Austria

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1. Introductory Remarks

The digitalisation of markets has led to profound changes in the way goods and services are conceived of, produced, distributed, marketed and bought. The business model of platform markets has taken hold in the digital marketplace, and in many markets, users have become accustomed to being provided 'free' services against the payment of personal data and attention. In addition, the multi-purpose nature of data is coming to play an ever-increasing role in these markets. The advent of the digital era has not only had a profound impact on markets, but also on those areas of the law that relate to these markets, and amongst them competition law.

The present report on Austrian competition law and the digital economy addresses the manifold ways in which the Austrian legislator, the Austrian (Supreme) Cartel Court and the Austrian Federal Competition Authority (Bundeswettbewerbsbehörde, BWB) have dealt with digital markets in the recent past and what developments may lie in store for digital markets in the near future. In order to embed the Austrian experience within a broader picture, these introductory remarks highlight four trends in the application of competition law to digital markets: first, the proliferation of reports to make sense of digital markets from a competition law point of view, second, the interconnection between competition law and other legal areas applying to digital markets, third, the development of new competition law tools for digital markets and, fourth, the increased need for cooperation amongst competition authorities where digital markets are concerned.

The first trend that we have been witnessing is the wide-spread understanding that digital markets raise specific competition issues that require either an adaptation of the current competition law framework or an adapted application of our present rules. Several reports on digital competition law have been published around the globe and have provided both insights into the workings of the digital economy and options for tackling the arising competition issues. To name just a few of these reports, they include:

- Competition Law and Data (Autorité de la concurrence and Bundeskartellamt; May 2016);
- Big Data and Innovation: Key Themes for Competition Policy in Canada (Competition Bureau Canada; February 2018);
- Unlocking Digital Competition: Report of the Digital Competition Expert Panel (Jason Furman et al. for the UK Government; March 2019);
- Competition Policy for the Digital Era (Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer for the European Commission; April 2019);
- Digital Platforms Inquiry – Final Report (Australian Competition and Consumer Commission; July 2019);
- A New Competition Framework for the Digital Economy – Report by the Commission 'Competition Law 4.0' (Martin Schallbruch, Heike Schweitzer and Achim Wambach for the German Federal Ministry for Economic Affairs and Energy; September 2019);
- Digital Era Competition: A BRICS View (Ioannis Lianos and Alexey Ivanov for the BRICS Competition Law and Policy Centre; September 2019);
- Stigler Committee on Digital Platforms – Final Report (Nolan McCarty, Guy Rolnik, Fiona Scott Morton and Lior Strahilevitz for The University of Chicago Booth School of Business; September 2019);
- Joint Memorandum of the Belgian, Dutch and Luxembourg Competition Authorities on Challenges Faced by Competition Authorities in a Digital World (October 2019);
- Algorithms and Competition (Autorité de la concurrence and Bundeskartellamt; November 2019).

[1] Viktoria Robertson contributed the introductory remarks, while Gerhard Fussenegger is the author of the substantive part of this report.

- Online Platforms and Digital Advertising (UK Competition and Markets Authority; July 2020);
- Investigation of Competition in Digital Markets (US House of Representatives, Subcommittee on Antitrust, Commercial and Administrative Law; October 2020).

In June 2020, the Austrian BWB published its own *Proposition Paper on Digitalisation and Competition Law*.[2] In that note, the BWB underlines that many of the tools of 'traditional' competition law can directly be applied in the digital economy. It stresses the importance of adequate staffing and resources to enable the authority to gain technical expertise in these markets, in line with the ECN+ Directive.[3] The BWB also notes that the Austrian Cartel Act is agnostic as to whether market behaviour occurs online or offline and can therefore adequately deal with both. While Austrian merger control continues to rely on the market dominance criterion, the BWB suggests that the SIEC test (significant impediment of effective competition), as it is applied under EU merger control, may represent a more useful substantive assessment, especially in digital mergers. In the legislative proposal that is now underway, the Austrian merger control regime will be brought in line with the European SIEC test.[4]

Directly connected to the insights gathered through the digital reports on competition law, the second trend is the dawning realisation that competition law is not an island, but part of a broader set of legal rules that apply to digital markets and that, ideally, should work together in order to provide a digital environment conducive to consumer welfare (understood in a broad sense) and innovation, while at the same time respecting fundamental rights that are afforded to every individual in a liberal democratic society. This need is already appreciated by some of the legal reports; eg, the Stigler Report brings together chapters on antitrust as well as chapters on privacy, the news media and politics. In some jurisdictions, competition authorities have also relied on data protection rules in order to flesh out obligations under competition law.[5]

