THE DOMINANCE AND MONOPOLIES REVIEW

Seventh Edition

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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SEVENTH EDITION

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PREFACE

Each of the past few years' editions of *The Dominance and Monopolies Review* has observed rapid development in abuse of dominance rules. If anything, the past year has seen more developments than ever before, including loud calls for an overhaul of antitrust rules to address perceived challenges raised by the digital economy.

Professor Carl Shapiro argues 'we need to reinvigorate antitrust enforcement in the United States'. US presidential hopeful Elizabeth Warren claims 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'. Nobel Prize economist 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'.

Against this background, governments have commissioned several thoughtful reports on whether competition law should be reformed. These include, in the UK, a report entitled Competition in Digital Markets, by a committee chaired by Professor Jason Furman; in the EU, a report entitled Competition Policy in the Era of Digitisation, written by Professors Heike Schweitzer, Jacques Crémer and Yves-Alexandre de Montjoye; and in Germany, a report entitled Modernising the Law on Abuse of Market Power, by Schweitzer and others. In parallel, greater regulation of the digital sector is already underway through, for example, the General Data Protection Regulation in Europe (which has triggered calls in the US to adopt a comparable framework); an EU platform-to-business regulation; and digital services taxes in France and the UK.

But even as these reports and regulations discuss and formulate new rules, the case law and decisional practice on abuse of dominance has continued to evolve as well. For example, in the EU, the courts reached notable decisions in *MEO*, *Servier* and *Slovak Telekom*, while the Commission continued its active enforcement in cases such as *Google Android*, *Qualcomm* and *Google AdSense for Search*. In the US, the Supreme Court reached its long-awaited decision in *American Express*, while the Californian District Court found that Qualcomm had violated antitrust laws in the landmark judgment of *FTC v. Qualcomm*. In Germany, the Federal Cartel Office identified a novel abuse concerning Facebook's terms and conditions relating to its use of user data. And in China, Brazil, Japan, the UK and other countries, authorities and courts reached several notable decisions – and continue to pursue investigations – in the pharmaceutical sector.

The seventh edition of *The Dominance and Monopolies Review* provides a welcome overview for busy practitioners and businesses who need an accessible and easily understandable summary of global abuse of dominance rules. As with previous years, each chapter – authored by a specialist local expert – 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 themes in 2018 enforcement.

Scrutiny of digital platforms

Digital platforms continue to come under intense antitrust scrutiny. As discussed in the EU chapter, in the *Android* case, the Commission fined Google a record-breaking €4.34 billion for imposing allegedly illegal restrictions on Android device manufacturers. Finding Android dominant in a market that excludes Apple, the Commission claims that Google's pre-installation of its search and browser apps prevents users accessing rival services and forecloses competition. The Commission kept up its focus on Google by also fining it €1.49 billion in a separate case relating to alleged exclusivity clauses in contracts with third-party websites (*AdSense for Search*).

Perhaps even more strikingly, in Germany, the Federal Cartel Office found that Facebook's terms and conditions relating to its collection of user data constitute an exploitative abuse of dominance. Specifically, the Federal Cartel Office – relying on German law principles that a breach of fundamental rights can constitute an abuse of dominance – held that Facebook committed an abuse by combining data from different sources (such as WhatsApp, Instagram and Facebook) without satisfactory user consent. Contrary to some reports, the case was therefore not about the amount of data Facebook collected. Rather, it concerned whether it was lawful for Facebook to combine users' Facebook profiles with data from, for example, WhatsApp without effective user consent.

Interestingly, Commissioner Margrethe Vestager has stated that the *Facebook* decision could not 'serve as a template' for EU action because the case 'sits in the zone between competition law and privacy'. That reflects case law from the European Court of Justice in *Asnef* that 'issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection'. Likewise, in its *Facebook/WhatsApp* decision, the Commission stated that 'privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules'.

