

# Kluwer Competition Law Blog

## Main Developments in Competition Law and Policy 2022 – Austria

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### Cartels

#### *Legal Framework and Procedure*

##### *Guidance on the Reduction of Fines*

In January 2022, the Austrian Federal Competition Authority published guidance on the reduction of fines under the Austrian leniency programme, which applies to undertakings that do not qualify for full immunity.

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. To qualify for a fine reduction under the leniency programme, applicants must disclose information or evidence that provides added value and enables the Federal Competition Authority to prove an infringement or additional details of an infringement, that the Authority would otherwise not be in a position to prove.

Pursuant to the guidance on the reduction of fines under the Austrian leniency programme, the first applicant eligible for leniency may receive a fine reduction of 30-50%, the second applicant a reduction of 20-30%, and any subsequent applicant a reduction of up to 20%. If an undertaking discloses information or evidence with “exceptionally significant” added value, e.g., with regard to the level of detail or the persuasiveness of the disclosed evidence, the Authority may grant fine reductions that exceed these ranges. The Authority will determine the fine reduction based on all relevant circumstances on a case-by-case basis.

An additional fine reduction of up to 20% is available for leniency applicants who agree to enter into a settlement with the Federal Competition Authority.

### Cases

#### *Industrial Sugar*

Following the European Court of Justice’s preliminary ruling in Case C-151/20 *Nordzucker*, the

Cartel Appeals Court ruled that the Cartel Court was wrong to invoke the *ne bis in idem* principle to decline to impose a fine on German sugar producer Südzucker for the allocation of geographic markets in relation to the supply of industrial sugar with respect to the Austrian territory. The Cartel Appeals Court also ruled that the Cartel Court was wrong when it declined to declare that German sugar producer Nordzucker had also participated in that allocation of markets with respect to the Austrian territory.

The Cartel Court had declined to impose a fine on Südzucker because it considered that the alleged cartel between Südzucker and Nordzucker with respect to sugar exports to Austria had already been an aspect taken into account in earlier fining decisions by the German *Bundeskartellamt*. [1]

The fining decisions by the *Bundeskartellamt* made reference to a telephone conversation between senior managers of Nordzucker and Südzucker relating to sugar exports by Nordzucker from its Slovakian subsidiary to Austria. In the Cartel Court's view, the imposition of another fine on Südzucker would have violated the *ne bis in idem* principle. As regards Nordzucker, the Cartel Court declined to adopt a declaratory ruling that Nordzucker had participated in the cartel because the Federal Competition Authority had granted full immunity to Nordzucker and therefore the Cartel Court did not consider that the Federal Competition Authority had a legal interest in obtaining such a declaratory ruling.

The Federal Competition Authority appealed the Cartel Court's rejection decision before the Cartel Appeals Court. The Cartel Appeals Court stayed the proceedings and requested the European Court of Justice to issue a preliminary ruling on the scope of the *ne bis in idem* principle. The Cartel Appeals Court asked the Court of Justice to rule on the question of whether the *ne bis in idem* principle applies in circumstances where the earlier decisions by the *Bundeskartellamt* mentioned certain facts relating to Austria (i.e., the telephone conversation concerning sugar exports to Austria), but where it was unclear whether the *Bundeskartellamt*'s decisions sought to penalise Nordzucker and Südzucker also with respect to collusion relating to the Austrian market.

The Court of Justice advised that, for the *ne bis in idem* principle to apply, the facts that were the subject of the first fining decision must be identical to the facts that are subject to the subsequent second fining decision. The question of whether two sets of facts are identical “*cannot be assessed in the abstract*” but “*must be examined with reference to the territory and the product market in which the conduct in question had such an object or effect and to the period during which the conduct in question had such an object or effect*” (para 41).

The Court of Justice advised the Cartel Appeal Court to verify whether the *Bundeskartellamt*'s decisions related to the same territory, product market, and period that were also the subject of the Austrian proceedings and whether the German decisions intended to penalise the cartel not only with respect to the German market but also with respect to the Austrian market (paras 42 and 45).

