000 fine on Sanicorse for imposing excessive price increases for medical waste treatment. The FCA had found that Sanicorse had abruptly, significantly, and durably increased the waste disposal prices it charged hospitals and clinics. In its ruling of November 2019, the Paris Court of Appeal clarified the conditions for establishing an exploitative abuse. Repeating the dictum from the *United Brands* ruling, the Court emphasised that an exploitative abuse arises in a situation where a dominant firm 'has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition'. The Court of Appeal found that the authority had failed to demonstrate that Sanicorse's price increases were unfair, and it accordingly annulled the decision.

Third, in December 2019, the FCA found in its *Gibmedia* decision (also discussed in the France chapter of this book) that Google's termination of three advertisers' Google Ads accounts was abusive. The authority's theory is that termination policies that allegedly lack objectivity and transparency, and are discriminatory, are a form of exploitation of customers. An apparent problem with the theory, however, is that a decision to terminate supply cannot, by definition, exploit the customer – it does not 'reap a trading benefit' from the trading partner, as required by United Brands and stressed by the Paris Court of Appeal in its *Sanicorse* decision.

Fourth, in February 2019, the Bundeskartellamt found that Facebook's terms and conditions relating to its collection of user data constitute an abuse (discussed in the Germany chapter). The Bundeskartellamt held that Facebook's terms and conditions, under which users agreed to the combination of their data from, for example, WhatsApp, Instagram and Facebook, violated the GDPR. Relying on German law principles that unlawful terms and conditions can constitute an abuse of dominance, the Bundeskartellamt held that Facebook committed an exploitative abuse by combining data from different sources. In August 2019, however, the Düsseldorf Court of Appeal granted suspensive effect to Facebook's appeal against the decision, holding that there are serious doubts about its legality. The Court found that users are not exploited by Facebook's use of data because, unlike financial payments, the data can be replicated and used again. Users freely decide whether to allow use of their data by balancing pros and cons of using ad-funded social network. The Court also held that the Bundeskartellamt had failed to prove the required causal link between Facebook's abuse and its market power: it failed to show that Facebook's terms deviated from the terms that would exist in a more competitive scenario. The judgment on the merits is pending.

Despite the renewed appetite to bring exploitation cases, these cases should in our view – in line with Advocate General Wahl's warning in the *Latvian Banks* case – remain rare and

exceptional. Otherwise, there is a risk that the concept of exploitative abuse is stretched to address policy issues beyond the scope of competition law and that require broader discussion outside individual cases.

A greater push for interim measures

The second notable development in abuse of dominance enforcement in 2019 was the EC's decision – for the first time in an antitrust case in almost 20 years – to impose interim measures on Broadcom (this decision is discussed in the EU chapter). The decision orders Broadcom to cease to apply exclusivity provisions in six agreements with manufacturers of TV set-top boxes and modems, while the Commission's full investigation continues. On announcing the decision, Commissioner Vestager stressed that interim measures decisions are 'so important', especially in 'fast-moving markets'. The Commissioner emphasised that she is 'committed to making the best possible use of this important tool' so as to enforce competition rules 'in a fast and effective manner'.

Like other developments at EU level, push for greater use of interim measures has been encouraged by national authorities, particularly in France, with the Commissioner citing France as a source of inspiration. The UK CMA has also stated that greater use of interim measures is 'essential if the CMA is to respond to the challenges thrown up by rapidly changing markets', and Germany is adopting new rules to accelerate proceedings and apply interim measures.

Two examples discussed in the French chapter illustrate the FCA's expansionist approach to interim measures, both in cases involving Google. First, in *Amadeus*, the authority found Google's decision to suspend the Google Ads accounts of a paid phone directory services operator to be an exploitative abuse (similar to the theory in the *Gibmedia* case discussed above). The Paris Court of Appeal subsequently partly annulled the decision. Second, in early 2020, the authority found that Google's refusal to pay news publishers for showing preview snippets in search results alongside a link to the publisher's site may also amount to an exploitative abuse. The decision orders Google to enter into good faith negotiations with publishers, although it also makes clear that the negotiations may result in zero monetary compensation to publishers (considering that Google sends traffic to the publishers that they can monetise via ads on their page or convert users to paid subscribers).

Several points of caution should be heeded from the appetite to bring interim measures cases. Interim measures decisions should focus on the most egregious and clear-cut abuses, such as exclusivity clauses by obviously dominant firms, rather than seeking to create new law or go against existing precedent. The efficiency and effectiveness of competition procedures should not come at the expense of investigative rigour, due process, and the right to be heard. Interim measures should not prejudge the final decision from the authority on the merits. Accordingly, they should be tailored to implementing measures that are possible in principle to reverse, if it subsequently turns out that on a full merits review there is no case to answer. Finally, the new appetite to impose interim measures should not slow down the speed of the main proceedings, as agencies get caught up duplicating investigations and satellite appeals.

Per se bans on self-preferencing

The third development is the wide-ranging proposals to overhaul competition rules to address the perceived challenges of the digital economy. Proposals in the pipeline include the EC's suggestion for further regulation of digital platforms; mandatory codes of conduct in Australia to address perceived bargaining power imbalances between platforms and media

companies; and, in the UK, the CMA's aim to develop 'a coherent and innovation-friendly approach to governing digital technologies to ensure their benefits are shared far and wide'.

Describing all these proposals is beyond the scope of the present editorial. We instead focus on one eye-catching suggestion: the suggestion – included in several of the reports commissioned by governments and agencies, such as the EU Special Advisors' Report, the Furman Report in the UK, the German ARC Amendments, and the Stigler Report – to introduce per se bans on digital platforms or companies that perform a 'regulatory function' from engaging in 'self-preferencing.' The reports, however, do not explain precisely what they mean by 'self-preferencing'. Self-preferencing is a generic expression that covers a range of different practices, for example, margin squeezing, tying and refusal to supply.

