DOMINANCE

Austria

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Getting The Deal Through

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Dominance

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Quick reference guide enabling side-by-side comparison of local insights, including into the general legal framework and sector-specific rules, the definition of collective dominance, and relevance of dominant purchasers; abuse of dominance and related defences; specific forms of abuse, enforcement, sanctions, remedies and appeals; and current trends.

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GENERAL FRAMEWORK

Legal framework

What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

Unilateral conduct of dominant firms is covered by the Austrian Act against Cartels and other Restrictions of Competition – the Cartel Act 2005 (CartA) , in particular by sections 4 to 6 thereof. Furthermore, the Austrian Act of Improvement of Local Supply and Competitive Conditions – the Fair Competitive Conditions Act (FCCA) provides certain rules that are typically associated with the abuse of market power (even though the FCCA is also applicable to non-dominant firms).

Further rules pertaining to enforcement, procedure and to institutional questions are contained in the Austrian Act on the Establishment of a Federal Competition Authority – the Competition Act (CompA) and the Non-Contentious Proceedings Act.

As Austria is a member of the European Union, EU competition law, in particular article 102 of the Treaty on the Functioning of the European Union (TFEU), might apply as well (if the conduct is liable to affect trade between member states).

Law stated - 13 January 2022

Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

The CartA provides a statutory definition of dominance, with the law distinguishing between (individual) dominance in section 4(1), collective dominance in section 4(1a), and relative dominance in section 4a. Section 4 paragraphs 2 and 2a contain market-share based presumptions of dominance for individual and collective dominance, respectively.

Section 4(1) of the CartA defines as dominant an undertaking that is exposed to no or only insignificant competition, or holds a predominant market position in relation to its competitors; in particular having regard to its financial resources, its relations to other undertakings, its opportunities to access supply and sales markets, the significance of its intermediary services for other undertakings' access to supply and sales markets, its access to competition-relevant data, the benefits derived from network effects and other circumstances that restrict market entry for other undertakings.

The Austrian courts have also referred to the case law of the EU courts on article 102 of the TFEU in order to assess dominance pursuant to section 4(1) of the CartA. The case law on article 102 of the TFEU can, therefore, be considered as relevant for the interpretation of section 4(1) of the CartA as well.

In practice, the most important factor for the (at least initial) assessment of dominance in Austria is market shares, as section 4(2) of the CartA establishes a rebuttable presumption of dominance for undertakings if at least one of the following market share thresholds is met: a market share of at least 30 per cent; or a market share of at least 5 per cent and the undertaking is subject to the competition of at most two undertakings; or a market share of at least 5 per cent and the undertaking belongs to the four biggest undertakings on the market who jointly achieve a market share of at least 80 per cent.

Section 4a of the CartA establishes a legal fiction of dominance for undertakings that are not dominant in relation to their competitors, but enjoy nonetheless a superior market position vis-à-vis their customers or suppliers. Such a superior market position is normally assumed where the continued business relationship is crucial for customers or suppliers to avoid serious economic detriment. In practice, this provision has been discussed in particular with regard

to cinemas being dependent upon 'blockbuster movies' from major studios. With a recent legislative amendment, intermediaries on multisided digital markets (gatekeepers) have also been added as an explicit example of undertakings that are susceptible to enjoying relative market power.

Collective dominance within the meaning of section 4(1a) of the CartA provides that two or more undertakings are dominant if no substantial competition exists between them and if those undertakings collectively fulfil the conditions for (individual) dominance.

Law stated - 13 January 2022

Purpose of legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The CartA is based on the idea that undistorted competition has an intrinsic value as the basic driving force for prosperity and economic opportunity in a free society. The general purpose of the CartA is therefore to maintain effective competition and, with respect to the prohibition of the abuse of dominance, to prevent abusive or exclusionary conduct to the detriment of other market participants (ie, customers (including, ultimately, consumers), suppliers and competitors). The prohibition of abusive behaviour of dominant undertakings is thereby primarily meant as a substitution for the lack of competition that in normal circumstances would prevent market power and thereby constrain undertakings from reverting to abusive practices in the first place.

In merger control, specific rules apply to media undertakings: concentrations between media undertakings must also not impede media plurality. However, the CartA distinguishes between threats to media plurality on the one hand, and threats to undistorted competition and the concept of dominance on the other hand. The dominance standard for media undertakings under the CartA is therefore the same as for other undertakings.

Other public policy goals such as industrial or trade policy, environmental protection, etc, are not explicitly pursued by the CartA or relevant for the dominance standard. With a recent amendment, the legislator has, however, established that benefits that contribute substantially to an ecologically sustainable or climate-neutral economy shall also be deemed consumer benefits in the assessment of efficiency gains for the purpose of exempting restrictive agreements from the cartel prohibition.