In the Court of Justice's view, a mere reference, in the German decision, to a factual element relating to the territory of Austria – the telephone conversation relating to sugar exports to Austria – “*is insufficient to support the inference that that factual element gave rise to the proceedings or was found ... to be one of the constituent elements of [the] infringement*” (para 44).

Based on this preliminary ruling, the Cartel Appeals Court concluded that the *Bundeskartellamt* had not determined that the market allocation involved also Austria and that the *Bundeskartellamt* had not sought to penalise Nordzucker and Südzucker with respect to their conduct relating to the

Austrian market. The telephone conversation between senior managers of Nordzucker and Südzucker relating to sugar exports to Austria had been relied upon by the *Bundeskartellamt* only as a factual element that reinforced the market allocation within Germany, but not as an element demonstrating that the market allocation covered also Austria. In addition, the Cartel Appeals Court obtained confirmation of this understanding directly from the *Bundeskartellamt*, i.e., the *Bundeskartellamt* confirmed that its decisions related only to the German market and that it had determined the amounts of the fines exclusively based on Nordzucker's and Südzucker's German revenues.

On this basis, the Cartel Appeals Court found that Nordzucker and Südzucker had engaged in a cartel arrangement also with respect to the Austrian market. As regards Nordzucker, the Cartel Appeals Court adopted a declaratory ruling that Nordzucker had participated in that infringement. As regards Südzucker, the Cartel Appeals Court referred the case back to the Cartel Court, which will need to determine the amount of the fine to be imposed on Südzucker for the infringement to the extent it related to the Austrian territory.

### *Construction Cartel*

Following the imposition of a fine of € 45.37 million on **Strabag** in 2021, the Cartel Court imposed fines of € 62.35 million on **Porr** and € 26.33 million on **Habau** for their participation in the Austrian construction cartel. In July 2022, the Competition Authority requested the Cartel Court to impose a fine of € 27.15 million on Swietelsky, another Austrian construction company.<sup>[2]</sup>

In July 2022, in an unprecedented development, the Federal Competition Authority requested the Cartel Court to overturn the decision that imposed a fine of € 45.37 million on Strabag. The amount of the fine had been intended to reflect Strabag's cooperation under the Austrian leniency programme and the implementation by Strabag of compliance and monitoring measures to prevent future infringements. The Federal Competition Authority however subsequently became aware that Strabag might not have fully cooperated under the leniency programme and might have withheld certain evidence. In November 2022, the Cartel Court rejected the Competition Authority's request to review the fining decision on procedural grounds. An appeal by the Federal Competition Authority against this rejection decision is currently pending.

The construction 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, and 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.

### *Metering Services*

In May 2022, the Cartel Court imposed a fine of € 2.2 million on *ista*, a company active in metering services relating to water consumption and heating in residential and commercial

buildings. The alleged infringement consisted in the coordination of prices and conditions with competing suppliers, the coordination of bids, and the exchange of competitively sensitive information (including prices, price increases, terms and conditions, customers, or bids) between 2004 and 2019. The amount of the fine imposed on ista reflects a 50%-reduction for ista's cooperation under the Austrian leniency programme and an additional 20%-reduction for ista having agreed to enter into a settlement with the Authority. Proceedings against at least two other participants in the metering cartel are pending.

## Restrictive Agreements

### *Legal Framework and Procedure*

#### *Sustainability Guidelines*

In September 2022, the Austrian Federal Competition Authority published guidelines on how it intends to apply the statutory exemption for sustainability agreements in practice. The exemption for sustainability agreements was introduced in 2021 and applies to agreements that “*significantly contribute to an ecologically sustainable or climate-neutral economy*”.