For example, keeping an indispensable asset to oneself and refusing to supply it to rivals is an example of abusive self-preferencing. But the refusal to deal in case law makes clear that it is, so far, not abusive for a dominant company to favour itself by reserving for its own use an asset that is not indispensable, but merely 'advantageous.' On the contrary, it is generally pro-competitive for companies to develop their own innovations, and use those innovations as the tools to compete against one another. As Advocate General Jacobs explained in *Bronner*:

> *it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business . . . Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it".*

This makes sense, for several reasons. First, there is an inherent contradiction between competition and duties to supply rivals; competition rules seek to encourage companies to compete vigorously against each other, not cooperate. Second, a duty to supply interferes with fundamental rights to dispose of property and to conduct business. Third, duties to supply reduce incentives to innovate for both the supplying company and the company that receives supply. Fourth, in industries with fast innovation cycles, a duty to integrate rivals into constantly-evolving technologies may delay – or preclude – new developments.

The Courts, therefore, only allow interference with the freedom to contract in exceptional and limited circumstances. By contrast, we are concerned that a per se ban on self-preferencing could have several unintended consequences: hampering vertical integration, which is presumptively efficient; eliminating synergies; and leading to delayed or mothballed product improvements.

Consider Google's introduction of a thumbnail map on its results pages in response to location-based queries: the UK High Court held that this was 'pro-competitive' and an 'indisputable' product improvement. Not only was Google's introduction of the thumbnail map not likely to harm competition, but the conduct was also objectively justified. This was because showing rival maps would have degraded the overall quality of Google's search services, for example, via delays in returning results. Under the contemplated presumptions against self-preferencing, however, companies would have to ask themselves before launching this type of improvement whether they could prove the negative (i.e., that it would not lead to long-run exclusionary effects). That appears to be a difficult threshold to cross before launch.

Accordingly, we believe we should be looking at measures that make a real improvement to consumer welfare and avoid chilling innovation and investment. Neat-sounding slogans – such as a presumptive and generic ban on self-preferencing – can prove harmful in practice.

As a recent CMA report into competition and regulation recognised, 'greater regulation is – on average – associated with less competition. For instance, countries with lower levels of product market regulation tend to have more competitive markets and enjoy higher rates of productivity and economic growth.' Similarly, in her speech on 'Remembering Regulatory Misadventure', FTC Commissioner Wilson recalled that attempts to prescribe 'fairness', 'non-discrimination', and 'reasonable and just' prices in the airline and railroad industries led to distortions of competition and restricted output. Removing these regulations 'significantly reduced consumer prices and increased output, generating billions of dollars in consumer surplus'. This is not to say that regulation is not desirable for objectives other than fostering competition, but regulation to encourage competition is likely to result in outcomes that any pro-competition and pro-innovation regime should avoid.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this eighth edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

Maurits Dolmans and Henry Mostyn
Cleary Gottlieb Steen & Hamilton LLP
London
June 2020

Chapter 3

AUSTRIA

Bernt Elsner, Dieter Zandler and Vanessa Horaceck[1]

I INTRODUCTION

The Austrian legal regime regulating market dominance is set out in Part II (Sections 4 to 6) of the Austrian Cartel Act (KartG), stipulating the prohibition on abusing a (single or collective) dominant position and retaliation measures imposed by dominant companies against companies initiating cartel court proceedings or lodging a complaint with the Federal Competition Authority (FCA) and the Federal Cartel Prosecutor (FCP) (together the Official Parties). Further, abusive behaviour of companies having 'relative' market power in relation to their suppliers or customers is also prohibited.

In addition to the general provision prohibiting abuse of a dominant position, Section 5 KartG also contains examples of abusive behaviour: the examples in Section 5, Paragraph 1, Nos. 2 to 4 KartG are based on Article 102, Letters b to d of the Treaty on the Functioning of the European Union (TFEU). Section 5, Paragraph 1, No. 1 KartG does not follow the exact wording of Article 102 Letter a TFEU, but prohibits requesting prices or other conditions that differ from those prices or conditions that would exist under a functioning competitive environment.

Another distinct characteristic of Austrian antitrust law is the specific (rebuttable) statutory presumptions of dominance based on market shares (Section 4 KartG), which are stricter than the market dominance presumptions developed by the EU institutions in the case law of Article 102 TFEU.

In addition, even for companies not holding a dominant position, the Austrian Act on Local Supply and Improvement of Competition Conditions (NahversorgungsG) contains specific provisions governing certain types of unilateral behaviour such as dissimilar trading terms.

In Austria, there exists no formal guidance on the application of the statutory rules on abuse of a dominant position in general. However, guidance can be derived from the case law of the cartel court (Higher Regional Court of Vienna (OLG) and the Supreme Court acting as a higher and appellate cartel court (OGH)). Moreover, the FCA has published

1 Bernt Elsner and Dieter Zandler are partners and Vanessa Horaceck is an associate at CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH.

sector-specific notices on market dominance in the field of funeral services,[2] motor vehicle distribution[3] and on media cooperation between concert promoters and radio stations,[4] as well as a notice on unfair trading practices in the supply chain.[5]

No special rules apply to public sector or state-owned enterprises. Thus, Austrian antitrust law also applies to companies entirely or partially, directly or indirectly, owned by the state if these companies carry out an economic activity (functional approach).[6] However, special rules apply to certain regulated industries, such as electricity, gas, telecommunications, post and railway, which are under the jurisdiction of industry-specific national regulatory authorities (e.g., the Telekom-Control Kommission, the Regulatory Authority for Broadcasting and Telecommunications (RTR), E-Control and Schienen-Control GmbH). When applying the provisions of the Austrian Cartel Act, the FCA shall ensure consistency with the decisions of regulators. Further, the FCA can exchange information with regulators in accordance with the principles of data protection. In this regard, the RTR's telecommunications and postal services unit and the FCA have recently announced that they will set up a joint task force in order to work together more closely on competition issues in the area of digital platforms.[7]

In the course of the amendment of the KartG in 2013, the legislator intended to enact specific rules for energy supply companies in a dominant position. However, the parliament's judicial committee in the review process rejected this proposal, as its legal implications were considered premature (apparently, the proposal faced heavy opposition from some Austrian federal states owning incumbent local electricity suppliers).[8]

II YEAR IN REVIEW

Compared to the number of proceedings initiated by the FCA in previous years in the field of agreements and concerted practices restricting competition, public enforcement in the area of abuse of dominance has been very limited. This might also stem from the fact that in a number of recent cases the FCA has not been successful in arguing its case before the cartel courts; examples include the *Taxi app* case relating to exclusivity clauses,[9] and more recently, the *Liquid gas tank* case relating to tying clauses.[10] In both of these cases, the OGH did not follow the FCA's arguments claiming an abuse of a dominant position.