Law stated - 13 January 2022

Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

The CartA does not contain any sector-specific dominance rules.

In the telecommunication industry, the competent regulator can proactively impose specific obligations on undertakings with substantial market power pursuant to section 35 et seq of the Telecommunication Act 2003. The obligations that may be imposed are in general comparable to the obligations stemming from the general dominance rules.

Other sector-specific regulation (eg, in the railway, gas or electricity sectors) includes rules with effects similar to the general dominance rules (eg, mandatory access and non-discrimination rules). While these rules do not specifically require that the undertakings concerned possess market power, the addressees of these rules can typically be expected to have market power (eg, as operators of important infrastructure). The general dominance rules and the

sector-specific regulation apply in parallel and are basically complementary in nature.

Moreover, sector-specific regulators have the competence to submit applications to the Cartel Court for cease-and-desist orders against infringements of the CartA, including the prohibition of abuse of dominance. Certain sector regulators are competent to investigate potential breaches of the competition rules in their respective sector of the economy. For example, energy regulator E-Control has powers similar to those of FCA in the natural gas and electricity sectors, including the power to conduct on-site inspections upon application to and approval by the Cartel Court (section 25 of the E-Control Act). Other regulators, such as the regulators for the media, telecommunication or railway sectors, are competent to supervise their respective markets and to request documents and information from market participants, but not to conduct on-site inspections.

Law stated - 13 January 2022

Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The dominance rules of the CartA apply to all undertakings, without exceptions. The notion of 'undertaking' refers to all entities engaged in economic activity, as interpreted in the case law of the EU courts on articles 101 and 102 of the TFEU. Therefore, public bodies may also constitute undertakings, if the activity in question is economic in nature. Activities that are, at least partially, not economic in nature include the organisation of social security systems such as certain activities of public health insurance bodies.

Law stated - 13 January 2022

Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The prohibition of unilateral abusive behaviour applies only to undertakings that are already dominant (or are deemed to be dominant because of relative market power). The transition from non-dominant to dominant is only caught by the CartA if it involves a concentration that is subject to Austrian merger control, or if the conduct infringes upon the general cartel prohibition (ie, anticompetitive agreements, decisions by associations of undertakings or concerted practices).

Law stated - 13 January 2022

Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Dominance within the meaning of the CartA includes also collective dominance. Section 4(1a) of the CartA provides that two or more undertakings are dominant if no substantial competition exists between them and if those undertakings collectively fulfil the conditions for (individual) dominance.

There is only limited case law by the Austrian courts on the concept of collective dominance. In one case decided by the Supreme Cartel Court on collective tying practices, the Cartel Court had considered in the first instance that collective dominance requires the following elements: (tacit) collusion regarding the coordinated behaviour, sufficient market transparency to monitor compliance, an effective deterrence mechanism to punish lack of compliance, and lack of external competition. Ultimately, the Cartel Court held that at least the second and third conditions were not met, and

that the parallel behaviour by the undertakings concerned was not an expression of collective dominance, but of the parallel interests each undertaking pursued individually (see Supreme Cartel Court in Flüssiggas , 1 December 2015).

Law stated - 13 January 2022

Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Dominant purchasers are explicitly covered by the statutory definition of dominant undertakings. As regards the statutory definition, no difference compared to dominant suppliers exists. In practice, however, competition law enforcement focuses mainly on dominant suppliers.

Law stated - 13 January 2022

Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

In general, product and geographic markets are defined in the same way as in merger control cases. Sections 21 and 23 of the CartA enshrine the demand-side oriented market concept as the main yardstick for the calculation of market shares. Supply substitutability and potential competition may also be relevant for defining the market concerned. The Supreme Cartel Court emphasises the importance of market definition as the starting point for any competitive analysis.

Section 4(2) of the CartA establishes a rebuttable presumption of (individual) dominance within the meaning of section 4(1) of the CartA if at least one of the following market share thresholds is met: a market share of at least 30 per cent; or a market share of at least 5 per cent and the undertaking is subject to the competition of at most two undertakings; or a market share of at least 5 per cent and the undertaking belongs to the four biggest undertakings on the market who jointly achieve a market share of at least 80 per cent.

According to the case law of the Austrian courts, it is conceivable that more than just one firm has a dominant position on the relevant market. Hence, the legal presumption cannot be rebutted by simply pointing out that another undertaking has even higher market shares. Still, in particular if the (relatively low) thresholds are only somewhat exceeded, it is quite possible to successfully rebut the presumption by submitting appropriate information on the market.

As for collective dominance, section 4(2a) of the CartA establishes a rebuttable presumption of (collective) dominance within the meaning of section 4(1a) of the CartA if three or fewer undertakings account for a market share of at least 50 per cent, or five or fewer undertakings account for a market share of at least two-thirds.

