

Kluwer Competition Law Blog

Main Developments Competition Law and Policy 2021: Austria

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I. Cartels

Legal Framework and Procedure

In November 2021, Austria adopted a regulation on certain procedural aspects of leniency applications.[2] The regulation sets out the required content of leniency and immunity applications, the possibility to request a marker, and the possibility to submit a short form application in case the applicant has already submitted an application or a marker request to the European Commission covering at least three Member States.[3]

The substantive conditions for immunity and leniency in Austria and the applicable fine reductions are in essence identical to the conditions for immunity and leniency under EU law. The first applicant eligible for leniency will receive a reduction of 30-50%, the second applicant a reduction of 20-30%, and any subsequent applicant a reduction of up to 20%. [4]

Cases

Construction Cartel

In 2021, the Cartel Court imposed fines of € 62.35 million on Porr and € 45.37 million on Strabag, two large Austrian construction companies, for their participation in a construction cartel between 2002 and 2017. Both Porr and Strabag had cooperated with the authority and had acknowledged their participation in the cartel. The fine amounts reflect that cooperation.[5]

The cartel is alleged to have involved price coordination, market sharing, and bid rigging across thousands of construction projects, ranging from highways, roads, bridges, railway tracks, canals, residential buildings, office buildings, public buildings like schools, to power stations. Investigations against several other construction companies are ongoing and the Federal Competition Authority is expected to request the Cartel Court to impose fines also on other cartel participants.

In Austria, the rigging of public tenders also is a criminal offence. Several criminal proceedings are understood to be ongoing in parallel to the cartel proceedings, both against companies and individuals.

Waste Disposal Cartel

In March 2021, the Austrian Federal Competition Authority conducted dawn raids in the waste disposal sector across Austria based on a suspicion of price coordination, market sharing, and bid rigging in the industry. The authority received several submissions via the authority's whistleblowing system following its initial dawn raids and conducted supplementary dawn raids in April 2022.

II. Restrictive Agreements

Legal Framework and Procedure

Under Austrian competition law, restrictive agreements are exempt from the statutory prohibition based on the same substantive conditions as under Article 101(3) TFEU. Following amendments to the Cartel Act adopted in 2021, Austrian competition law expressly acknowledges sustainability considerations as a potential justification for restrictive agreements. It does so by stipulating that consumers are deemed to “*also*” participate in the benefits resulting from the agreement if the agreement “*contributes significantly to an ecologically sustainable or climate-neutral economy*”.^[6]

Cases

School bags

In July 2021, the Cartel Court imposed a fine of € 340,000 on Fond Of, a distributor of school bags, for imposing fixed or minimum prices on retailers between 2012 and 2019 and for prohibiting online sales between 2012 and 2016. The amount of the fine reflects Fond Of's cooperation under the Austrian leniency programme, which applies also to vertical infringements.

This case, although apparently the only vertical pricing case in 2021, continues the Austrian competition authority's policy to proactively prosecute resale price maintenance cases and restrictions of online sales across a range of sectors including several consumer-type products. Cases in the past years related to, e.g., food and beverages, musical instruments, bicycles, audio equipment, or kitchen appliances.

III. Abuse of Dominance

Legal Framework and Procedure

Under amendments to the competition law adopted in 2021, the legal framework applicable to dominant companies was adjusted to take into account characteristics of digital and multi-sided markets

- *Criteria for determining dominance.* The amendments added illustrative criteria to be taken into account when assessing the existence of a dominant position, i.e., (i) the significance of a

company's intermediation services for other companies' ability to access upstream or downstream markets, (ii) access to data, and (iii) network effects.[7]

- *Relative market power in multi-sided digital markets.* The concept of "relative market power" is expanded to include providers of intermediation services in multi-sided digital markets who will be deemed dominant if their customers depend on access to these intermediation services.[8]
- *Declaration of digital companies as dominant.* The Cartel Court has received jurisdiction to declare companies active in multi-sided digital markets as dominant at the request of the Federal Competition Authority and other regulatory agencies (but not at the request of competitors or other parties).[9] Such a declaration of dominance would have indicative value for potential subsequent proceedings for alleged abuse of dominance, which it is intended to make more expedient and efficient.