2 A German version of the notice is available at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Standpunkt%20zum%20Bestattungswesen.pdf (last accessed 10 April 2020).

3 A German version of the notice is available at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/BWB%20Standpunkt%20KFZ-Vertrieb.pdf (last accessed 10 April 2020).

4 A German version of the notice is available at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Standpunkt%20-%20Medienkooperationen%20zwischen%20Konzertveranstaltern%20und%20H%C3%B6rfunk.pdf (last accessed 10 April 2020).

5 An English version of the notice is available at https://www.bwb.gv.at/fileadmin/user_upload/Downloads/standpunkte/BWB-Guidance_Fairness_in_business.pdf (last accessed 10 April 2020).

6 ECJ, 23 April 1991, case C-41/90, *Höfner and Elser*; 12 July 2012, case C-138/11, *Compass-Datenbank v. Republic of Austria*; OGH 8 October 2015, 16 Ok 3/15z.

7 An English version of the joint announcement is available on the website of the FCA at https://www.bwb.gv.at/en/news/news_2019/detail/news/rtr_telecommunications_and_postal_services_and_bwb_stepping_up_digital_cooperation_development_of_a/ (last accessed 10 April 2020).

8 A German version of the judicial committee's report is available at https://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_02035/fname_277230.pdf, p. 3 (last accessed 10 April 2020).

9 OGH 27 June 2013, 16 Ok 7/12.

10 OGH 1 December 2015, 16 Ok 4/15x.

In early 2019, the FCA initiated an investigation against Amazon Services Europe Sàrl (Amazon) concerning unfair trade practices imposed on Austrian retailers active on Amazon's market place after having received a number of complaints collected and submitted by the Austrian Retail Association.[11] These proceedings were conducted in close cooperation with the German Federal Cartel Office. After the opening of the proceedings, Amazon revised some terms and conditions of its business solutions agreements. These modifications removed some of the competition concerns of the FCA. However, the FCA declared that it will continue to monitor individual aspects (such as communication and logistics), which remain subject to further investigations.[12] The detailed case report on the matter[13] particularly deals with the discriminatory clauses imposed on retailers by Amazon, inter alia, allowing the immediate termination or suspension of a retailer's account, the obligation to disclose purchase prices, the provision of incorrect delivery details by Amazon for deliveries by the retailers, unjustified deletion/loss of product rankings and choice of law and choice of court clauses that make it difficult for a retailer to take legal action.

In the *Flight ticket booking* case, a private enforcement case initiated by an association of undertakings (professional association of travel agencies) against Lufthansa, the application of different prices on the Graz to Frankfurt route for flight bookings made in Austria and abroad was considered an unlawful price discrimination pursuant to Section 5, Paragraph 1, No. 3 KartG (applying different conditions for equivalent services) and Article 102 TFEU.[14]

Another recent case involved contracts on the supply of distribution data from pharmaceutical wholesalers to an information service provider in the healthcare sector,[15] which contained a multi-supplier clause providing for reductions of the contractual remuneration in the event of the conclusion of a contract by the pharmaceutical wholesaler with a competitor of the information service provider. The contractual clause was contested by a competitor of the information service provider, and the OLG (in the interim relief proceedings) ordered the defendant to stop abusing its dominant position by applying multi-supplier clauses leading to a disproportionate reduction (in particular, a reduction of 40 per cent) of the contractual remuneration.

Other than that, the most recent published dominance case dates back to December 2015: in the *Old-packaging recycling* case, a competitor requested that another competitor be prohibited from abusing its dominant position by offering unprofitable prices for its services, for which the OGH confirmed the finding of an abuse of a dominant position by predatory pricing.[16]

11 An English version of the announcement of investigations of 14 February 2019 is available on the website of the FCA at https://www.bwb.gv.at/en/news/news_2019/detail/news/austrian_federal_competition_authority_initiates_investigation_proceedings_against_amazon/ (last accessed 10 April 2020).

12 An English version of the press release dated 17 July 2019 is available on the website of the FCA at https://www.bwb.gv.at/en/news/detail/news/bwb_informs_amazon_modifies_its_terms_and_conditions-1/ (last accessed 14 April 2020).

13 An English version of the case summary of the FCA of 17 July 2019 is available at https://www.bwb.gv.at/fileadmin/user_upload/Fallbericht_20190911_en.pdf (last accessed 14 April 2020).

14 OGH 12 July 2018, 16 Ok 1/18k (16 Ok 2/18g), *Fachverband Reisebüros v. Lufthansa – Flugticketbuchung*; OLG Vienna 6 December 2017, 27 Kt 13/16p (published 13 May 2019).

15 OLG Vienna, 19 December 2017, 25 Kt 2/17g, 25 Kt 3/17d, *INSIGHT Health GmbH & Co KG v. IQVIA Information Solutions GmbH*.

16 OGH 8 October 2015, 16 Ok 9/15g.

A case not directly relating to abuse of a dominant position under the KartG concerns a monopoly undertaking's obligation to enter into a contract that was published very recently.[17] In this decision, the OGH sets out the obligation of a subsidiary of a publicly owned company operating an airport with a taxi area (on private ground) to conclude a contract with taxi drivers who depend on access to this area for providing airport taxi services to their customers. The OGH's ruling again confirms previous rulings that a monopolist's refusal to contract or termination of a contract can only be based on justified reasons.