The [Sustainability Guidelines](#) provide guidance notably on the scope of the exemption and on how the Authority intends to assess the significance of an agreement's contribution to sustainability:

- The Guidelines clarify that sustainability benefits that can be taken into account under the exemption must relate to ecological sustainability and may comprise contributions to the protection of the climate, the adjustment to climate change, the transition to a circular economy, the reduction of environmental pollution, the prevention of damage to the environment, the protection and restoration of biodiversity, and the sustainable use and protection of water resources including oceans (paras 75 et seq.).
- It is sufficient that the sustainability benefits accrue to the general public, including in circumstances where the benefits are realised outside of Austria (para 75). There is thus no need that the benefits to accrue specifically on the markets that are affected by the restrictive object or effects of the agreement.
- Contributions to ecological sustainability are considered to be significant when they at least outweigh the negative impact of cooperation on competition. The more restrictive of competition an agreement is, the more significant must be its contribution to sustainability. The assessment whether the claimed sustainability benefits outweigh the restriction of competition can involve both quantitative and qualitative criteria (paras 88-90 and 91).
- The Guidelines apply the “*do not significantly harm*”-principle. If an agreement significantly contributes to one aspect of ecological sustainability but at the same time is expected to cause a significant deterioration in relation to another aspect of ecological sustainability, the agreement will not be able to benefit from the exemption. (para 77).
- An agreement that is restrictive of competition but is expected to bring about sustainability benefits, in order to benefit from the sustainability exemption, must be indispensable to bring about the claimed sustainability benefits (paras 71 et seq.).

## Cases

## *School Bags*

In 2019, the Federal Competition Authority initiated infringement proceedings against a producer of school bags, Fond Of, and several retailers of school bags, for the application of fixed or minimum retail sales prices for school bags and the prohibition of online sales imposed on retailers. Following the imposition of a fine € 340,000 on Fond Of in 2021, the Cartel Court imposed additional fines for the same infringement on two retailers, i.e., a fine of € 70,000 on Kastner & Öhler and a fine of € 100,000 on Thalia. It did not impose a fine on a third retail company, Hausmann, on account of Hausmann's difficult economic situation. Fond Of and Kastner & Öhler received discounts based on the Austrian leniency programme, while Thalia received a discount for cooperation outside of the leniency programme. [3]

The Cartel Court considered that the vertical agreements between Fond Of and each of the retailers led to a horizontal effect because of the retailers' participation in the monitoring of the pricing arrangements ("*hub and spoke*"). The *School Bags, therefore*, illustrates that retailers can themselves be liable for resale price restrictions if they consistently comply with the pricing restrictions imposed on them by the supplier and participate in the monitoring of the arrangements.

## **Abuse of Dominance**

### *Cases*

#### *Digital Road Toll Vignettes*

In November 2021, the Cartel Appeals Court confirmed that a refusal by Asfinag to supply digital road toll vignettes to a commercial reseller, who resold the digital vignettes to end-users for immediate use, was an abusive refusal to supply, in circumstances where Asfinag did not offer a digital vignette to private end-users for immediate use (but only subject to an 18-day waiting period).

Asfinag is an Austrian State-owned company that operates and manages motorways in Austria and is entitled to charge toll fees for the use of these motorways. Users can pay the toll fees by purchasing physical or digital vignettes from Asfinag. The physical vignettes must be attached to the vehicles, while the digital vignettes must be registered with Asfinag's electronic toll system. Asfinag's terms and conditions prohibit the commercial resale of digital vignettes. Digital vignettes purchased by end-users in Asfinag's online store can be used only after the expiry of an 18-day waiting period, during which private end-users can rescind the purchase contract based on applicable consumer protection legislation. Digital vignettes with immediate validity can be purchased only in Asfinag's or its authorised resellers' physical sales outlets.

The applicant was a German company who purchased digital vignettes in Asfinag's online store and resold them to end-users, subject to a service fee, via its own online store and enabled the end-users to use the digital vignette immediately after the purchase (i.e., without an 18-day waiting period).

After Asfinag became aware that this company was engaging in the commercial resale of digital vignettes, Asfinag blocked the company from access to Asfinag's online store. The company requested the Cartel Court to order Asfinag to grant it access to Asfinag's online store and to

authorise it to resell digital vignettes to end-users or, at least, to non-Austrian end-users.