Cases

Peugeot

On 17 February 2021, the Cartel Appeals Court confirmed a judgement by the Cartel Court that the Austrian importer of Peugeot vehicles had abused its position of relative dominance *vis-à-vis* an Austrian distributor of Peugeot vehicles by imposing abusive terms and conditions on the distributor Büchl.

The Court considered that the relevant market as the sale of Peugeot-branded vehicles because a distributor of a certain brand of vehicles cannot readily switch to another brand without losing its customer base and brand-specific investments and know-how. The Court left open whether repair services for Peugeot vehicles were part of the market for the sale of vehicles.[10]

The Court found that Peugeot had a relative dominant position *vis-à-vis* the distributor because of the distributor's economic dependence on Peugeot: The distributor has distributed Peugeot vehicles for almost 30 years and generated c. 68% of its vehicle sales revenues with the sale of Peugeot vehicles and c. 60% of its repair services revenues with repair services for Peugeot vehicles. In addition, the distributor achieved the remainder of its revenues with other brands of the Peugeot group (i.e., Citroen and Opel).

The Court found several of the clauses in the distribution contract to be abusive because they were either unfair in themselves or disproportionately in favour of Peugeot:

- *Restriction of distributor's pricing autonomy.* Peugeot had unduly restricted the distributor's autonomy to set its own end-customer prices by compelling the distributor, on a *de facto* basis, to participate in regular promotion campaigns (i.e., price reductions) for certain models. Such promotion campaigns applied in essence throughout the year (although across different models). Not participating in these promotion campaigns was not an option for the distributor, as the distributor would likely not have been able to achieve the yearly sales targets and would not have been eligible for the annual bonus payments.[11]
- *Unfair conditions for bonus payments.* A large proportion of the distributor's annual bonus payments depended on customer satisfaction parameters (such as the percentage of customers who would recommend the distributor). The Court found these surveys to be not based on objective criteria, not representative, not methodologically sound, and potentially subject to manipulation.

- *Arbitrarily high sales targets.* The sales targets were set at arbitrarily high levels. The distributor as well as several other distributors had not been able to reach the target or even get close to it and not even Peugeot's own distribution subsidiary was able to reach these targets. Nonetheless Peugeot had increased the sales target by 25% from 2018 to 2019.
- *Margin squeeze.* Peugeot supplied vehicles to its own distribution subsidiary at lower prices than to the independent distributor. The price differentiation was abusive because it was of such a magnitude that the distributor was unable to match the prices of Peugeot's own distribution subsidiary and because Peugeot's distribution subsidiary was not even able to sell the vehicles at a profit.
- *Refusal to refund warranty services.* Peugeot refused to refund warranty repair services if the distributor failed to comply with minor formal requirements (e.g., if a customer's signature was missing on warranty forms). Peugeot also refused to refund all warranty services of a specific category if only a small proportion (3%) of the distributor's warranty services in that category did not meet certain quality requirements.
- *Unfair passing on of audit costs.* Peugeot conducted annual audits of the distributor, including test purchases, to verify the distributor's compliance with certain quality guidelines. Peugeot charged a portion of the audit costs to the distributor, even though these audits were solely in Peugeot's interest and the distributor did not receive any benefit in exchange. In the Court's view, Peugeot had been able to pass on these costs to the distributor only due to its dominant position relative to the distributor.

Merck Sharp & Dohme

On 11 March 2021, Merck Sharp & Dohme agreed to behavioural commitments to end proceedings for alleged abuse of its dominant position on the Austrian market for the supply to hospitals of a pharmaceuticals (Temodal) containing the active ingredient temozolomide used to treat brain cancer.