Another interesting Austrian case on a possible abuse of a dominant position, which has already kept the courts busy for more than eight years, relates to the newspaper boxes in front of and inside the Viennese underground stations offering the (free) Austrian yellow-press newspaper, *Heute*.[18] The case was initiated by a competitor publishing another yellow-press newspaper, *Österreich*, also offered free of charge, which requested that the Viennese underground operator be prohibited from only allowing one (other) competing newspaper publisher to offer its newspaper (*Heute*) in front of and inside the Viennese underground stations free of charge. The competitor argued that this practice constitutes a violation of Section 5, Paragraph 1, No. 2 KartG (restricting offerings to the detriment of consumers), Section 5, Paragraph 1, No. 3 KartG (applying different conditions to equivalent services) and Article 102 TFEU. The OLG granted the request with regard to three specific underground stations but dismissed the remainder of the claim. Both parties appealed against this decision, and the OGH set aside the ruling and referred the case back to the OLG to further assess the exact market definition in order to assess the alleged dominant position of the Viennese underground station operator. In October 2018, the FCA reported that the parties had entered into a settlement pursuant to which the Viennese underground operator, inter alia, undertakes to not discriminate the publisher of *Österreich* against *Heute* or other competitors.[19]

Owing to the small number of cases related to abuse of a dominant position, the table below lists the most important (fine) decisions in abuse of dominance cases before the Austrian cartel courts in recent years.

Year	Sector	Company	Conduct	Fine
2007	Financial services	Europay Austria Zahlungsverkehr GmbH	Discriminatory pricing, exclusionary practices	€7 million
2009	Telecommunication	Telekom Austria TA AG	Abuse of a dominant position (not specified)	€1.5 million
2011	Film distribution	Constantin Filmverleih	Refusal to supply	€150,000 and an obligation to provide copies of films to all requesting cinemas
2012	Rail freight transport		Alleged discriminatory prices depending on whether the main run was procured together with the pre-carriage and delivery	No infringement found by the cartel court

17 OGH 20 February 2018, 4 Ob 13/18t.

18 OGH 11 June 2015, 16 Ok 8/14h.

19 A German version of the publication is available at https://www.bwb.gv.at/news/detail/news/verfahren_zwischen_der_mediengruppe_oesterreich_und_den_wiener_linien_mit_vergleich_vor_dem_kartellge/ (last accessed 10 April 2020).

III MARKET DEFINITION AND MARKET POWER

i Market definition

The assessment of whether a company enjoys a dominant position is closely linked to the definition of the relevant product and geographic market. Before the Austrian courts, the market definition is an issue of fact when it comes to examining the objective delimitation criteria, and a legal question when it comes to choosing the methods to define a market.[20]

When defining the relevant product market, the FCA and cartel courts follow the demand-side substitution concept, and thus analyse the substitutability of the goods or services from the demand-side perspective.[21] However, in cases where the market position of a supplier or manufacturer is to be determined, it is also necessary to include the substitutability of the goods or services from the supply-side perspective (i.e., whether other suppliers or manufacturers are able and willing to adapt their product portfolio or production within a short time and without significant costs) when defining the relevant product market.

The small but significant and non-transitory increase in price test is often used when defining the relevant market. However, in accordance with the European Commission,[22] the OGH takes the view that in cases of abuse of dominance, this test should be dealt with carefully, as the prices of a company holding a dominant position might already be above market level, with a further small price increase causing the demand-side to switch to a (false) substitute that could result in a too-broad market definition.[23]

In accordance with EU law, the geographic market comprises the area in which the companies concerned compete, in which the conditions of competition are sufficiently homogeneous, and that can be distinguished from neighbouring areas because of appreciably different competitive conditions.[24] Factors for determining the relevant geographic market are thus the characteristics of the product (i.e., durability, limited transport capacity), the existence of market entry barriers or consumer preferences as well as significantly varying market shares of competitors in neighbouring areas. Thus, the geographic market is also defined through a substitutability test. In practice, in legal proceedings before the cartel court, questions concerning market definition are very often dealt with by court-appointed experts, with the cartel court frequently and to a large extent relying on the expert's opinion. Thus, challenging an expert's findings as regards the relevant markets in an appeal (which is limited to questions of law) can be quite difficult.

ii Dominance

While single dominance has a long tradition in the Austrian antitrust rules, specific rules on joint dominance have only been incorporated into the Austrian legal regime with the Cartel Amendment Act 2012, which entered into force on 1 March 2013.

20 OGH 25 March 2009, 16 Ok 4/08; 12 December 2011, 16 Ok 8/10.

21 See, for example, OGH 2 December 2013, 16 Ok 6/12.

22 Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), recital 19.

23 OGH 25 March 2009, 16 Ok 4/08.

24 Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), recital 8.

Single dominance

According to the definition in Section 4, Paragraph 1 KartG, a company has single dominance if it is not subject to any or only insignificant competition, or in comparison to all other competitors holds a 'superior market position'. Section 4, Paragraph 1, Sentence 2 KartG further substantiates that a company's financial strength, its links to other companies, its access to the supply and sales markets as well as market barriers for other companies should all be taken into account when determining the existence of single dominance.

In addition to the characteristics of the respective company, it is also necessary to consider the market structure, particularly the number of competitors and their respective market shares.

When calculating market shares, the activities of all companies belonging to the same group active on the relevant market have to be taken into account. As an Austrian company particularity, the turnover of any non-controlling participations of at least 25 per cent may also have to be taken into account when it comes to market share calculation.[25]

Overall, the respective market share of a company (including its group companies) is still considered the most important factor in determining market power in case law. The OGH has classified a company having a 95[26] and 65[27] per cent market share as holding a dominant position. In cases of market shares below 60 per cent, particular consideration is given to the market position of the other competitors: that is, whether they have similar market shares, or whether one company is the only 'major' player with its competitors playing just a minor role in the market. In its assessment, the authorities and courts also take into account how market shares have developed to date and what is to be expected in the near future.