Following on from the first trend that strives to understand the competition issues in digital markets, and the second trend that increasingly comes to see competition law as an integral part of the broader legal puzzle, one can observe a third trend, namely competition authorities and legislators that have already moved beyond the stage of gathering intelligence on these markets: both at the European level and at many national levels, new competition tools are being developed through legislative and policy changes to address the particular competition issues and market failures that arise in digital markets. In the EU, the European Commission is now reviewing its Market Definition Notice of 1997 in an effort to bring it up-to-date with the current economic reality.[6] At the same time, the European Commission has proposed its Digital Markets Act in December 2020, through which it intends to tackle structural issues in digital platforms that act as gatekeepers.[7] In Austria, the draft Austrian Cartel and Competition Law Amendment Act 2021 ("Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021 – "KaWeRÄG 2021") is set to explicitly incorporate data as a relevant factor for the assessment of dominance, and to introduce a new declaratory procedure whereby the BWB and the Federal Cartel Prosecutor can ask the Cartel Court to declare that a company is dominant on a multi-sided digital market.[8] This new instrument at the national level is a first step in order to

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[2] For the English version, see here: BWB, https://www.bwb.gv.at/fileadmin/user_upload/Considerations_on_digitalisation_challenges_in_the_economy.pdf accessed accessed 26 August 2021.

[3] Directive 2019/1 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive), OJ 2019 L 11/3.

[4] At the time of writing, the antitrust amendment act 2021 was still awaiting approval from the first chamber of Parliament; see Kartell- und Wettbewerbsrechtsänderungsgesetz 2021 (KaWeRÄG 2021), 114/ME XXVII. GP (Ministerialentwurf).

[5] See Bundeskartellamt, Case B6-22/16, *Facebook* of 6 February 2019. Facebook's request for a suspensory effect of its appeal was initially granted by the Higher Regional Court Düsseldorf (Case VI-Kart 1/19 (V), of 26 August 2019), but subsequently denied by the German Bundesgerichtshof (Case KVR 69/19, of 23 June 2020). In March 2021, the Düsseldorf Court sent a number of questions to Luxembourg in a request for a preliminary ruling; Case C-252/21, *Facebook v Bundeskartellamt* (pending).

[6] On the evaluation, see here: European Commission, 'EU competition law – market definition notice (evaluation)' https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12325-Evaluation-of-the-Commission-Notice-on-market-definition-in-EU-competition-law accessed 26 August 2021. For the evaluation results, see European Commission, 'Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997' SWD(2021) 199 final.

[7] European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final.

[8] Kartell- und Wettbewerbsrechtsänderungsgesetz 2021 (KaWeRÄG 2021), 114/ME XXVII. GP (Ministerialentwurf), introducing a new § 28a KartG.

successfully tackle anti-competitive be haviour in digital markets, but further steps – at the national level, at the European level, or at both levels – will need to follow in order to do so successfully.

In 2017, at the same time as the German legislator, Austria introduced an additional transaction value threshold into its national merger regime (§ 9 para 4 Cartel Act 2005). This new threshold requires the notification of mergers where the value of the transaction exceeds €200m, certain (lower) turnover-based thresholds are exceeded and the acquired undertaking is active on the Austrian market to a large extent. While the European Commission does not currently consider such a legislative change,[9] the Austrian and German thresholds mean that mergers in digital markets that raise concerns could be referred to the European Commission from either country (Art 22 EUMR). It should also be pointed out, however, that contrary to widely held expectations the new transaction value threshold has so far mainly caught mergers outside of digital markets.[10]

The fourth notable trend relates to the enforcement of competition law in the digital economy: there is an increasing need for competition authorities to cooperate thanks to the particular competition issues that arise in these markets. This need for collaboration has two dimensions. On the one hand, national competition authorities are called upon to collaborate with each other in order to tackle competition issues that affect several jurisdictions, including competition investigations that span several jurisdictions. The second need for collaboration is directly related to the second trend noted above, namely that digital markets have made it especially clear that a number of interconnected legal issues – and interconnected market failures – can arise in them, relating to competition law, data protection law, democracy, sector-specific regulation, and many more. This has led to competition authorities becoming increasingly aware of the need to work together with other authorities – including data protection authorities and sector-specific regulators – in order to comprehensively tackle the challenges of digital markets.[11] This is also recognised by the BWB in its recent *Proposition Paper*.[12]

Regarding the first type of collaboration, Austria is part of the European Competition Network (ECN) that consists of the European Commission and the national competition authorities of all Member States of the European Union. The ongoing collaboration within the ECN represents an important pillar of competition law enforcement, also in digital markets. It can be expected that the implementation of the ECN+ Directive, which was due to be transposed by 4 February 2021 and is currently being implemented by the Austrian Parliament, will add to the efficiency of the ECN. The BWB also has a long-standing tradition of collaboration with the neighbouring German Bundeskartellamt. When the Austrian and the German legislators introduced transaction value-based thresholds into their respective national merger regimes, the BWB and the Bundeskartellamt together issued a Guidance Paper on how they would interpret these new provisions.[13] In 2019, the BWB carried out an investigation into Amazon's competitive behaviour towards retailers active on its Marketplace, in parallel with the German Bundeskartellamt.[14] While several of the competition concerns voiced by the two authorities are now resolved based on the P2B Regulation, which entered into force on 12 July 2020,[15] this case highlighted that competition issues relating to digital platforms are frequently not confined to one jurisdiction.