In its preliminary assessment, the Austrian competition authority alleged that Merck had abused its dominant position in the supply of temozolomide through predatory pricing. Patients would first be treated with temozolomide while in the hospital and would then continue the treatment outside of the hospital. Doctors would normally be reluctant to switch to a generic version of temozolomide once the patent leaves the hospital, given the particularly sensitive indication (brain cancer). The volumes of temozolomide supplied for treatment outside of the hospital are significantly larger than the volumes supplied for the initial treatment in the hospital.

After the patent expiry of temozolomide in 2008, Merck started to supply temozolomide to hospitals for free and, for those volumes that it did not supply for free, reduced the price to the price level of generic versions. The authority concluded that Merck intended to discourage hospitals from switch to generic versions of temozolomide and thus foreclosed competing generic producers from supplying temozolomide to hospitals and subsequently from supplying it to patients once they left hospital care.

Merck agreed to commitments pursuant to which it would not supply temozolomide below average variable costs. The commitments have a duration of 10 years but will remain in force for as long as Merck has a dominant position in the supply of temozolomide products to hospitals or to doctors.

Austrian Mail

On 22 July 2021, the Cartel Court found that Austrian Mail had abused its dominant position on the market for the distribution of certain types of mail (mass mailings such as advertising leaflets) to households by applying discriminatory rates and rebates to postal consolidators compared to other customers.^[12] Consolidators provide certain logistics services, such as the sorting of the mass mail or its transport from the customer to Austrian Mail's distribution centres, to companies, institutions, or non-profit organisations that send large volumes of mass mail. Consolidators do not themselves distribute mail to households but rely on Austrian Mail's distribution services.

Certain consolidators argued that Austrian Mail would apply more favourable rebates to its direct customers, who deliver their mass mailings to Austria Post themselves, compared to intermediaries such as consolidators.

The Court held that consolidators and other large customers were in comparable situations as both customer groups delivered mass mailings to Austrian Mail for further distribution to the recipients of the mass mailings. Both consolidators and other large customers obtain the same service from Austrian Mail with regard to mass mailings, i.e., the distribution of mass mailings to the final recipients of the mass mailings; as customers of mass mailings distribution services, consolidators and other large customers are therefore not active at different upstream or downstream levels of the market relative to Austrian Mail. Austrian Mail would however apply significantly different rebates to these two groups of customers, which the Court found to be discriminatory. The Court also accepted that the discriminatory rebates were liable to have a negative impact on the competitiveness of the consolidators.

Upon appeal, the Cartel Appeals Court held that, in order to determine if there was discrimination, it was necessary to compare not only the rates and rebates but the entire terms and conditions applied to consolidators with those applied to other large customers. The Cartel Appeals Court also confirmed the discriminatory and abusive nature of the rebates applied to consolidators, because the less favourable rebates had led to the market exit of at least one consolidator. The different rebates were therefore not competitively neutral but had a detrimental effect on competition.^[13]

IV. Merger Control

Legal Framework and Procedure

Revised thresholds

In 2021, Austria amended its competition law by adding a new local revenue threshold to the jurisdictional thresholds. As of 1 January 2022, a transaction is notifiable only if each of at least two parties must have had revenues of more than € 1 million in Austria, in addition to their combined revenues in Austria exceeding € 30 million. The other elements of the existing jurisdictional thresholds remain unchanged, i.e., the parties' combined worldwide revenues must have exceeded € 300 million and each of at least two parties must have had worldwide revenues of more than € 5 million. The existing *de minimis* exemption^[14] and the existing transaction value threshold^[15]

are unaffected by the amendments.

New substantive standard

In the same amendments, Austria also introduced the significant lessening of competition standard for the substantive assessment of mergers, applicable for notifications submitted as of 1 January 2022. The existing dominance test is retained as an alternative test.