In addition to the market share of a company and under the criteria set out in Section 4, Paragraph 1, Sentence 1 KartG, the authorities and courts also take into account possible technical leadership or commercial know-how, outstanding innovation capability, access to public funding or vertical integration of the company when determining single dominance.

In addition to the general clause of Section 4, Paragraph 1 KartG, Austrian antitrust law foresees (rebuttable) market dominance presumption thresholds in Section 4, Paragraph 2 KartG in the case of a company holding a market share of:

a at least 30 per cent;

b more than 5 per cent, with only two other competitors being active in the same market; or

c more than 5 per cent, with the company belonging to the four biggest companies in the market, which together hold a combined market share of at least 80 per cent.

In these cases, the onus is on the company to prove that it does not have a market dominant position as stipulated in Section 4, Paragraph 1 KartG. To rebut the above presumptions of market dominance, companies generally base their arguments on the presence of strong competitors, low market entry barriers, a strong countervailing market side and overall significant competition in the market.

25 However, indirect participations of at least 25 per cent normally will only be considered if there is also a controlling influence at the preceding level (see OGH 17 December 2001, 16 Ok 9/01).

26 OGH 11 October 2004, 16 Ok 11/04.

27 OGH 22 June 1999, 4 Ob 90/99k.

In practice, the threshold of a 30 per cent market share receives a great deal of attention, in particular in merger control proceedings, while the other two presumptions so far have not gained any major practical importance, especially since the entry into force of the new presumptions for collective dominance (Section 4, Paragraph 2a KartG).

Collective dominance

Section 4, Paragraph 1a KartG was incorporated into the Cartel Amendment Act 2012 and defines collective dominance under Austrian antitrust law. According to this provision, two or more companies hold a collective market dominant position if there is no significant competition between them, and they are not subject to any or only insignificant competition or together hold a 'superior market position' in comparison to all other competitors.

When determining whether two or more companies collectively hold a dominant position, the same principles relevant for the assessment of single dominance are used (see above). However, so far, we are not aware of any published Austrian case law where collective dominance was established.

As for single dominance, a (rebuttable) presumption for collective market dominance exists if three or less companies hold a combined market share of at least 50 per cent, or five or less companies hold a combined market share of at least two-thirds.

In these cases, the onus is on these companies to prove that they do not hold a collectively dominant market position as stipulated in Section 4, Paragraph 1a in connection with Section 4, Paragraph 1 KartG. Thus, for a rebuttal of the presumption of collective dominance, companies have to either show that there is significant competition between them or that they do not collectively fulfil the dominance criteria set out in Section 4, Paragraph 1 KartG.

'Relative' dominance

A company is also considered dominant if it has a paramount market position relative to its customers or suppliers; in particular, 'relative' market dominance exists when customers or suppliers are dependent on continuing their business relationship with a company if they do not want to suffer severe economic disadvantages.

'Relative' market dominance exists if the respective business partner depends on a specific good or service (only) offered by a company taking into account possible alternative sources of supply or demand.[28] So far, the Austrian courts have established 'relative' market dominance in cases of a (vertically integrated) film distributor in relation to its customers (i.e., independent film theatres).[29]

Prohibition on granting dissimilar trading conditions for non-dominant companies

As outlined above, the cartel courts are also competent to enforce the NahversorgungsG, which is not limited to companies holding a dominant market position. In particular, Section 2 NahversorgungsG allows an injunction against a supplier on the wholesale level (or a dealer on the retail level) requesting or granting dissimilar conditions to retailers (or

28 OGH 1 July 2002, 16 Ok 5/02.

29 OGH 1 July 2002, 16 Ok 5/02; 16 July 2008, 16 Ok 6/08.

wholesalers, respectively) without an objective justification. Claimants often try to use the provisions of the NahversorgungsG in the event that they have difficulties establishing the dominant market position of a defendant.

Note that while the title of the NahversorgungsG might suggest that it only applies to sectors relevant for local (food) supply (e.g., food retailers, supermarkets), the OGH has also applied its provisions to other economic sectors such as round timber[30] and running shoes.[31]

IV ABUSE

i Overview

Section 5, Paragraph 1 KartG contains a general prohibition on abusing a dominant market position, and further sets out a non-exhaustive list of specific types of abusive conduct (Section 5, Paragraph 1, Nos. 1 to 5 KartG). In general, the concept of abuse of a dominant market position under Section 5 KartG largely corresponds to the provision in Article 102 TFEU. Therefore, the case law of the European Commission as well as the EU courts in the field of dominance is also relevant to domestic Austrian cases.

ii Exclusionary abuses

Section 5 KartG prohibits exclusionary conduct ranging from predatory pricing to margin squeeze, loyalty rebates and (long-term) exclusivity clauses in vertical agreements, as well as tying and bundling, price tying and refusal to deal or supply.

With regard to predatory pricing, the Austrian Supreme Court followed the European Court of Justice (ECJ) rulings in *AKZO*,[32] *Tetra Pak II*[33] and *Post Danmark*,[34] according to which prices below the average variable costs are considered an indication of exclusionary conduct. It further held that in cases where prices are set above the average variable costs, but still below the overall costs, they are only considered abusive if it can be demonstrated that they are used to exclude competitors.[35]

By reference to the *Post Danmark* judgment, the Supreme Court confirmed the long run incremental cost method used in a case by a court-appointed expert to establish the existence of predatory pricing.[36]

Further, Section 5, Paragraph 1, No. 5 KartG (as Article 102 TFEU) specifically stipulates the abusive character of selling goods below cost. Based on the case law of the Austrian cartel courts, this provision only applies to the selling of goods below cost for a certain period and not to selling services.[37] Moreover, Section 5, Paragraph 2 KartG stipulates that the dominant company may rebut an appearance of sales below cost or provide an objective justification (e.g., because the expiry date of the products is approaching).