Again, this presumption is rebuttable (ie, the undertaking concerned may either prove that substantial competition exists between the undertakings collectively exceeding the market share thresholds established in section 4(2a) of the CartA, or that those undertakings, taken together, are subject to substantial competition and do not enjoy a superior market position vis-à-vis the remaining competitors).

Law stated - 13 January 2022

ABUSE OF DOMINANCE

Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Section 5(1), first sentence of the Austrian Act against Cartels and other Restrictions of Competition – the Cartel Act 2005 (CartA) establishes a general prohibition of the abuse of a dominant position. The second sentence of section 5(1) of the CartA provides a non-exhaustive list of five examples of what may in particular constitute abusive behaviour:

- imposing purchase or selling prices or other trading conditions different from those prevalent under effective competition;
- limiting production, sales or technical development to the detriment of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; and
- selling goods below costs without objective justification.

The concept of abuse of dominance in Austrian law is generally considered as being largely identical in substance to the prohibition of abuse in article 102 of the TFEU, and the Austrian courts routinely refer to the case law of the EU courts when applying section 5 of the CartA. Similarly, the examples provided in section 5(1), Nos 1 to 4 of the CartA are largely identical to the four typical forms of abusive behaviour specified in article 102(a) to (d) of the TFEU. Accordingly, the concept of abuse is considered to be objective, and based on the idea that while a dominant position itself is not illegal and a dominant undertaking continues to be entitled to fully compete on the merits, it has a special responsibility to ensure that its conduct does not further distort competition. That responsibility may even extend to conduct by third parties, such as distribution agents, if the conduct can be imputed to the dominant undertaking (see Supreme Cartel Court in Fachverband Reisebüros v Lufthansa , 12 July 2018). Aspects where the Austrian law on abuse of dominance is stricter than EU competition law concern mostly procedural issues, such as the presumptions for dominance established by section 4(2) and (2a) of the CartA and rules on the burden of proof with regard to predatory pricing, as established by section 5(2) of the CartA.

Like article 102 of the TFEU, section 5 of the CartA is not based on per se prohibitions (at least not in the strict sense). The examples listed in section 5(1), Nos 1 to 5 of the CartA as well as other categories of abusive behaviour identified by case law only designate behaviour that is considered 'typically' anticompetitive, not 'per se'. Hence, it is always possible to adduce additional circumstances or reasons for objective justification that might warrant an alternative assessment of a particular behaviour based on the specific circumstances of the case. However, section 5 of the CartA could be considered as following a 'form-based' approach insofar as at least some forms of behaviour are presumed to be anticompetitive unless the existence of special, justifying circumstances is established. In any event, as Austrian competition law is not based on a strict consumer welfare standard; ie relevant anticompetitive effects are not limited to consumer harm, but include also distortions of competition to the detriment of other market participants. In this regard, the Austrian courts emphasise the need to balance the legitimate interests of the dominant undertaking with the objective of protecting competition, namely, the possibility of other market participants to compete on the merits.

Law stated - 13 January 2022

Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes.

Law stated - 13 January 2022

Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

As a rule, conduct amounting to potentially abusive behaviour must occur on the market where the dominant position is being held. However, the Austrian case law has, in accordance with the case law of the EU courts, refused the necessity of a strict causality test. In exceptional cases, the conduct may therefore also occur on other markets. This may be the case either if the markets are closely linked, or if the conduct is otherwise liable to either strengthen the dominant position on the dominated market or to leverage the dominant position to the market where the conduct occurs.

Law stated - 13 January 2022

Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

A dominant undertaking may always invoke legitimate reasons for objective justification. For example, the Supreme Cartel Court held that tying the delivery of liquid natural gas with the renting of liquid natural gas tanks from the same undertaking is objectively justified, owing to the dangers connected with the services and because it had been established that when those services were provided separately, accidents were, although still rare, more likely.

Efficiency gains may provide a reason of objective justification as well, provided that the efficiencies gained are real, the conduct is strictly necessary to achieve those efficiencies, the efficiency gains for consumers outweigh other negative effects, and effective competition is not completely eliminated.

Whether exclusionary intent excludes the possibility to objectively justify an otherwise abusive behaviour has not been decided by the Austrian courts yet. Arguably, as the concept of abuse is objective in nature, the intent of the dominant undertaking ought to have only limited, if any, relevance for the legal assessment of the conduct. However, it is conceivable that competition authorities and courts might take an established exclusionary intent into account when assessing the credibility of exculpatory submissions and evidence. In practice, an established exclusionary intent may therefore diminish the chances of a successful defence.