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[9] European Commission, Summary of Replies to the Public Consultation on Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control (2017) 4-7 https://ec.europa.eu/competition/consultations/2016_merger_control/summary_of_replies_en.pdf. Accessed 26 August 2021.

[10] See BWB, *Proposition Paper on Digitalisation and Competition Law* (June 2020) 6-7.

[11] On this, see for instance A. Reyna, Optimizing Public Enforcement in the Digital Single Market Through Cross-Institutional Collaboration (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529198. Accessed 26 August 2021.

[12] BWB, *Proposition Paper* 11-12.

[13] BKartA and BWB, *Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)* (July 2018) https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2. Accessed 26 August 2021.

[14] For Austria: 'BWB informs: Amazon modifies its terms and conditions' of 17 July 2020, available at https://www.bwb.gv.at/en/news/detail/news/bwb_informs_amazon_modifies_its_terms_and_conditions-1/.Accessed 26 August 2021. For Germany: BKartA, 'Bundeskartellamt obtains far-reaching improvements in the terms of business for sellers on Amazon's online marketplaces' of 17 July 2020, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html .Accessed 26 August 2021.

[15] Regulation 2019/1150 of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services (P2B Regulation), OJ 2019 L 186/57.

It is also noteworthy that the Austrian Ministry for the Economy and Digitalisation has recently proposed an amendment to the Austrian Cartel Act against the background of digital markets.[16] When kicking off its public debate on that issue, it invited two leading German individuals to join the debate: Achim Wambach, the Chairman of the Competition Commission 4.0 and then Chairman of the German Monopoly Commission, as well as Thorsten Käseberg, a leading voice in preparing the 10th German amendment of the German Competition Act that includes many new approaches to digital platforms and was ultimately passed in January 2021.[17] This highlights that not only competition authorities but also legislators have recognised the need for a converging legal framework for digital platforms.

Concerning the second type of collaboration, the BWB announced in May 2020 that it was joining forces with the national telecommunications regulator – the Austrian Regulatory Authority for Broadcasting and Telecommunications (RTR) – in order to monitor digital platforms.[18] The aim is to allow an insight into competition-related challenges that arise in these platforms. In the future, this might provide the BWB with a basis to start an antitrust investigation. At the European level, the European Data Protection Board (EDPB) has repeatedly offered its expertise on data protection to the European Commission in the case of mergers between digital platforms that may lead to data concentration.[19]

Having noted four recent trends in the application of competition to digital markets, we should bear in mind that digital markets are often highly dynamic, and competition law needs to continuously adapt to them. As the Austrian Report that follows shows, this is what the Austrian competition authority has been doing, in its cases as well as in the soft law guidance it provides. The Austrian legislator also sprang into action, adapting the Austrian merger control regime to new market environments in 2017 and proposing a further amendment to the Cartel Act in 2021. While the national advances when it comes to the application of competition law to digital markets are important building blocks that are more easily achieved than change at the European level, as we move forward it will be vital to ensure that the European Union's competition law framework and that of its 27 Member States remain in sync.

2. The Role of Antitrust Authorities Regarding the Digital Economy

2.1. Digitalization, a New Field of Law in Austrian Competition Law

The field of digitalization, e.g., the definition of digital markets (including provision of free services and platforms), criteria of market dominance (including data collection) is not explicitly mentioned in the current version of the Austrian Cartel Act ("*Österreichisches Kartellgesetz 2005*", thereafter "Cartel Act").[20]

In terms of subject matter, there had been, investigations of the BWB concerning Amazon's dual / "gatekeeper" position as merchant platform and online retailer and, in consequence, Amazon's alleged unfair trade practices against its Austrian retailers. As a consequence, Amazon agreed in a settlement with the BWB to change its terms and conditions in contracts with its retailers. The BWB published a detailed case report (see, in detail, Section 1.5. below).

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[16] Kartell- und Wettbewerbsrechtsänderungsgesetz 2021 (KaWeRÄG 2021), 114/ME XXVII. GP (Ministerialentwurf).

[17] Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer wettbewerbsrechtlicher Bestimmungen (GWB-Digitalisierungsgesetz) BGBl I 2021/1.

[18] BWB, 'RTR presents method paper on monitoring digital platforms prepared together with AFCA' of 27 May 2020, available at https://www.bwb.gv.at/en/news/detail/news/rtr_presents_method_paper_on_monitoring_digital_platforms_prepared_together_with_afca/. Accessed 26 August 2021.

[19] European Data Protection Board, 'Statement of the EDPB on the data protection impacts of economic concentration' of August 2018, available at https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_economic_concentration_en.pdf. Accessed 26 August 2021; European Data Protection Board, 'Statement on privacy implications of mergers' of 19 February 2020, available at https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_2020_privacyimplicationsofmergers_en.pdf. Accessed 26 August 2021.

[20] Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz 2005 – KartG 2005, as amended).