To date, the OGH has not had to issue a material decision on a margin squeeze case. However, the OLG held in an *obiter dictum* in 2002 that a company with a dominant

30 OGH 16 July 2008, 16 Ok 3/08; 25 March 2009, 16 Ok 2/09 (16 Ok 3/09); 9 June 2010, 16 Ok 1/10.

31 OGH 26 June 2014, 16 Ok 12/13.

32 ECJ, 3 July 1991, case C-62/86, *Akzo*.

33 ECJ, 14 November 1996, case C-333/94P, *Tetra Pak v. Commission*.

34 ECJ, 27 March 2012, case C-209/10, *Post Danmark*.

35 OGH 9 October 2000, 16 Ok 6/00.

36 OGH 8 October 2015, 16 Ok 9/15g.

37 OGH 16 December 2002, 16 Ok 10/02.

position is not obliged to set its prices at a level to guarantee its competitors commercial success. According to the OLG, this is also true for cases where competitors purchase an intermediate product from the dominant company.[38] Once a question of material law related to margin squeeze conduct has reached the OGH, it will be seen whether it will uphold this rather sceptical approach by the OLG or will follow the ECJ's case law.[39]

With regard to rebates, the OGH follows the ECJ's distinction between generally admissible quantity rebates and generally inadmissible target and loyalty rebates.[40] However, case law on exclusionary conduct stemming from inadmissible rebates is rather limited in Austria.

The OGH has dealt with a number of cases relating to the obligation to contract by dominant companies.[41] For example, the OGH recently affirmed the obligation of the Austrian Federal Railways to allow its only private competitor, Westbahn, to participate in the Austrian Federal Railways electronic timetable information system.[42]

iii Discrimination

Section 5, Paragraph 1, No. 3 KartG prohibits discrimination of contract partners by the application of dissimilar conditions to equivalent transactions, thereby placing them at a competitive disadvantage. A similar prohibition of discrimination for wholesalers and retailers (even if not in a dominant position) is contained in Section 2, Paragraph 1 NahversorgungsG (see above; a violation against this prohibition allows the contracting party to claim for injunctive relieve but does not lead to any fines). Under both provisions, the most common discriminatory behaviour is discriminatory pricing.

A transaction is considered to be equivalent and requires equal treatment where the various contract partners are in the same position towards the supplier.[43] With regard to possible objective justifications, the OGH takes the view that, inter alia, different delivery terms, transportation costs or statutory frameworks in different countries can provide objective justifications for applying different conditions to equivalent transactions.[44]

iv Exploitative abuses

The main statutory provision prohibiting exploitative abuses, including (but not limited to) excessive pricing is Section 5, Paragraph 1, No. 1 KartG. This provision was amended with the Cartel Amendment Act 2012, and changed from a wording that corresponded to Article 102, Letter a TFEU to an almost identical wording as Section 19, Paragraph 2, No. 2 of the German Act against Restraints of Competition. However, the case law relating to the former Section 5, Paragraph 1, No. 1 KartG may still be used for interpretation purposes.[45]

38 OLG 14 May 2002, 29 Kt 554, 555/00.

39 ECJ, 14 October 2010, case C-280/08P, *Deutsche Telekom v. Commission*; 17 February 2011, case C-52/09, *TeliaSonera*.

40 OGH 22 June 1999, 4 OB 90/99k; 11 October 2004, 16 Ok 9/04.

41 OGH 20 December 2005, 16 Ok 23/04; 4 April 2004, 16 Ok 20/04; 16 July 2008, 16 Ok 6/08.

42 OGH 11 October 2012, 16 Ok 1/12.

43 OGH 10 March 2003, 16 Ok 1/03.

44 OGH 9 June 2010, 16 Ok 1/10.

45 OGH 12 September 2007, 16 Ok 4/07.

So far, there has been only one case before the OGH based on this amended provision. Therein the OGH, by referring to German case law,[46] held that requesting excessive prices or other exploitative conditions from a contract partner is not limited to contract negotiations, but is also applicable to an ongoing contractual relationship when refusing to lower prices or allow changes to the contract.[47] Moreover, it stipulated that only a significant price excess compared to the price that would have to be paid in a competitive environment falls under Section 5, Paragraph 1, No. 1 KartG.

V REMEDIES AND SANCTIONS

i Sanctions

The legal nature of fines imposed for antitrust violations under Austrian law is not clear. Austrian antitrust fines share some of the characteristics of criminal sanctions as well as of the sanctions under administrative criminal law, but are imposed by the cartel courts as civil courts, and not by the criminal courts or an administrative authority. The OGH considers them to have a hybrid nature having some similarities with criminal sanctions.[48]

According to Section 29 KartG, a fine requires an intentional or negligent violation of the antitrust law. Thus, when imposing a fine upon a company for abusing a dominant position, it is necessary to identify one or more individuals who have committed the infringement intently or negligently, and whose acts or omissions can be attributed to the company.[49] However, similar to that found under EU competition law, the standard for proving an intentional or negligent infringement is not very high. In an abuse of dominance case, the FCA can request a cartel court to impose a fine of up to 10 per cent of the overall group turnover of the last business year.

Section 30, Paragraph 1, KartG stipulates that the amount of a fine shall be based on the gravity and duration of the infringement, the illicit gain from the infringement, the degree of liability and the economic strength of the perpetrator. Since 1 March 2013, Section 30, Paragraphs 2 and 3 KartG sets out aggravating (e.g., repeat offender) and mitigating (e.g., own termination of infringement, cooperation, damage payments) factors.

Fines are imposed on the undertaking normally being the company that committed the abuse. However, as under EU law, fines may also be imposed on a parent company in cases where a subsidiary did not act autonomously in the market but followed the instructions of the parent company (single-economic entity doctrine).[50] In a vertical price-fixing case, the OGH already has used the EU law concept of parental liability to fine the company committing an infringement as well as its four direct and indirect controlling shareholders.[51] Thus, it can be assumed that the Austrian cartel courts will follow the single-economic entity doctrine for calculating fines and attributing liability also in cases of fines for abuse of a dominant market position.