Cases

In 2021, the Federal Competition Authority received 650 merger notifications, compared to 429 in 2020 and 495 in 2019. For 2022, it is expected that the total number of notifications will be materially lower than in 2021 as a consequence of the revised revenue-based notification thresholds.

One case, *Facebook/Kustomer*, was referred to the European Commission under Article 22 of the EU Merger Regulation.[16] Two cases were referred to Phase II, i.e., *Facebook/Giphy*[17] and *METRO Cash & Carry/C & C Abholgroßmärkte*. [18] Seven notifications were withdrawn by the notifying parties. All other cases were reviewed in Phase I and were cleared either unconditionally or subject to remedies. Phase I cases cleared subject to remedies included *Fujifilm/Hitachi*, *Recticel/FoamPartner*, and *Adevinta/eBay Classifieds Group* and *eBay/Adevinta*. One notification, *Funke/WAZ/Krone*, was rejected by the Cartel Court as inadmissible due to the hypothetical nature of the notified transaction.

Fujifilm/Hitachi[19]

Fujifilm intended to acquire Hitachi's endoscopic ultrasound systems business. Fujifilm is the only supplier of endoscopic ultrasound systems able to supply both ultrasound *endoscopes* and ultrasound *monitoring equipment*. All other competitors, including Hitachi, are able to produce only either endoscopes or monitoring equipment. All of these other suppliers purchase components that they do not produce themselves from competitors, notably from Hitachi.

To dispel potential foreclosure concerns, Fujifilm committed to continue supplying a particular competitor with certain ultrasound components produced by Hitachi, to ensure connectivity between Hitachi's products and that competitor's products, and to implement appropriate firewalls to avoid the disclosure of competitively sensitive information from that competitor to Fujifilm's endoscopic ultrasound systems business. These commitments were identical to the commitments accepted by the Japanese Fair Trade Commission and are not subject to a time limitation.

Recticel/FoamPartner[20]

Recticel and FoamPartner are both active in the supply of synthetic foams. Recticel's intended acquisition of FoamPartner led to concern in certain technical foams, where the authority considered the parties to be each other's closest competitors. In these segments, switching by

customers was not easily possible due to the customers' specific product requirements. The authority considered that the transaction would lead to a dominant position in these technical foams and would entail a risk of price increases and supply reductions.

To address these concerns, Recticel committed to continue supplying certain minimum volumes of certain technical foam products to a particular customer, Eurofoam, and to all of the target's existing Austrian customers for a period of 3 years at current prices.

Adevinta/eBay Classifieds Group and eBay/Adevinta[21]

Adevinta/eBay Classifieds Group/eBay involved the supply of online classified advertising services. Adevinta, an online classifieds company based in Norway, intended to acquire eBay's worldwide online classified advertising business. In return, eBay intended to acquire a non-controlling minority shareholding of 44%, corresponding to 33% of the voting rights, in Adevinta. Adevinta is present in Austria through a 50%-shareholding in the Austrian online classified advertising platform Willhaben.

The authority considered online classified advertising and online marketplaces as potentially relevant markets and suggested that a plausible relevant market might comprise general online classified advertising and C2C online marketplaces. According to the authority, online classified advertising and online marketplace services were converging toward each other, as classified advertising platforms would increasingly also offer transactional services similar to online marketplaces where sellers and buyers can interact and directly enter into a binding transaction. Based on this market definition, the authority considered Adevinta and eBay to be close competitors for Austrian users, despite Adevinta being active primarily in online classified advertising and eBay primarily in online marketplaces. The authority considered that eBay's minority shareholding would soften the mutual competitive pressure between Adevinta and eBay post-transaction, as the transaction would reduce eBay's incentives to win customers from Willhaben. In addition, the authority alleged that eBay's minority shareholding in Adevinta could enable eBay to influence Willhaben's competitive behaviour and that the minority shareholding could lead to the exchange of competitively sensitive information between eBay and Adevinta.