Furthermore, the Austrian Regulatory Authority for Broadcasting and Telecommunications ("RTR") published in May 2020 its methodology paper "Monitoring of digital communication platforms and gatekeepers of open Internet access". On that basis, the RTR is currently developing a monitoring system for digital platforms in order to cover the most important digital communications platforms used in Austria, e.g. voice and messaging apps, voice assistants, operating systems and app stores or browsers. The aim of the monitoring is to provide an overview of the competitive dimension and to present an analysis of possible economically damaging developments. Central to the RTR's monitoring of platforms and their competitive assessment will be broad covering ecosystems in which different services and platforms are embedded (e.g., Facebook, which is active in social media, Online advertising, telecommunication (WhatsApp)).

The results of the monitoring process are to be shared between RTR and the BWB on an ongoing basis, thus enabling an initial competitive assessment. Subsequently, indications of competition law violations, in particular suspicions of abuse of market power, can be taken up and thus enable the RTR to initiate investigations.

In June 2020, the BWB published its thesis paper "digitalization and competition" ("Thesenpapier „Digitalisierung und Wettbewerbsrecht", "digitalization paper"). In a response to the BWB's draft "digitalization paper" (from November 2019), the Austrian section of the "Studienvereinigung Kartellrecht", an association of German-speaking attorneys, which is specialising in competition law, summarized the current status quo and recommendations concerning digitalization and its practical impacts on competition law in Austria ("Stellungnahme der Studienvereinigung Kartellrecht", 10 January 2020, "Opinion Studienvereinigung").

The KaWeRÄG 2021, which is expected to enter into force in autumn 2021,[21] refers for the first time to certain aspects of digitalization (in combination with market dominance). In essence, these cited investigations, initiatives and sources will form the basis of this Austrian report.

2.2. Austrian Competition Law and its General Approach to the Digital Economy

In the BWB's view, the essential question with regard to large technology and internet undertakings is of whether these undertakings gain unjustified advantages over their "traditional", regional or national competitors due to their "special standing". In the authority's view, the "special standing" of many digital companies and/or the advantage of large networks are based on the collection, processing, linking and transfer of user data.

The "injustice" can be based on several sources: in the BWB's view, not only antitrust law and fair trading law, but also other fields of law may be taken into account in assessing an infringement of antitrust law. Such broad approach is also backed up by the Cartel Act, "market dominance" is defined in general terms.[22] Similarly, Section 5 Cartel Act defines an abuse of dominance in very general open terms: "The abuse of a dominant position is prohibited. Such abuse may consist *in particular* of the following: […]".

Therefore, the BWB states that the existing competition law rules, which are formulated in an open and neutral manner, "*offer certain flexibility for application to new types of situations, even if the historical legislator may not have had this in mind*."[23] The BWB hereby also takes into account § 20 Cartel Act, which states that facts have to be assessed according to their true economic content and not according to their outward appearance. Furthermore, new case law in Austria, but also in the EU, is to be expected to provide guidance how to apply existing rules on new digital cases and, more fundamental, whether new antitrust issues based on digitization can be dealt with within the framework of the current Cartel Act. In this context, the BWB considers that a possible inclusion of examples in the law itself (as it has been done in Section 18 of the German GWB) or soft law instruments (e.g. Commission notices) might facilitate and speed up investigations and proceedings (while the substance of competition / cartel law as such would not be changed).

This is in line with the view of the Studienvereinigung Kartellrecht, which considers the current open wording of Austrian competition law, especially with regard to market dominance and abuse of dominance, of being sufficient with regard to upcoming digital cases:

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[21] Currently, a more accurate date cannot be specified as the Austrian Federal Council („Bundesrat"), the second house of the Austrian Parlament, voted on 15 July 2021 against the draft KaWeRÄG 2021 . It is expected that the first house of the Austrian Parlament, the National Council („Nationalrat"), which adopted the draft KaWeRÄG 2021 on 8 July 2021, will overrule the Federal Council's refusal to approve in autumn 2021.

[22] Cf, § 4 Cartel Act: "For the purposes of this Federal Act, an undertaking shall be deemed to be dominant if, as a supplier or buyer (1) is not exposed to any or only insignificant competition, or (2) has a superior market position in relation to the other competitors."

[23] Digitalization Report, p. 4.

Concerning digital markets and dominance, the Studienvereinigung hereby refers to the European Commission's case practice, following which also the provision of free services - a business model that is increasingly encountered especially with regard to digital platforms - can constitute a market (with the consequence that companies may have a dominant position in the provision of free services).[24] Furthermore, the Studienvereinigung stresses the fact that following the Commission's practice, it is acknowledged that, e.g., direct and indirect network effects and related economies of scale, customer usage patterns (e.g. multi-homing or single-homing), switching costs and access to data can be taken into account, when examining market dominance of digital undertakings. [25]

Concerning abuse of dominance, the Studienvereinigung states that various proceedings of the EU Commission with regard to undertakings active in digital markets are based on "traditional" concepts of an abuse. E.g., the practices investigated by the European Commission in the Google Android case can be traditionally classified as an abuse based on tying and exclusivity clauses (specifically with regard to the exclusive pre-installation of Google search by manufacturers of mobile devices).[26] Also in this regard, in the Studienvereinigung's view, legal standards of the Cartel Act do not have to be changed, at least at this stage. Further development of the decision-making practice of the European Commission in particular and the case law of the ECJ should be awaited.[27]