46 BGH KVR 13/83, WuW/E BGH 2103.

47 OGH 16 September 2014, 16 Ok 13/13.

48 OGH 26 June 2006, 16 Ok 3/06; 12 September, 16 Ok 4/07.

49 OGH 5 December 2011, 16 Ok 2/11.

50 ECJ, 10 September 2009, case C-97/08P, *Akzo Nobel ao v. Commission*.

51 OGH 8 October 2015, 16 Ok 2/15b (16 Ok 8/15k).

ii Behavioural remedies

Section 26, Sentences 1 and 2 KartG allows the OLG to issue (proportionate) restraining orders to end an abusive behaviour. These orders require a prior request by the Official Parties or by an interested company to the cartel proceedings. Often such requests to end an abusive behaviour are combined with a request for an interim injunction according to Section 48, Paragraph 1 KartG.

As an alternative to ordering a company to cease an infringement, the OLG may issue binding commitments if it can be expected that these preclude an abusive behaviour in the future (Section 27, Paragraph 1 KartG). In contrast to commitment decisions of the European Commission, such decisions can only be passed on the basis of the (tacit) assumption that there was an infringement. In cases of commitments, the OLG has to reopen a case if the facts have changed significantly, the company in question does not comply with its commitment, or if the decision was based on incomplete, incorrect or misleading information.

iii Structural remedies

In a proceeding requesting the ending of an abuse of dominance, the OLG may also order structural remedies (i.e., a change in the company structure). However, such structural measures may only be imposed if no other effective remedies are available, or if these alternatively effective remedies would result in a greater burden for the company (Section 26, Sentence 3 KartG). The OGH explicitly held that such structural remedies may only be imposed in particularly severe cases of an abuse of dominance and are in any case subsidiary compared to all other available measures.[52]

VI PROCEDURE

Abuse of dominance cases are either investigated by the FCA (*ex officio* or on the basis of complaints) or are commenced directly by parties claiming harm from an alleged abusive behaviour initiating proceedings in front of the cartel court.

i Commencement of proceedings

Proceedings may be commenced by the Official Parties, in particular based on market investigations or more often on third-party complaints (i.e., consumer associations, competitors, customers or suppliers). The FCA may send formal or informal information requests and questionnaires to the investigated undertaking and to third parties, or (subject to a court order) may also conduct surprise inspections or dawn raids to gain further evidence in connection with an alleged abusive conduct to copy or seize documents and electronic files.

Alternatively, parties claiming harm from an alleged abusive behaviour can directly commence proceedings in the cartel court (requesting that a certain behaviour is stopped or that it is determined that past behaviour was an abuse of dominance). In addition, in some cases parties may also claim that a certain behaviour was an illegal abuse of a dominant market position in a civil law proceeding before the ordinary courts. In particular, a violation of Section 5 KartG can also constitute a 'breach of law' within the meaning of Section 1 of the Austrian Federal Act Against Unfair Competition, which can be used as a basis for an action before the ordinary courts.

52 OGH 19 January 2009, 16 Ok 13/08.

ii Right to be heard

During the proceedings of the cartel court, based on the fundamental right to a fair trial, every party has the right to be heard during all stages of the proceedings, and is entitled to be represented by an attorney-at-law at all times.

In the event that the FCA plans to initiate proceedings before the cartel court following an investigation, it has to inform the (prospective) defendant about the results of its investigation and give the defendant the possibility to comment on them.[53] In the event that the FCA's investigation does not give a reason for the commencement of proceedings before the cartel court, the defendant also has to be informed within a reasonable period.[54]

iii Settlements

Informal settlements between the FCA and the (alleged) perpetrator before the commencement of proceedings before the cartel court make up the majority of antitrust fine cases in Austria. The FCA published a guidance paper on settlements in 2014.[55] After the decision in a vertical price-fixing case in the retail sector that did not involve a settlement,[56] where the OGH multiplied the fine initially imposed by the OLG by 10, the incentive for companies to settle fine cases has increased even further (at least in cases where it is likely that an infringement ultimately can be proved by the Official Parties).

In dominance cases, those types of settlements are not yet that common. At the same time, in the case of proceedings initiated by private claimants, sometimes the parties agree on a settlement in the cartel court proceedings or out of court (by means of a settlement agreement).

iv Appeal proceedings

Decisions of the OLG may be appealed with the OGH. The OGH may only review decisions on questions of law, and therefore typically cannot review decisions as regards questions of fact. Thus, the review is rather limited, and in particular does not encompass the consideration and assessment of the evidence made by the OLG.

VII PRIVATE ENFORCEMENT

Private antitrust litigation in Austria has substantially increased in recent years. To a large extent, such growth can be attributed to an increase of cartel court decisions imposing fines against cartel members based on intensified enforcement activity of the Official Parties. The OGH, in several cases, has affirmed the possibility of claims for damages for directly damaged parties[57] as well as for indirectly damaged parties,[58] including cases where damages were allegedly caused by cartel outsiders (umbrella pricing).[59]

53 Section 13, Paragraph 1 of the Act on the foundation of the Federal Competition Authority (Wettbewerbsgesetz).

54 Section 13, Paragraph 2 Wettbewerbsgesetz.

55 An English version of the notice is available at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Settlements_english.pdf (last accessed 10 April 2020).