In the first instance, the Cartel Court granted the applicant's request and ordered Asfinag to enable the applicant to purchase digital vignettes for resale to private and commercial end-users irrespective of whether they are based in Austria or abroad.

Upon an appeal by Asfinag, the Cartel Appeals Court confirmed the Cartel Court's ruling but restricted the reseller's right to resell to the resale of digital vignettes to private end-users. The Cartel Appeals Court agreed that Asfinag had a legal monopoly as regards the supply of digital and was therefore obliged to supply digital vignettes to the reseller. The Cartel Appeals Court also agreed that the reseller offered a product to end-users via its online store that was not available through other online outlets (i.e., a digital vignette with immediate validity). It confirmed that a digital toll vignette for immediate use immediately (i.e., without an 18-day waiting period) is a "new product" and that there was consumer demand for it. [4]

The Cartel Appeals Court, therefore, upheld the Cartel Court's order, although it limited the reseller's right to resell digital vignettes to the resale to private end-users (i.e., excluding commercial end-users).

## Merger Control

### *Legal Framework and Procedure*

#### *Revised Revenue Thresholds and New Substantive Test*

In 2021, Austria revised the jurisdictional thresholds and the substantive test for the assessment of mergers, both of which became applicable as of January 2022. Under the revised revenue thresholds, a transaction is notifiable only if each of at least two parties 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 revenue 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 *de minimis* exemption[5] and the transaction value threshold[6] remain applicable and unchanged.

The substantive standard for the assessment of mergers was changed to the significant lessening of competition standard, although the existing dominance test was retained as an alternative test.

### *Cases*

#### *Salzburger Alpenmilch/Gmundner Molkerei and Gmundner Molkerei/Milchwerk Jäger*

In April 2022, the Federal Competition Authority cleared the intended merger between [Salzburger Alpenmilch](#) and [Gmundner Molkerei](#), two regional dairy associations, in Phase I, subject to certain behavioural conditions. The Federal Competition Authority identified preliminary concerns in the market for the purchase of raw milk due to geographic overlaps between the two companies purchasing activities in certain regions of Austria. The Authority was concerned that the parties



could offer less advantageous milk offtake contracts to dairy farmers for the supply of their raw milk to the parties. To dispel these concerns, the parties agreed to certain behavioural commitments, including commitments to purchase certain minimum volumes of milk, to allow dairy farmers to market unlimited volumes of milk directly, to offer farmers offtake contracts with indefinite duration and off-take contracts with fixed terms of 1, 3, or 5 years with an option to extend the term. In addition, the parties agreed to certain amendments to the merged dairy association's statutes to allow farmers to terminate their membership in the association at the end of each year. The commitments would have been applicable for 6 years. The transaction was ultimately abandoned by the parties.

In October 2022, the Federal Competition Authority cleared the intended merger between *Gmundner Molkerei and Milchwerk Jäger*, a Bavarian dairy company, in Phase I, subject to certain behavioural conditions that were similar to the conditions imposed in *Salzburger Alpenmilch/Gmundner Molkerei*.

#### *Meta/Giphy*

In February 2022, the acquisition by Meta of Giphy, a supplier of digital bitmap images (so-called GIFs), was cleared by the Cartel Court in Phase II, subject to certain behavioural commitments. The commitments comprised an obligation imposed on Meta to provide non-discriminatory access to Giphy's GIF library to competing social media providers (for a duration of 5 years) and to grant competing GIF libraries access to Giphy's GIF library (for a duration of 7 years) in order to enable the market entry of at least one additional supplier of GIFs besides Giphy and Tenor (owned by Google).