Law stated - 13 January 2022

SPECIFIC FORMS OF ABUSE

Types of conduct

Rebate schemes

Austrian case law on rebate schemes essentially relies on the jurisprudence of the EU courts: volume-based and functional rebates are usually deemed compatible with section 5 of the Austrian Act against Cartels and other Restrictions of Competition – the Cartel Act 2005 (CartA), whereas loyalty rebates and rebates with loyalty inducing effects (such as retroactive rebates) by dominant undertakings are normally considered abusive. This applies also to multi-suppliers-clauses by which a dominant purchaser imposes rebates on purchasing prices if a supplier also sells its products to other purchasers (see Cartel Court in INSIGHT Health , 19 December 2017).

Moreover, undertakings with monopoly power in one market and activities in other, competitive markets must not grant rebates for their monopoly product in an arbitrary or non-transparent manner, if customers active in both markets may gain the impression that a rebate on monopoly products may be dependent on purchasing goods or services in the competitive market (see Supreme Cartel Court in ÖPAG-Rahmenverträge , 11 October 2004). Also rebate schemes that are, in fact, discriminatory and liable to adversely affect competition may be considered abusive; if the dominant undertaking is under a specific obligation for transparent and non-discriminatory pricing, already the fact that rebates are not public may constitute an abuse (eg, different or non-public rebates for consolidators and large customers for direct mail services by the universal service provider, see Supreme Cartel Court in 16 Ok 3/21h, 11 November 2021).

Law stated - 13 January 2022

Tying and bundling

Section 5(1), No. 4 of the CartA specifically designates tying as a practice that is typically abusive. Exceptionally, commercial practices also involving tying may be justified by objective reasons. The Austrian courts accepted that tying the rental of tanks for liquid natural gas with the supply of liquid natural gas was objectively necessary as it had been established that unbundling those services led to a higher risk of potentially severe accidents (see Supreme Cartel Court in Flüssiggas , 1 December 2015).

Bundling is not generally considered abusive. However, it may be regarded as anticompetitive if the markets of the bundle (at least one of which is dominated) are closely linked with each other, or if the bundling practice for other reasons allows the dominant undertaking to establish or strengthen a dominant position in any of the markets concerned (see Supreme Cartel Court in TikTak-Tarif , 11 October 2004).

Law stated - 13 January 2022

Exclusive dealing

Exclusive dealing may constitute an abuse, depending in particular on the duration of the exclusivity and the volume of the market affected by the exclusivity. The practice is abusive if it prevents potential competitors from entering the market. If it is possible (both legally and economically) to terminate exclusivity contracts within a short period, even exclusivity contracts concluded for a non-determined duration are compatible with section 5 of the CartA (see Supreme Cartel Court in Taxifunkzentrale , 27 June 2013).

Law stated - 13 January 2022

Predatory pricing

Predatory pricing is expressly listed in section 5(1), No. 5 of the CartA as a typically abusive practice. The Austrian courts in general follow the cost benchmarks established by the EU courts. Pursuant to section 5(2), if a prima facie case of predatory pricing is established, the dominant undertaking bears the burden of proof that its prices are cost covering or that prices that are below costs are objectively justified.

Prices are usually abusive if they do not cover the average variable costs of the dominant undertaking. Prices may be considered predatory if they are below average total costs but above average variable costs, provided that it can be proven that the price setting is part of a general strategy to foreclose the competition. In its most recent judgment on predatory pricing, the Supreme Cartel Court held that a foreclosure strategy may be assumed if prices are below the long-run average incremental costs of the dominant undertaking (Supreme Cartel Court in Recycling of packaging materials , 8 October 2015). It is not necessary to demonstrate the possibility of recoupment as an element of a predatory pricing strategy.

Law stated - 13 January 2022

Price or margin squeezes

In a recent decision, the Supreme Cartel Court has endorsed the ECJ case law on margin squeezes and held that a general car importer (who enjoyed at least relative dominance vis-à-vis its distributors) abused its dominant position by practising loss-making resale prices with its majority-owned dealers while applying prices and rebates towards its independent distributors that did not allow, even for an as efficient distributor, to match those resale prices (Büchl/ Peugeot , 17 February 2021).

Moreover, in a case concerning not upstream and downstream markets but complementary markets, the Supreme Cartel Court considered it abusive if the best price for the monopoly product was offered for a bundle including the complementary product (the use of which required the monopoly product) at no additional costs (TikTak-Tarif , 11 October 2004). Furthermore, the Supreme Administrative Court has addressed margin squeeze issues repeatedly in regulatory cases in the telecoms sector. It assessed those cases on the basis of an 'as efficient competitor' test, in accordance with the practice of the EU courts and the European Commission.