The author agrees with such an approach as suggested by the BWB and the Studienvereinigung. There seems to be no actual need to amend the respective Cartel Act's legal clauses in Austria, at least in substance. This does not only affect the current law concerning market dominance and abuse of dominance, but also illegal coordination according to Art 101 para 1 TFEU and its Austrian national equivalent, § 1 Cartel Act. E.g., as concluded in the "Joint Working Paper - Algorithms and Competition" of the French Autorité de la concurrence and the German Bundeskartellamt of November 2019,[28] the contemporary legal framework, in particular Art. 101 TFEU and its accompanying jurisprudence, allows competition authorities to address possible competitive concerns with a certain spectrum of cases involving algorithms. Following this paper, it currently remains open, whether algorithms could independently engage in behaviour that resembles explicit forms of collusion.

Only if an evaluation of new cases will prove that the existing Austrian law is not or only insufficiently capable in dealing with new questions and challenges of digitalization, the legislator would be obliged to change or supplement the existing law. Therefore, close and prompt monitoring by competition authorities and the legislator must be guaranteed. As an additional value for the present time being, the BWB's proposed publication of soft law, e.g., guidelines, which reflect the authority's status quo in dealing and investigating in new digital cases, should be implemented.

However, as mentioned, the KaWeRÄG 2021 now includes specific criteria in assessing market dominance, which refer to the digital market:

§ Section 4 (1) Austrian Cartel Act

"For the purposes of this Act, a dominant undertaking shall be an undertaking which, as a supplier or demand
[..]
2. has a superior market position in relation to the other competitors; in this context, particular account shall be taken of its financial strength, relations with other undertakings, opportunities for access to procurement and sales markets, *the importance of its intermediary services for the access of other undertakings to procurement and sales markets, access to competitively relevant data, the benefits derived from network effects,* and the circumstances restricting market access for other entrepreneurs."
Furthermore, the KaWeRÄG 2021 also edits the legal definition of "relative market dominance", which – following precedents – exists in existing vertical relationships, "*if the customers are dependent on the maintenance of the business relationship in order to avoid serious economic disadvantages*."[29]

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[24] The Opinion Studienvereinigung hereby refers, inter alia, to the decisions of the European Commission case AT.40099 – Google Android; case AT.39740 – Google Search (Shopping) and, concerning Merger Control, COMP/M.8124 – Microsoft/LinkedIn; COMP/M.7217 – Face-book/WhatsApp; COMP/M.6281 – Microsoft/Skype and GC, case T-79/12 *Cisco Systems and Messagenet/Commission*, ECLI:EU:T:2013:635.
[25] Opinion Studienvereinigung, paras 22 ff.
[26] European Commission, case case AT.40099 – *Google Android*.
[27] Opinion Studienvereinigung, paras 25 ff.
[28] Available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_Working-Paper.pdf?__blob=publicationFile&v=5. Accessed 19 September 2021.
[29] *See* Austrian Supreme Cartel Court ("KOG"), case 16 Ok 4/20d, *Büchl/Peugeot*.

Following § 4a KaWeRÄG, even potential customers now can claim "relevant dominance" towards undertakings which act as an intermediary in a multi-sided digital market. The new § 4a KaWeRÄG reads as follows (new edits of the KaWeRÄG 2021 in *italic*):

"An undertaking which has a superior market position in relation to his customers or suppliers shall also be deemed to have market dominance; such a position exists in particular if the latter are dependent on the maintenance of the business relationship in order to avoid serious business disadvantages. *An undertaking which acts as an intermediary in a multi-sided digital market shall also be deemed to have a dominant market position if the customers of his intermediary services are dependent on the establishment of a business relationship in order to avoid serious business disadvantages*."

Lastly, as mentioned in the introductory remarks,[30] § 28a KaWeRÄG introduces a new declaratory procedure whereby the BWB and the Federal Cartel Prosecutor can ask the Cartel Court to declare that a company is dominant on a multi-sided digital market.

It will have to be seen if, and if yes, how these new legal provisions will be applied in practice.

E.g., concerning "relative dominance", it remains to be seen, whether also potential customers can claim / prove that they will be "*dependent on the maintenance of the business relationship in order to avoid serious economic disadvantages*." Furthermore, the new declaratory procedure of § 28a KaWeRÄG will, if the respective request is successful, only result in a declaratory dominance for the moment of the judgment itself. For the time being, it remains unclear, how (potential) customers of these declared dominant undertakings can claim any rights at a later point of time. Also the defending rights of the then declared dominant undertakings are not defined in detail yet.

Leaving aside changes in subject matter, in view of the long duration of administrative proceedings and subsequent court proceedings on the one hand and the rapid changes in digitization on the other, the question arises as to whether there is an actual need to modify procedural law and/or interim legal protection already now. The digital economy is characterised by strong 'winner takes most' effects, whereby an accumulation of large amounts of data often generates an incontestable competitive advantage within short time and entry barriers for competitors.