Several of the Policy Reports mentioned above recommend stricter regulation of online platforms, and establishing a set of 'pro-competition' *ex ante* rules (in line with calls made by economics professor Jean Tirole for 'participative antitrust'). This may have some benefits over a reliance only on *ex post* enforcement. If designed in cooperation with stakeholders, such *ex ante* rules may enhance consumer welfare better than enforcement in individual cases. But there is a concern about proliferation of unharmonised initiatives in various jurisdictions: online platforms are typically active internationally. They must comply with rules in all countries where they are active, and have to take into account the combined effect of practice codes, platform regulation and reinforced competition enforcement. If they face a combination of policies to make it easier to find intra-platform dominance, impose stricter rules for unilateral conduct, reintroduce form-based abuse principles (or reverse the burden of proof, requiring defendants to prove absence of anticompetitive effects), eliminate a requirement to show consumer harm, show greater tolerance of over-enforcement and 'false positives' – all examples of policy recommendations – the cumulative effect may be stifling.

This concern is even more pressing when combined with procedural proposals to speed up proceedings and make appeals more difficult. While it makes sense to accelerate proceedings and – where appropriate – use interim measures more widely and wisely, this should not be at the expense of due process and the rule of law.

On the other side of the Atlantic, in terms of digital platforms, the past year was notable for the US Supreme Court's decision in *Ohio v. American Express*. As discussed in the US chapter, that case will have significant implications for future monopolisation cases in multi-sided markets. The Supreme Court held that 'anti-steering provisions' in American Express's contracts – which prohibit merchants from encouraging customers to use credit cards other than American Express by, for example, stating that the merchant prefers Visa or Mastercard – do not violate antitrust laws. Importantly, the Court held that competitive effects on both sides of the market need to be considered (merchants and cardholders) when assessing overall effects on competition: identifying a price rise on one side of the market is insufficient to prove anticompetitive effects – one needs to consider the overall effect on the platform as a whole. In this respect, the decision is consistent with the European Court of Justice's *Cartes Bancaires* decision, which finds that it is always necessary to take into consideration interactions between 'the two facets of a two-sided system'.

Focus on pharmaceutical sector

There is a continued focus on the pharmaceutical sector, through a variety of different cases covering both exploitative and exclusionary abuses. In the UK, for example, the Competition Appeal Tribunal (CAT) quashed the Competition and Market Authority's (CMA) landmark 2016 decision to fine Pfizer and Flynn £90 million for charging excessive prices for phenytoin sodium tablets (an anti-epileptic drug), discussed in the UK chapter. The CMA had considered that overnight price increases of 2,600 per cent after the drug was de-branded were excessive and broke competition rules. The CAT found that the CMA applied the wrong legal test for identifying excessive prices. It failed to identify the appropriate economic value of the drug. It also wrongly ignored the price of comparable products, such as the price for phenytoin sodium capsules. Unsurprisingly, the CMA has expressed disappointment with the judgment and is appealing it before the Court of Appeal. The CMA has other excessive pricing cases in the pharmaceutical industry in the pipeline and the direction of those cases may turn on the outcome of the appeal proceedings. Given the increase in exploitative abuses in Europe – with cases at the EU Commission, Germany, France and Italy – there is keen interest in the appeal, and the EU Commission has applied to intervene.

There is enforcement activity in pharmaceuticals outside the sphere of excessive pricing. In its *Remicade* case, the CMA issued a notable no grounds for action decision after issuing a statement of objections, finding that Merck's volume-based discount scheme was not likely to limit competition from biosimilar products. In *Servier*, by contrast, the EU General Court upheld much of the Commission's findings that pay-for-delay agreements between Servier and generic manufacturers relating to its blockbuster drug perindopril constituted restrictions by object contrary to Article 101 of the Treaty on the Functioning of the European Union (TFEU). The judgment is noteworthy for abuse of dominance, however, for three main reasons:

a The judgment – coming in at 1,968 detailed paragraphs – illustrates how the General Court is increasingly subjecting Commission decisions to extremely detailed and thorough judicial review.

b The Court annulled the Article 102 of the TFEU part of the Commission's decision due to errors in the market definition – one of the very few cases where the Commission has not prevailed on market definition at the court level.

c When assessing the anticompetitive effects of the conduct, the Court held it would be 'paradoxical' to permit the Commission to limit its assessment to likely future effects in a situation where the alleged abusive conduct has been implemented and its actual effects can be observed. In this respect, the judgment is consistent with Mr Justice Roth's observation in *Streetmap* that he would 'find it difficult in practical terms to

reconcile a finding that conduct had no anticompetitive effect at all with a conclusion that it was nonetheless reasonably likely to have such an effect'.