Law stated - 13 January 2022

Refusals to deal and denied access to essential facilities

A refusal to deal is abusive if the dominant undertaking has an obligation to contract and if there is no objective justification not to deal with the prospective customer. An obligation to contract with non-competitors exists for undertakings which are de jure or de facto monopolists (see Supreme Cartel Court in Asterix bei den Olympischen Spielen , 16 July 2008). For dominant undertakings that have already contracted with other undertakings, thereby opening the market to competition, an obligation to contract may arise from the duty not to discriminate against (potential) customers, including competitors (see Supreme Cartel Court in ÖBB-Westbahn II , 11 October 2012).

Even if the dominant undertaking has not contracted with third parties and thereby opened the market to competition yet, an obligation to contract may arise if the object of the request is an essential facility, meaning that the facility must be both impossible to replicate and indispensable for the undertaking requesting access to it (see ECJ in Oscar Bronner , 26 November 1998 and Austrian Supreme Court in Oscar Bronner , 15 May 2000). The same holds true if the refusal to deal prevents the prospective counterparty from establishing a new product that the dominant undertaking so far has refused to offer itself, for example, a digital road toll vignette for consumers domiciled abroad without a waiting period (see Supreme Cartel Court 16 Ok 1/21i, 12 October 2021).

Law stated - 13 January 2022

Predatory product design or a failure to disclose new technology

This conduct has not yet been in the focus of Austrian case law.

Law stated - 13 January 2022

Price discrimination

Pursuant to section 5(1), No. 3 of the CartA, it is in general abusive for a dominant undertaking to disadvantage its trading partners by applying dissimilar conditions to similar transactions. Hence, price discrimination may constitute an abuse unless it is objectively justified. To be similar, transactions do not need to be identical. However, substantial differences in the costs or quality of the product or service, in the conditions of competition or in the person of the trading partner (eg, creditworthiness, negotiation power) can make two transactions dissimilar. Therefore, it may, for example, be justified for a dominant undertaking to offer a termination right for a long-term supply contract only to some, but not to all, customers, if these customers are in objectively different situations, for example, with regard to the share of supply that is captured by their contracts (see Supreme Cartel Court in E-Control/Gazprom of 25 January 2021).

In addition to the prohibition of (price) discrimination contained in section 5(1) of the CartA and regardless of dominance, section 2 of the Austrian Act of Improvement of Local Supply and Competitive Conditions – the Fair Competitive Conditions Act (FCCA) provides that suppliers discriminating against resellers and resellers discriminating against suppliers may be sued for a cease-and-desist order.

Law stated - 13 January 2022

Exploitative prices or terms of supply

Pursuant to section 5(1), No. 1 of the CartA, dominant undertakings may not demand purchasing or selling prices or other business terms that differ to a significant extent from those that would be very likely to arise if effective competition existed, particularly taking into account the conduct of undertakings in comparable markets where effective competition exists (see Supreme Cartel Court in Simulcrypt-Vereinbarung , 12 March 2020). However, a dominant company is not prohibited from setting the price at a level it deems to be appropriate and, if necessary, defending this position in court (or administrative) proceedings. Whether a price or a trading condition is exploitative must be assessed against the overall balance of the contract. Individual, disadvantageous terms may be balanced out by other, more favourable terms and conditions governing the overall relationship. A pricing abuse in this sense requires that prices are ‘strongly’ or ‘clearly’ excessive.

Even terms that may be – on balance within the overall relationship – not exploitative can nonetheless still be abusive if they are excessively restrictive. That is the case if the clause in question is only or overwhelmingly in the interest of the dominant undertaking, has no objective justification and prevents the contractual partner from reaping the economic benefits from the products or services acquired from the dominant undertaking, for example, arbitrary or excessive conditions for rebates or the unjustified passing-on of additional costs (see, with regard to certain practices by a general car importer vis-a-vis an independent retailer, Supreme Cartel Court in Büchl/Peugeot , 17 February 2021).

Law stated - 13 January 2022

Abuse of administrative or government process

Such conduct has not yet been a focus in an Austrian case. If such a case were to arise, it could be expected that the Austrian courts would pay due consideration to the respective case law of the EU courts (eg, ECJ in AstraZeneca , 6 December 2012).

Law stated - 13 January 2022

Mergers and acquisitions as exclusionary practices

The Supreme Cartel Court has explicitly ruled out that mergers and acquisitions (ie, concentrations within the meaning of section 7 of the CartA that may be subject to Austrian merger control) could constitute an abuse pursuant to section 5 of the CartA.