Concerning interim relief, such possible modification must be balanced with the predicament of interim legal protection, i.e., the urgency and the interest of security on the one side and the rights of defence and the threat of massive interference with the business activities of the company concerned on the other side. Such conflict of interests is especially intensified in the digital sector, where allegations against big tech undertakings are based on complex technical and economic backgrounds, which usually require a detailed and long-lasting investigation, even before deciding on interim measures.

In its digitalization paper, the BWB, which is not established as a decision authority (but has the exclusive right[31] to initiate fine proceedings in front of the Cartel Court) suggests to complete the already existing provisions on interim relief by the Cartel Court in the Cartel Act (which do require proof of the conditions for prohibition, but do not request a proof of imminent irreparable damage), by introducing decision deadlines and/or presumption rules and thus make it easier / more practicable for the courts to issue interim injunctions.[32] The Studienvereinigung rejects the BWB's proposed amendments in this regards, as, in its view, the (procedural and material) thresholds for interim relief in Austria are already low as compared to other jurisdictions (however, as outlined above, also the low thresholds of interim relief in Austria cannot avoid that imposition of interim reliefs may take too long, especially in complex cases).

In recognizing that time constrains might be of crucial importance concerning cases concerning the digital economy, the Studienvereinigung encourages to strengthen the legal power of the Cartel Court by also accepting requests for withdrawal with regard to imminent threatening and not only already on-going infringements.[33]

In order to facilitate its investigations, the BWB further suggests introducing a reversed burden of proof in the Cartel Act (possibly in combination with instruments of interim relief) if there is a prima facie case of abusive or

[30] See Section 1 above.
[31] Together with the Federal Competition Attorney („Bundeskartellanwalt") as the second official competition authority in Austria.
[32] Digitalization Report, p.8 ff.
[33] Opinion Studienvereinigung, p. 22.

unfair conduct and if the facts are difficult for an applicant to understand or where investigations of authorities reach their natural or technical limits. In this case, the BWB suggests that it would be up to the companies to explain, using their data, why a certain practice or conduct does not have anti-competitive effects.

Although reasonable from an authority's point of view, the Studienvereinigung doubts whether such reversal of the burden of proof is justified. It hereby mainly refers to the principle of presumption of innocence, as established in EU law and in precedents of the ECHR.[34] Even though introduced, the level of the burden of proof must not be excessive or unrealistic in order to rebut that presumption.[35] Undertakings concerned must have the practicable opportunity to rebut the presumption.

It also has to be noted, that in Austria, contrary to, e.g., the EU, there is already a legal presumption of market dominance included in the Cartel Act. If the market share thresholds of § 4 (2) and (2a) Cartel Act are triggered[36], it is on the undertaking or undertakings (if there is an alleged collective dominance) concerned to prove that it is (or they are) not dominant on the respective market.

2.3. Austrian Competition Law and Data Protection, Compared to the German law and Practice

As outlined above, in the BWB's view, the "special position" of many digital companies and/or the advantage of large networks is based on the collection, processing, linking and transfer of user data. In assessing a respective infringement of antitrust law, the BWB, besides applying antitrust and unfair competition law, hereby generally states that it might base its legal assessment also on other legal sources. It hereby explicitly refers to the handling of and compliance with data protection regulations such as the GDPR. Although these aspects "*are not to be dealt with or solved by the competition authorities, they may well be included in the antitrust investigation as factors affecting the market position of a company*."[37]

So while Austria has its own data protection authority[38], (breach of) data protection as such may be also taken into account by the Austrian competition authorities. It therefore seems to be undoubted that the BWB might also find that terms and conditions which are referring to data collection result in an anti-competitive conduct, especially an abuse of dominance.

Concerning the specific combination of data collection and a potential abuse of dominance in undertaking's general terms and conditions, no case precedents in Austria exist. Concerning general terms and conditions in general, the BWB's whole settlement with Amazon (see Section 1.5.) was based on changing Amazon's terms and conditions (e.g., by abolishing Amazon's free, irrevocable, unlimited, worldwide right of use of the materials provided by Sellers). Some Amazon retailers furthermore complained that in some cases Amazon requested information on the retailer's purchase prices and supplier information. However, based on retailer's feedback, it was unclear whether such information was mandatory required by Amazon. Amazon argued that disclosure of purchase prices of marketplace traders were only required exceptional cases, where it was necessary to examine the authenticity of a product or where there had been a disagreement about the amount of the refund. The BWB acknowledged in general that Amazon might have objectively justified reasons to request such information in exceptional cases. The BWB therefore did not investigate any further into this subject.

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[34] ECJ, case C-74/14, *Eturas*, ECLI:EU:C:2016:42, para 38; ECHR 14 February 2019, case 5556/10, *SA Capital Oy v Finland*, paras 65 ff.

[35] ECJ, case C-74/14, *Eturas*, ECLI:EU:C:2016:42, para 41.