The Federal Competition Authority and the Federal Cartel Attorney appealed the clearance decision before the Cartel Appeals Court arguing, in essence, that the Cartel Court's competitive assessment was potentially incomplete and that the conditions imposed by the Cartel Court were inadequate to address their concerns. The Cartel Appeals Court dismissed the appeal in June 2022.<sup>[7]</sup>

#### *Metro Cash & Carry/C&C Abholgroßmärkte*

In April 2022, the acquisition by Metro Cash & Carry of C&C Abholgroßmärkte (AGM) was cleared by the Cartel Court in Phase II, subject to certain structural commitments. Both parties were active in the wholesale of food products to hotels, restaurants, bars, cafés, catering companies, independent supermarkets, and others. The transaction would have added 9 of AGM's outlets to Metro's 12 outlets across Austria. <sup>[8]</sup>

The Cartel Court considered the relevant product market to be the wholesale supply of food products without distinguishing between customer groups, as suppliers would not be able to price discriminate between customer groups, and without distinguishing between modes of delivery (i.e., delivery by the supplier vs. self-collection by the customer). The Court considered the relevant geographic markets as local, comprising catchment areas of 75 km driving distance around each outlet.

Based on this market delineation, the Cartel Court identified competitive concerns in relation to two overlapping outlets around Bludenz and two overlapping outlets around Klagenfurt. The Cartel Court considered that the combination would lead to the creation of a dominant position in each of these two geographic areas, with the parties having combined shares of 30-40% and only one or two remaining competitors in these areas. In all other overlap areas, the number of remaining competitors was larger or the share increment brought about by the transaction was lower.

To address the Cartel Court's concerns, the parties committed to divest the two AGM outlets that gave rise to the overlap with Metro's outlets around Bludenz and Klagenfurt.

## Sector Inquiries

In 2022, the Federal Competition Authority concluded sector inquiries into the Austrian fossil fuel sector and into public charging stations for electric vehicles. In its final report on the fossil fuel sector inquiry, the Authority confirmed that it had not found evidence of collusive behaviour but announced that it would continue to monitor the fossil fuel market. In its final report on the inquiry into public charging stations for electric vehicles, the Authority expressed general concern about the non-transparent cost and pricing structures and the potentially concentrated nature of the charging stations infrastructure sector. Most charging stations are operated by large electricity and energy companies which, in the Authority's preliminary view, could potentially have incentives to engage in discriminatory behaviour or to offer bundled products consisting of household electricity and vehicle charging services. The Authority however did not identify any concrete concerns, although it announced that it would continue to monitor also this sector.

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\* *This overview is a summary of selected main developments and is not intended to be exhaustive.*

[1] In 2014, the *Bundeskartellamt* imposed fines of € 8.5 million on Nordzucker and € 195.5 million on Südzucker for having allocated the German market for industrial and household sugar among themselves.

[2] The fine has not yet been imposed by the Cartel Court at the time of writing.

[3] The exact methodology of how the Federal Competition Authority determined the fine amounts that it requested the Cartel Court to impose and the magnitude of the discounts are not disclosed in the decisions.

[4] The Cartel Court referred in this context to the European Court of Justice's ruling in Joined Cases C-241/91 and C-242/91, *Magill*.

[5] 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.

[6] 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".

[7] The appeals judgment is not yet public.

[8] Three additional AGM outlets were not part of the transaction and were sold by AGM to REWE Group, which prior to the transaction was AGM's parent company.

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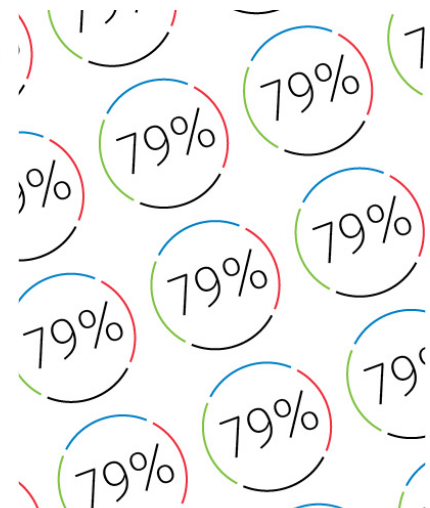
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