If a concentration is subject to Austrian merger control and threatens to create or to strengthen a dominant position, the concentration is to be prohibited by the competent authorities pursuant to section 12(1), No. 1 of the CartA. In contrast to the prohibition of abuse of dominance, private parties are not entitled to rely on section 12 of the CartA or to apply for such a prohibition. The Supreme Cartel Court held that construing a concentration as abuse would circumvent the exclusive role attributed to the official parties in merger control proceedings.

Law stated - 13 January 2022

Other abuses

The general provision in section 5(1) of the CartA does not focus on specific types of behaviour but prohibits abuse of dominance in any form. Similarly, the examples of abusive behaviour provided do not constitute an exhaustive list of all possible violations. Therefore, additional forms of abuses beyond those addressed above are conceivable (eg, the Supreme Cartel Court considered a contractual prohibition to invest in competitors to constitute an abuse). In general, it should be expected that the Austrian courts will give due consideration to precedents established in other jurisdictions, in particular precedents from the EU courts and other EU member states.

Law stated - 13 January 2022

ENFORCEMENT PROCEEDINGS

Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The Federal Competition Authority (FCA) is the general authority competent for investigations of possible abuses of dominance. The FCA also represents Austria in the European Competition Network. To conduct its investigations, the FCA is entitled:

- to rely on experts, witnesses, and parties concerned (section 11 of the section 12 of the Austrian Act on the Establishment of a Federal Competition Authority – the Competition Act (CompA));
- to request information either in writing or on site in person, or documents from undertakings or association of undertakings (section 11a of the CompA); and

- to perform unannounced on-site inspections – dawn raids – upon application to and order by the Cartel Court (section 12 of the CompA).

Pursuant to section 14 of the CompA, the FCA may also call on the public security services – the police – for support in its investigations and inspections (eg, on forensic IT experts of the criminal police).

A particularity in the Austrian institutional setup is the Federal Cartel Prosecutor (FCP) as second statutory party in all proceedings before the Cartel Court. The FCP's task is the protection of the public interest in all competition matters, including dominance cases (section 75 of the Austrian Act against Cartels and other Restrictions of Competition – the Cartel Act 2005 (CartA)).

In addition, certain sector regulators are also competent to investigate potential breaches of the competition rules in their respective sector of the economy. For example, energy regulator E-Control has powers similar to those of FCA in the natural gas and electricity sectors, including the power to conduct on-site inspections upon application to and approval by the Cartel Court (section 25, E-Control Act). Other regulators, such as the regulators for the media, telecommunication or railway sectors, are competent to supervise their respective markets and to request documents and information from market participants, but not to conduct on-site inspections.

Law stated - 13 January 2022

Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Section 26 of the CartA provides that infringements of the prohibition to abuse a dominant position must be effectively brought to an end. The most common remedy to achieve this aim are cease-and-desist orders designating a specific conduct that must be stopped. Ultimately, however, remedies may include whatever is necessary to effectively stop the abuse, as long as the remedy is proportionate to the infringement. Section 26 of the CartA specifically provides that as ultima ratio, also structural remedies may be imposed (ie, if no other equally effective measures are available or if those would prove more burdensome for the undertakings concerned).

As an alternative to ordering measures that bring an infringement to an end pursuant to section 26 of the CartA, section 27 of the CartA provides the possibility to render commitments by the undertakings concerned legally binding. Such commitments may be amended or even abolished if material changes in circumstances occur at a later point in time. For example, a dominant undertaking was recently released from its commitment to sell a minority stake in another undertaking, given that a sale within the terms of the commitment had failed despite its best efforts and that the competitive situation had improved to a point where the sale was not necessary anymore. The Cartel Court has held that similar to the committment procedure under EU law, decisions pursuant to section 27 of the CartA do not require a final decision on whether the contested conduct does actually amount to an infringement of competition law; reasonable, fact-based concerns with regard to the conduct are sufficient (see Cartel Court in Merck Sharp & Dohme of 11 March 2021).

If an infringement has already ended, an order to bring the infringement to an end is not possible anymore. Instead, a decision establishing the existence of the infringement in the past may be adopted pursuant to section 28 of the CartA.

In addition to those remedies, fines up to 10 per cent of the turnover of the previous business year may be imposed pursuant to section 29 of the CartA on undertakings for infringements of the competition rules, including section 5 of the CartA or article 102 of the TFEU. Individuals may be fined only if they qualify as undertakings (entrepreneurs). It is noteworthy that in contrast to the fining system applied by the European Commission, the 10 per cent limit is not applied as a 'cap' for an otherwise independent calculation method of the fine, but is considered to establish the upper

end of the range for setting an appropriate fine.

Compared with other jurisdictions, fines for abuse of dominance have been relatively modest in Austria for the time being. A notable case was closed in 2007, when the Supreme Cartel Court imposed a fine of €7 million on the Austrian licensee of today's Mastercard system, for concluding an agreement with her shareholders that made investments by its shareholders in competing payment systems subject to its approval, and for committing her shareholders to charge users of competing payment systems with excessive fees.