[36] Following the law (§ 4 (2) Cartel Act), an undertaking is considered of being rebuttable single dominant if it has a market share of i) at least 30% or ii) more than 5% and is exposed to competition from a maximum of two undertakings or iii) has a market share of more than 5% and is one of the four largest undertakings on this market with a combined market share of at least 80%. An undertaking is considered of being rebuttable collective dominant law (§ 4 (2a) Cartel Act), if the undertakings concerned i) have a combined market share of at least 50 % and consist of maximum three undertakings, or ii) have a combined market share of at least two thirds and consist of maximum five undertakings.

[37] Digitalization Report, p. 10.

[38] The Austrian data protection authority ("Datenschutzbehörde") ensures compliance with data protection in Austria. Austria was one of the first European states to have a data protection authority. The Data Protection Commission was created by the first Data Protection Act, Federal Law Gazette No. 565/1978. The EU Data Protection Directive 95/46/EC was implemented in Austria by the Data Protection Act 2000 (DSG 2000). With 25 May 2018, the Basic Data Protection Regulation (DSGVO) and the revised Data Protection Act (DSG) form the basis of Austrian data protection law.

In general, there are precedents of the Supreme Cartel Court, following which general terms and conditions of dominant undertakings can be considered as an abuse (cf, 16Ok46/05, concerning postal deliveries, i.e. a "traditional sector"): "*The abuse of a dominant position within the meaning of § 5 para. 1 no. 1 Cartel Act may in particular consist in the demand for purchase or sales prices or other terms and conditions which deviate from those which would very probably result from effective competition (16 Ok 1/20p)*".

2.4. Assessment of Market Power and the Relevance of Network Effects in Digital Markets

So far, no guidelines concerning competition law in digital markets in general and concerning market power of networks and platform in particular exist in Austria.

As with regard to market power, the BWB refers in its digitalization paper to the wording of the Cartel Act (§ 4 KartG), which leaves a broad scope of discretion when examining the existence of a dominant position. In the BWB's view, (all) circumstances which restrict market access for competitors of large technology and internet firms, e.g., "*network effects, barriers to switching, access to user data, etc*." can be taken into account when assessing dominance. Furthermore, the BWB stresses that already on a very general level, § 20 KartG states that facts are to be assessed according to their true economic content and not according to their outward appearance ("economic approach").

Therefore, the difficulties in applying the existing antitrust rules on new digital cases are thus likely to result less from the lack of appropriate legal clauses than from the fact that enforcement is not as developed as well as in "traditional" business segments. In the authority's view, the legal request to provide reasonable evidence for the alleged antitrust infringement in "digital" cases regularly causes much higher efforts as compared to "traditional" antitrust infringements.[39]

2.5. Amazon and the General Definition and Concept of a "Platform"

As mentioned, there exists no legal definition of (or soft law concerning) platforms in Austria. Some general remarks concerning the authority's approach towards platforms can be derived from the BWB published case study of its Amazon investigation and settlement. [40]

In the BWB's view, defining platforms as "one-sided" markets is insufficient with regard to Amazon's online trading platforms; rather, they are to be understood as "two- or more general as "multi-side" markets. Whether multi-sided markets should be defined as separate markets for the respective user types or as a single market, remains open. However, the authority refers to the fact that in any case interdependencies between the individual market sides should be considered.

The lower the prices and the higher the number and diversity of the products offered on Amazon's website are, the higher customer's demand is. On the other side, based on the increase of number of customers, the demand of the marketplace retailers (4,500 Austrian retailers as per 2018) to sell their products via Amazon will increase as well (following the BWB's case study, in average, Austrian retailers, which are active on Amazon, achieve 64% of its revenues on sales via the Amazon platform).

Adjacent business fields, e.g., Amazon's PRIME subscription, enables paying customers to receive PRIME goods quickly and free of charge, while retailers can distribute their goods as PRIME and store and ship their goods using Amazon's logistics service.

While not finally defining the relevant market for online trading platforms, the BWB preliminary assumed that the market for online trading platforms does neither include brick and mortar shops, nor retailer owned webshops. The latter differ significantly from Amazon's offering in terms of the functionality offered to the retailer (assumption of essential distribution tasks by the platform). In addition, by using a platform, the retailer also acquires the brand trust placed in it, an essential asset compared to an own web shop or a stationary shop. Whether this applies to the same extent to other online trading platforms with related functionality (e.g. Ebay, Rakuten, Zalando) could not be conclusively assessed by the BWB on the basis of the available data from the survey.

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[39] Digitalization Report, p. 5.

[40] BWB, *Fallstudie Amazon.de Marktplatz*, 2019, https://www.bwb.gv.at/fileadmin/user_upload/Downloads/standpunkte/BWB_Amazon-Fallbericht_20190717.pdf. Accessed 10 September 2021.

Also in geographical terms, the definition of the relevant markets was left open. Criteria which refer to a national market (or at least a separate market for Austria and Germany) were, e.g., the stronger focus of Austrian retailers on Austrian customers and structural factors such as differences in delivery times. On the other side, the similarly strong demand on Amazon.de in Germany and Austria and the fact that Austrian retailers achieve 75% percent of its Amazon turnover with German customers could indicate that the geographic scope of the market is a broader than national.