Standard-essential patents

The third theme of 2018's enforcement is the continued global focus on the licensing of standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms, especially around Qualcomm's licensing practices. In 2015, China's National Development and Reform Commission fined Qualcomm US$975 million for failing to license its SEPs according to its FRAND promise. In December 2016, the Korean Fair Trade Commission followed suit, fining Qualcomm US$854 million. In January 2018, the EU Commission fined Qualcomm €997 million for making significant payments to Apple on the condition that Apple would not buy baseband chipsets from rivals. And most recently, Judge Koh issued her decision in the *FTC v. Qualcomm* (discussed in the US chapter) finding that Qualcomm violated antitrust laws.

In the US case, the FTC alleged that Qualcomm would only supply its modem chips to mobile phone manufacturers that agreed to a Qualcomm patent licence requiring the customer to pay royalties to Qualcomm even when using modem chips bought from Qualcomm's rivals. The FTC claimed this 'no licence, no chips' policy imposed an anticompetitive tax on competing chips. In her opinion, Judge Koh reached several notable findings:

a The 'no licence, no chips' policy is anticompetitive.

b Qualcomm's provision of incentive funds to manufacturers such as Apple constituted *de facto* exclusive deals that were also anticompetitive.

c Qualcomm's refusal to license its SEPs to other chip suppliers violates its FRAND commitments and is anticompetitive, too. The Court also found that Qualcomm's refusal to license is tantamount to an anticompetitive refusal to deal because it was the termination of a prior, voluntary and profitable course of dealing.

d Qualcomm's royalties for its SEPs are unreasonably high. In particular, Qualcomm's contributions to the standards do not justify its high rates and its SEPs do not drive handset value (and so taking a percentage of handset value is inappropriate).

Overall, the combined effect of these practices was to cause the exit of, or to foreclose, rival chip manufacturers, raise prices for chips, and to slow innovation. The judgment was scant comfort for the many competitors that have, in the meantime, left the modem market, but is important as a benchmark for licensing of SEPs for 5G and the internet of things. The proceedings were remarkable in that they led to an unusual juxtaposition between the US Department of Justice Antitrust Division (led by Makan Delrahim, a former lobbyist for Qualcomm who is recused from any case involving Qualcomm but who has clocked up a high number of speeches in favour of the SEP owners' position) and the US Federal Trade Commission, which was deadlocked and thus allowed the legal proceedings to continue to judgment.

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 seventh edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

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June 2019

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 Austrian 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 Federal Competition Authority (FCA)

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has published 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, E-Control). 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).[7]

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,[8] and more recently, the *Liquid gas tank* case relating to tying clauses.[9] In both of these cases, the OGH did not follow the FCA's arguments claiming an abuse of a dominant position. 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.[10]

2 A German version of the notice is available at www.bwb.gv.at/fileadmin/user_upload/PDFs/Standpunkt%20zum%20Bestattungswesen.pdf (last accessed 15 April 2019).

3 A German version of the notice is available at www.bwb.gv.at/fileadmin/user_upload/PDFs/BWB%20Standpunkt%20KFZ-Vertrieb.pdf (last accessed 15 April 2019).

4 A German version of the notice is available at www.bwb.gv.at/fileadmin/user_upload/PDFs/Standpunkt%20-%20Medienkooperationen%20zwischen%20Konzertveranstaltern%20und%20H%C3%B6rfunk.pdf (last accessed 15 April 2019).

5 A German version of the notice is available at www.bwb.gv.at/fileadmin/user_upload/Downloads/standpunkte/BWB-Guidance_Fairness_in_business.pdf (last accessed 15 April 2019).

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

7 A German version of the judicial committee's report is available at www.parlament.gv.at/PAKT/VHG/XXIV/I/I_02035/fname_277230.pdf, p. 3 (last accessed 15 April 2019).