Law stated - 13 January 2022

Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The Federal Competition Authority (FCA) and the Federal Cartel Prosecutor (FCP) are not empowered to impose remedies or sanctions for competition law infringements themselves (the FCA may, however, impose sanctions for non-compliance with investigative measures). Whereas the investigative function is essentially attributed to the FCA (and, to some extent, sector regulators), the enforcement and decision-making function for the purposes of the CartA is attributed to the Cartel Court as a specialised court of first instance. The Cartel Court is a division of the Higher Regional Court Vienna. Only the Cartel Court is competent to impose, upon application, remedies or sanctions pursuant to the CartA. However, pursuant to section 36(2) of the CartA, only the FCA and the FCP are entitled to apply for the imposition of fines on the basis of the CartA. Other applicants may only apply for remedies pursuant to sections 26 to 28 of the CartA. The Cartel Court must not impose higher fines than requested in the application by the FCA or the FCP.

Some sector regulators have similar powers in their respective area of competence and may also submit applications for fines to the Cartel Court. For example, E-Control may apply to the Cartel Court to impose fines up to 10 per cent of the turnover of the previous business year on certain regulated undertakings pursuant to section 164 of the Austrian Gas Act, and the telecom regulator may apply for the disgorgement of certain illegal profits up to the same limits pursuant to section 190 of the Austrian Telecommunications Act.

Pursuant to sections 28a and 36(2a) of the CartA, the FCA, the FCP and the sector regulators are now also competent to apply to the Cartel Court for a finding that an undertaking has a dominant position on a multisided digital market insofar as there is a legitimate interest in such a finding. Once such a finding has been made, it will be up to the undertaking concerned to demonstrate a material change in circumstances if it wants to dispute the existence of a dominant position in future proceedings.

Law stated - 13 January 2022

Enforcement record

What is the recent enforcement record in your jurisdiction?

In Austria, public enforcement of the dominance rules is relatively rare, as the FCA focuses its investigative resources mostly on the fight against hardcore cartels. The cases when FCA took action mainly concerned sectors where the behaviour in question particularly hurt consumers or small businesses (eg, the payment cards system case). This focus appears understandable as the Austrian system is well suited for private enforcement by victims of potentially abusive behaviour of dominant undertakings. In fact, many of the abuse of dominance related cases decided by the Cartel Court are based on applications for cease-and-desist orders by private parties.

Law stated - 13 January 2022

Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Pursuant to section 879(1) of the Austrian Civil Code, agreements violating statutory prohibitions, such as section 5 of the CartA, are void. It must be assessed on a case-by-case basis if and to what extent the nullity affects the entire contract or the problematic clause. Possibly, a contract may even remain valid if it is necessary to protect the good faith and the legitimate interests of the non-dominant party to the contract.

Note that the Cartel Court has no jurisdiction to decide about contractual consequences of abusive conduct, such as the validity of a clause or a contract. A declaration that a contractual obligation is void would have to be sought from the civil courts.

Law stated - 13 January 2022

Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Pursuant to section 36(4) of the CartA, every undertaking or association of undertakings having a legitimate interest may submit applications for remedies to the Cartel Court. Hence, in the field of remedies (not fines), private parties have the same instruments available as the FCA, FCP and the sector regulators. Accordingly, applicants may ask for cease-and-desist order or even, if appropriate, for orders to grant access to infrastructure or to indispensable goods or services (eg, Supreme Cartel Court in ÖBB-Westbahn II, 11 October 2012).

The procedure before the Cartel Court is governed by the Non-Contentious Proceedings Act which is based, at least in principle, on the inquisitorial method. Hence, if given due cause by an applicant, the Cartel Court may order the parties to provide documents or answers to questions, to cooperate with a court-appointed expert, etc, thereby discovering facts and evidence that might be difficult to obtain for private litigants under the normal rules of civil procedure (the Cartel Court will nonetheless often be hesitant to employ its inquisitorial powers in private enforcement proceedings, hence the practical difference from civil proceedings is usually limited). With the recent implementation of the EU Damages Directive, these procedural benefits may be less important in the future.

Private parties may also avail themselves of the civil courts to apply for cease-and-desist orders for evident breaches of the dominance rules on the basis of the Unfair Trading Act.

Law stated - 13 January 2022

Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Plaintiffs who want to claim damages for abuses of a dominant position need to avail themselves of the civil court system in Austria, which is possible both as a follow-up action and as a stand-alone action. The Cartel Court has no jurisdiction to award damages.