56 OGH 8 October 2015, 16 Ok 2/15b, 8/15k.

57 OGH 26 May 2014, 8 Ob 81/13i.

58 OGH 2 August 2012, 4 Ob 46/12m.

59 OGH 29 October 2014, 7 Ob 121/14s.

i Private right of action

With the Austrian Cartel and Competition Law Amendment Act 2017 implementing the EU Damages Directive,[60] the Austrian private enforcement regime changed significantly. The provisions on the compensation of harm caused by infringements of the antitrust law (Section 37a to 37m KartG) entered into force retroactively as of 27 December 2016 (apart from the provision in Section 37m concerning the imposition of fines). Thus, the substantive provisions apply to harm incurred after 26 December 2016; for all damages arising before this date, the old regime has to be applied.

ii Collective actions

Austrian law does not provide for class actions as found in Anglo-American legal systems (neither on an opt-in nor an opt-out basis). Recently, Austrian-style 'class actions' have been brought before courts mainly by the Association for Consumer Protection (VKI) through individual consumers assigning their claims to the VKI, which then tries to combine these claims in a single court proceeding.[61] However, courts have differed in their treatment by either treating them as separate single proceedings, by joinder of claimants, or by having one 'test proceeding' (while staying the other proceedings) that then serves a similar function to a 'precedent' for the other claims.[62]

iii Calculating damages

Under Austrian law, antitrust damages are limited to the actual loss suffered, which also includes lost profits plus statutory default interest[63] calculated from the date when the harm occurred. Thus, Austrian law does not allow claims for punitive or treble damages and does not take into account possible fines imposed by competition authorities.

According to Austrian case law, antitrust damages are calculated by comparing the actual financial situation of the injured party after the infringement with the counterfactual hypothetical scenario without the damaging infringement.[64]

Further, Austrian law allows the courts to estimate the quantum of the damages if the liability has already been established and the injured party was able to establish that it has suffered damages owing to an antitrust infringement (i.e., the injured party has to prove the 'first euro' of its damages).[65]

60 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349, p. 1.

61 Kodek, 'Haftung bei Kartellverstößen in WiR – Studiengesellschaft für Wirtschaft und Recht' (eds), *Haftung im Wirtschaftsrecht* (2013), pp. 63 and 77.

62 Kodek in Neumayr, *Beschleunigung von Zivil- und Strafverfahren*, 2014, p. 9.

63 The applicable statutory default interest is 4 per cent (Section 1000, Paragraph 1 General Civil Code), except for claims from contractual relationships between businesses, which is 9.2 per cent +/- base interest (Section 456 Austrian Business Code).

64 OGH 15 May 2012, 3 Ob 1/12m.

65 In one case, the allegedly injured party was not able to establish that it had suffered damages in follow-on litigation from the *Escalator* cartel as the claimant (owing to lack of contractual documentation) was only able to make estimates of the prices paid to the cartel members rather than the actual prices paid (see OGH 15 May 2012, 3 Ob 1/12m).

iv Interplay between government investigations and private litigation

Section 37i, Paragraph 2 KartG stipulates that decisions of the cartel court, the European Commission or the national competition authorities of other EU Member States establishing an infringement have a binding effect for the Austrian civil courts as regards illegality and culpability. Therefore, in a follow-on scenario, claimants 'only' have to establish the damage incurred and a causal link between the infringement and such damage.

VIII FUTURE DEVELOPMENTS

In view of the current covid-19 crisis, as the FCA has already highlighted that it will prioritise complaints about excessive prices, artificially induced scarcity of supply or other abusive behaviour concerning health products (e.g., face masks, sanitising gels and protective clothing).[66] In this regard, the European Competition Network (ECN), which includes the FCA together with the European Commission and other national competition authorities in the EU Member States, has also emphasised in a joint statement that its members will not hesitate to take action against companies taking advantage of the current situation by abusing their dominant position.[67] Moreover, considering the investigations against Amazon and the (digital) cooperation with the regulator RTR, there is a clear trend towards enforcement against the abuse of dominance behaviour in the digital sector, in particular concerning digital platforms.

However, based on the limited activity of the FCA in dominance cases in the past, we do not consider it very likely that the FCA will suddenly change its approach towards being more active in this area in the near future. Rather, we would expect that the public enforcement focus will remain on agreements and concerted practices restricting competition (in particular, vertical agreements) and merger control. Therefore, enforcement activity in the field of dominance to a large extent will depend on private parties pursuing their claims directly (on a stand-alone basis and not as a follow-on action).

66 An English version of the announcement is available at the website of the FCA at https://www.bwb.gv.at/en/news/detail/news/coronavirus_covid_19_and_its_impact_on_competition_law_in_austria_joint_statement_by_the_europea/ (last accessed 10 April 2020).

67 An English version of the joint statement of the ECN is available at https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf (last accessed 10 April 2020).

Appendix 1

ABOUT THE AUTHORS

BERNT ELSNER

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Bernt Elsner is a partner at CMS Reich-Rohrwig Hainz and leads the Austrian team for EU competition law, public procurement law and public law. He is head of the global CMS public procurement group and a member of the managing team of the global CMS competition and EU practice groups. Bernt studied law at the University of Vienna and business administration at the Economic University of Vienna. He was a law clerk at the Austrian Constitutional Court and has over 23 years of experience as an attorney in Vienna and Brussels. Bernt has authored numerous books and articles. He is a well-known expert with specific experience on cross-border merger control matters, anticompetitive behaviour in tender procedures, antitrust damage, antitrust compliance and state aid.

DIETER ZANDLER

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Dieter Zandler is a partner at CMS Reich-Rohrwig Hainz in Vienna. He specialises in European and Austrian antitrust law, representing international and Austrian clients especially in cartel (fine), antitrust damage, antitrust compliance, merger control and abuse of dominance proceedings before national competition authorities and courts, and the European Commission and EU courts. He has over 10 years of experience as a lawyer and holds a doctorate from the University of Salzburg, as well as a master's of law from Central European University in Budapest. Prior to joining CMS, he clerked at the Austrian cartel court and was an intern with two well-known international law firms in Vienna. In 2011, he was seconded to the CMS EU law office in Brussels.

VANESSA HORACECK

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Vanessa Horaceck is an associate at CMS Reich-Rohrwig Hainz in Vienna. She specialises in European and Austrian competition law, with a focus on merger control.

CMS

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH
Gauermanngasse 2
1010 Vienna
Austria
Tel: +43 1 40443 0
Fax: +43 1 40443 9 0000
bernt.elsner@cms-rrh.com
dieter.zandler@cms-rrh.com
vanessa.horaceck@cms-rrh.com
www.cms.law/de/AUT
www.cms.law

an LBR business

ISBN 978-1-83862-446-0