Despite disagreeing with the authority's assessment, in order to obtain clearance in Phase I, Adevinta and eBay agreed to commitments pursuant to which (i) eBay would reduce its equity shareholding in Adevinta to 33% or less within 18 months from closing with a view to reducing the potential incentives not to compete as intensively as before the transaction, (ii) eBay would not exercise its voting rights in the board of directors of Adevinta in relation to decisions concerning Adevinta's Austrian business, (iii) Adevinta would waive its right to appoint a director at Willhaben, and (iv) Adevinta would either waive its right to appoint members to Willhaben's advisory board or would appoint independent members to Willhaben's advisory board. The commitments remain in force for as long as eBay is entitled to appoint at least one member of Adevinta's board of directors and owns a shareholding of at least 25% in Adevinta but not longer than 10 years following closing.

Funke/WAZ/Krone

In *Funke/WAZ/Krone*, the Cartel Appeals Court confirmed that a transaction can be notified only if it is sufficiently concrete and likely to occur within the foreseeable future.^[22] Notifications relating to hypothetical transactions are not permissible.

Funke and Funke's subsidiary WAZ had submitted a merger notification relating to a change from joint control to sole control by WAZ over Kronen Zeitung, an Austrian newspaper. Kronen Zeitung had been 50/50 owned by its founder and WAZ. According to WAZ, the change of control was the result of the passing away of Kronen Zeitung's founder, whose 50%-shareholding was split among his four heirs. WAZ argued that, based on the rules in the by-laws on the number of voting rights attaching to the capital shares, the heirs would be entitled to jointly exercise only 48% of the voting rights in Kronen Zeitung (and not 50%), while WAZ would still be able to exercise its full 50% voting share and would thus have passively obtained sole control. Whether that was the correct interpretation of the by-laws was however subject to ongoing and unresolved arbitration between WAZ and the heirs before a Swiss tribunal.

The Federal Competition Authority considered the notification to be inadmissible as, in its view, it was not certain whether there had indeed been a change of control. The Cartel Court agreed with this view (confirmed upon appeal by the Cartel Appeals Court), arguing that a merger notification can be submitted only if there is agreement in principle between the parties on the exact transaction structure and the timeline for the transaction. In this case, however, it was unclear if a change of control had occurred. In the Court's view, it is not within the Cartel Court's jurisdiction to rule on the validity of corporate documents. A transaction the legal validity of which is unclear and subject to an unresolved dispute between the parties is "hypothetical" and, as a consequence, the merger notification submitted by WAZ was not admissible.

Fines for failure to file

In 2021, the Cartel Court imposed fines for failure to file, amongst others, against Facebook in relation to its acquisition of Giphy and Salesforce in relation to its acquisition of Tableau. Both transactions would have been subject to a notification requirement under the transaction value threshold, pursuant to which a transaction is notifiable if the target has "significant activities" in Austria.

In *Facebook/Giphy*, the fine was € 9.6 million, the highest fine for failure to file imposed to date. Previously, the highest fine for failure to file had been € 1.5 million, imposed in *Lenzing/Tencel* in 2005 on a large Austrian industrial undertaking that had ignored a filing obligation in a transaction that was ultimately found to raise serious concern and was prohibited in Phase II.

In *Salesforce/Tableau*, the fine was € 100,000, which is more in line with the general level of fines for failure to file imposed by the Court, although the average level of fines for failure to file has increased over the past c. 10-15 years.

V. Sector Inquiries

In November 2021, the Federal Competition Authority initiated a sector inquiry into electric

vehicle charging station infrastructure. This inquiry comes in the wake of similar inquiries by the German *Bundeskartellamt*[23] and the CMA in the UK[24] and apparently is based on complaints from market participants.

[1] This overview is a summary of selected main developments and is not intended to be exhaustive.

[2] Regulation on Leniency Applications, Austrian OJ II 487/2021.