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

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

10 OGH 12 July 2018, 16 Ok 1/18k (16 Ok 2/18g), *Fachverband Reisebüros v. Lufthansa – Flugticketbuchung*.

Another recent case involved contracts on the supply of distribution data from pharmaceutical wholesalers to an information service provider in the healthcare sector,[11] 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.[12]

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.[13] 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*.[14] 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 such 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 have 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.[15]

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

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

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

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

15 A German version of the publication is available at www.bwb.gv.at/news/detail/news/verfahren_zwischen_der_mediengruppe_oesterreich_und_den_wiener_linien_mit_vergleich_vor_dem_kartellge/ (last accessed 15 April 2019).

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

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.[16]

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.[17] 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,[18] 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.[19]

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.[20] Factors for determining the relevant geographic market

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

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

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

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

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

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.

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.[21]

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[22] and 65[23] 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.

21 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).

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

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

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.

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, such '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.[24] 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).[25]

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 wholesalers, respectively) without an objective justification. Claimants often try to use the provisions of the NahversorgungsG in the event that they have difficulty 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[26] and running shoes.[27]

IV ABUSE

i Overview

Section 5, Paragraph 1 KartG contains a general prohibition on abusing a dominant market position, and also 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*,[28] *Tetra Pak II*[29] and *Post Danmark*,[30] 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.[31]

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

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

26 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.

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

28 ECJ, 3 July 1991, Case C-62/86, *Akzo*.

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

30 ECJ, 27 March 2012, Case C-209/10, *Post Danmark*.

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

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.[32]

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.[33] 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 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.[34] 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.[35]

With regard to rebates, the OGH follows the ECJ's distinction between generally admissible quantity rebates and generally inadmissible target and loyalty rebates.[36] 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.[37] 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.[38]

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.[39] With regard to

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

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

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

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

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

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

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

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

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.[40]

iv Exploitative abuses (including excessive pricing)

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.[41]

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,[42] 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.[43] 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.[44]

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.[45] 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.

40 OGH 9 June 2010, 16 Ok 1/10.
41 OGH 12 September 2007, 16 Ok 4/07.
42 BGH KVR 13/83, WuW/E BGH 2103.
43 OGH 16 September 2014, 16 Ok 13/13.
44 OGH 26 June 2006, 16 Ok 3/06; 12 September, 16 Ok 4/07.
45 OGH 5 December 2011, 16 Ok 2/11.

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).[46] 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.[47] 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.

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 to the cartel proceedings, that is, the FCA or the Federal Cartel Prosecutor (FCP), or by an interested company. 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.[48]

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 (i.e., the FCA or the FCP), in particular based on market investigations or more often on third-party complaints (i.e., consumer

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

47 OGH 8 October 2015, 16 Ok 2/15b (16 Ok8/15k).

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

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.

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.[49] In case 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.[50]

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.[51] After the decision in a vertical price-fixing case in the retail sector that did not involve a settlement,[52] 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).

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

50 Section 13, Paragraph 2 Wettbewerbsgesetz.

51 A German version of the notice is available at www.bwb.gv.at/fileadmin/user_upload/PDFs/BWB%20Standpunkt%20zu%20Settlements%20September%202014.pdf (last accessed 15 April 2019).

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

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 FCA and the FCP. The OGH, in several cases, has affirmed the possibility of claims for damages for directly damaged parties[53] as well as for indirectly damaged parties,[54] including cases where damages were allegedly caused by cartel outsiders (umbrella pricing).[55]

i Private right of action

With the Austrian Cartel and Competition Law Amendment Act 2017 implementing the EU Damages Directive,[56] 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.[57] 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.[58]

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

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

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

56 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.

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

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

iii Calculating damages

Under Austrian law, antitrust damages are limited to the actual loss suffered, which also includes lost profits plus statutory default interest[59] calculated from the date when the harm occurred. Thus, Austrian law does not allow claims for punitive or treble damages, and also 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.[60]

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).[61]

iv Interplay between government investigations and private litigation

Section 37i(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

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).

59 The applicable statutory default interest is 4 per cent (Section 1000(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).

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

61 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 3 Ob 1/12m).

Appendix 1

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