Damage claims may be based on general tort law or the Unfair Trading Act, provided that the general conditions (in

particular, the existence of fault) are met. Until now, such actions have been relatively rare, and most of the case law relates to cartel damage claims. It remains to be seen whether this will change following the implementation of the EU Damages Directive into the CartA.

Claims for damages that have occurred after 26 December 2016 may now also be based on section 37c of the CartA.

Law stated - 13 January 2022

Appeals

To what court may authority decisions finding an abuse be appealed?

The authorities themselves are not competent to adopt decisions finding an abuse, but may only apply to the Cartel Court for such a decision.

Decisions of the Cartel Court may be appealed to the Austrian Supreme Court acting as Supreme Cartel Court. In principle, the review by the Supreme Cartel Court is limited to questions of law.

Law stated - 13 January 2022

UNILATERAL CONDUCT

Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

The Austrian Act of Improvement of Local Supply and Competitive Conditions – the Fair Competitive Conditions Act (FCCA) contains rules on unilateral conduct that apply also to non-dominant firms. The aim of the FCCA is to protect competition on the merits and a structure of competition characterised by a multitude of small and medium-sized undertakings (see Supreme Cartel Court in Bayrisches Sägerundholz I , 16 July 2008).

Section 1 of the FCCA generally prohibits conduct that is likely to jeopardise merits-based competition, in particular rebates or conditions that are not objectively justified. In addition, section 1(3) of the FCCA establishes that breaches of the prohibitions contained in articles 3 to 12 of the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services by providers of online intermediations services and providers of online search engines are also prohibited by section 1(1) of the FCCA.

Section 2 of the FCCA prohibits discrimination on price or conditions that are not objectively justified. Section 4 of the FCCA provides an obligation to contract if a refusal to deal would jeopardise the local supply of goods necessary for daily needs, or if it would significantly affect the competitiveness of a final retailer. Section 5a et seq prohibit certain (wholesale) trading practices in the context of the sale of agro and food products (implementation of Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain).

The scope of the prohibitions and obligations pursuant to the FCCA is largely disputed and the existing case law is very specific; recently, however, the Supreme Cartel Court considered that the provisions in the FCCA are equivalent in substance to the respective provisions in section 5 of the Austrian Act against Cartels and other Restrictions of Competition – the Cartel Act 2005 (CartA) (Fachverband Reisebüros v Lufthansa , 12 July 2018). Infringements of the prohibitions and obligations contained in sections 1 to 4 of the FCCA are not subject to fines.

Law stated - 13 January 2022

UPDATE AND TRENDS

Forthcoming changes

Are changes expected to the legislation or other measures that will have an impact on this area in the near future? Are there shifts of emphasis in the enforcement practice?

Additional rules for intermediaries and online platforms who have a crucial position for the customers and suppliers on their respective markets have been introduced with the latest amendment of the Cartel Act, for example, additional assumptions of relative dominance or the possibility for the authorities to apply for a finding of a dominant position, thus paving the way for easier and faster proceedings regarding specific conducts. The practical effect of those amendments remains to be seen.

The FCA has launched a sector inquiry into the electric mobility market, including the expertise of E-Control, the Austrian energy regulator.

Law stated - 13 January 2022

Jurisdictions

Australia	Gilbert + Tobin
Austria	Schima Mayer Starlinger
Belgium	Cleary Gottlieb Steen & Hamilton LLP
Brazil	Mattos Filho Veiga Filho Marrey Jr e Quiroga Advogados
Bulgaria	Wolf Theiss
Canada	Baker McKenzie
China	DeHeng Law Offices
Denmark	Bruun & Hjejle
Ecuador	Robalino
European Union	Cleary Gottlieb Steen & Hamilton LLP
France	UGGC Avocats
Germany	Cleary Gottlieb Steen & Hamilton LLP
Greece	Nikolinakos & Partners Law Firm
Hong Kong	Eversheds Sutherland (International) LLP
India	Shardul Amarchand Mangaldas & Co
Indonesia	ABNR
Ireland	Matheson
Italy	Rucellai & Raffaelli
Japan	Anderson Mōri & Tomotsune
Morocco	UGGC Avocats
Nigeria	Streamsowers & Köhn
Norway	Advokatfirmaet Thommessen AS
Poland	Linklaters LLP
Portugal	Gómez-Acebo & Pombo Abogados
Saudi Arabia	Al Tamimi & Company

Slovenia	Odvetniska druzba Zdolsek
South Korea	Yoon & Yang LLC
Spain	.
Switzerland	CORE Attorneys Ltd
Turkey	ELIG Gurkaynak Attorneys-at-Law
United Kingdom	Cleary Gottlieb Steen & Hamilton LLP
USA	Cleary Gottlieb Steen & Hamilton LLP