[3] Leniency applications and marker request must be submitted to the Federal Competition Authority. Applications and requests can be submitted in writing or orally and can be made in German or in English (although the authority can request a translation).

[4] The Federal Competition Authority issued revised guidance on the assessment of fine reductions in January 2022 and announced the publication of a revised leniency handbook during 2022.

[5] The judgments imposing the fines are not yet public at the time of writing and will likely include further detail on the determination of the fine amounts.

[6] See § 2(1) of the Austrian Cartel Act as amended in 2021.

[7] See § 4(1) of the Cartel Act as amended in 2021.

[8] See § 4a of the Cartel Act.

[9] See § 28a of the Cartel Act.

[10] The Court however considered that, even if repair services constituted a separate relevant market, it would be limited to the repair of Peugeot vehicles but would not include repair services for other car brands.

[11] The Cartel Appeals Court referred this aspect of the case back to the Cartel Court requesting the Cartel Court to substantiate certain factual elements (e.g., which models were subject to promotion campaigns or whether a higher sales volume of the models subject to a price promotion was able to offset the reduced margin per model).

[12] Case 27 Kt 8/19 g – Austrian Mail. The Cartel Court’s judgment was upheld on appeal by the Cartel Appeals Court on 11 November 2021; the Cartel Appeals Court’s decision is not yet publicly available.

[13] Based on the Federal Competition Authority’s press release reporting on the case. As noted, the Cartel Appeals Court’s decision is not yet public.

[14] A transaction that otherwise meets the revenue-based thresholds is not notifiable if only one party had revenues of more than € 5 million in Austria and all other parties’ combined worldwide revenues did not exceed € 30 million.

[15] A transaction that does not meet the revenue-based thresholds is notifiable if the parties' combined worldwide revenues exceeded € 300 million, the parties' Austrian revenues exceeded € 15 million, the transaction value is more than € 200 million, and the target has significant market-related activities in Austria. This threshold can be met in circumstances where the target has zero revenues in Austria, provided its non-revenue generating activities in Austria are "significant".

[16] Case M.10262 – *Meta/Kustomer*.

[17] Case BWB/Z-5549 – *Facebook/Giphy*.

[18] Case BWB/Z-5650 – *METRO Cash & Carry/C & C Abholgroßmärkte*.

[19] Case BWB/Z-5282 – *Recticel/FoamPartner Group*.

[20] Case BWB/Z-5195 – *Fujifilm/Hitachi's Diagnostic Imaging Business*.

[21] Case BWB/Z-5241 – *Adevinta/eBay Classifieds Group* and Case BWB/Z-5240 – *eBay/Adevinta*.

[22] Case 16 Ok 5/20a – *Funke Group/WAZ Holding/Krone*.

[23] See the *Bundeskartellamt's* press release of 9 July 2020, at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/09_07_2020_Lades%C3%A4ulen.html?nn=3591568.

[24] The CMA published its report on its market study of the electric vehicle charging market in the UK in July 2021; see at: <https://www.gov.uk/government/publications/electric-vehicle-charging-market-study-final-report>.

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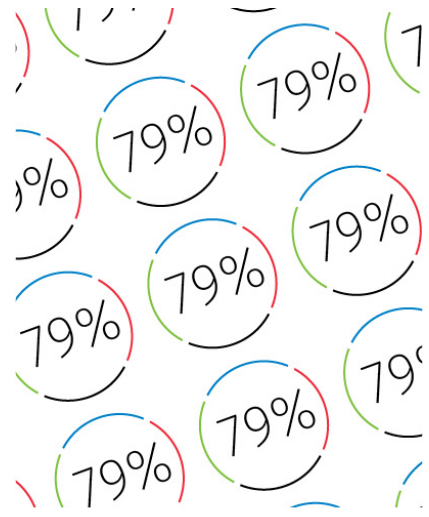
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