Although not finally defining the relevant market, BWB's retailer survey showed that for a representative sample of larger Austrian marketplace retailers Amazon.de has market power[41]. This conclusion is based on, inter alia, the retailer's answers that there are hardly any relevant alternatives to reach their customers, that most retailers would be prepared to accept 5-10% price increases from Amazon, that a large percentage of all retailers sells exclusively on Amazon.de and that other sales channels such as web shops, stationary sale and other online trading platforms only contribute a small share of sales.

In substance, Amazon agreed in settlement talks with the BWB to change its terms and conditions in its contracts with retailers, inter alia, with regard to the following clauses:

- Termination or suspension of the contract at any time with immediate effect, without giving reasons;
- Irrevocable, unlimited, worldwide right of use by Amazon of the materials provided by Sellers;
- Indemnification/compensation of Amazon by dealers only in the event of violations of the law, not already in the event of merely alleged breach of contract;
- Amendment of the terms and conditions only after at least 15 days after notification;
- No other Jurisdiction than Luxembourg;
- Extensive disclaimer or indemnity of liability regarding storage in the "Shipping through Amazon" program.

2.6. Can there be an Antitrust 'Market' for Free Services?

The Cartel Act, contrary to Germany[42], , does not explicitly refer to markets for free services. However, it seems to be undisputed, that also in Austria a definition of the relevant market and therefore also market dominance could be based on free services.

E.g., in the BWB's guidance on Transaction Value Thresholds[43] it is stated that "despite the absence of monetization, an activity could conceivably still have market orientation" if, inter alia, "a service is offered free of charge but is monetized in a different way".

Furthermore, as mentioned above, the BWB, in its Amazon case study, stated that Amazon is active on "multi-side" markets, an approach, which is also chosen in order to confirm the existence of markets for free services. Last, there are precedents in EU law, which confirm markets for free services with regard to both, antitrust and merger control purposes.[44]

2.7. Online Advertising

So far, the BWB has not initiated sector inquiries concerning online advertising. In general, traditional media undertakings (publishing houses, free tv channels), but also traditional advertising undertakings claim that online advertising more and more suppresses traditional advertising in print titles or in free tv. Following such comments, the previous approach which defines separate product markets, e.g., for advertisement in newspapers, magazines, classified ads or in free tv would be arguably too narrow.

Therefore, a possible focus of a sector inquiry could target advertising customers and request information whether, from their point of view, separate forms of advertising (including print and online advertising) are viewed as substitutes to each other or whether, from the point of view of advertisers, there is at least a competitive pressure from online advertising on traditional forms of advertising such as print or TV advertising. Media undertakings

[41] Case report, p. 8. The BWB hereby followed the European Commission's recommendation that concerning two-sided markets it is essential to focus on the theory of harm and less on a market definition.
[42] Cf, § 18 (2a) GWB.
[43] Prepared and published together with the German Bundeskartellamt, available at https://www.bwb.gv.at/fileadmin/user_upload/Downloads/standpunkte/2018-07_Guidance_Transaction_Value_Thresholds.pdf.
[44] See European Commission, AT.40099 – Google Android; AT.39740 – Google Search (Shopping); or – concerning merger control - COMP/M.8124 – Microsoft/LinkedIn; COMP/M.7217 – Face-book/WhatsApp.

could be asked whether their print advertising gets more and more substituted by online advertising on their web-presence.

Based on the feedback from the market received, one could ask whether the market definition of advertising markets must be eventually broadened in consequence of the significant impact of online advertising on the total advertising market and its differing advertising segments.

2.8. Best Price Clauses and Most-favoured Nation Clauses

In 2015, the BWB settled its investigations on booking.com and Expedia. Unlike the later quashed decision of the German Bundeskartellamt, the BWB accepted that Booking.com and Expedia operate so-called narrow most favored nation (MFN) clauses (or best price clauses) on its hotel booking platform. I.e., booking platforms were allowed to oblige hotels in Austria not to offer better prices or conditions on their own internet sites. The narrow MFN clauses were considered to be justified in order to prevent hotels from "free riding" which might occur if potential guests find hotels via the booking platform and then book the rooms at better prices on the hotel's own website.

On the other side, booking and Expedia offered and agreed on not to oblige the hotels on broad MFN clauses, which would prohibit the latter to offer better prices through other sale channels, including phone calls, other hotel portals etc.

The Austrian Supreme Cartel Court stated in its grocery "Spar" decision (and therefore concerning a traditional, non-digital economy) that most-favoured nation clauses, e.g., a customer obliging its supplier to dispose of its goods to other customers not at lower prices, generally infringe Article 101(1) TFEU (the Supreme Court did not refer to the vertical Block Exemption Regulation 330/2010, which covers such clauses)[45]. In the author's view it seems to be undoubted, that such approach can be also applied on dominant undertakings and/ or on content providers, also with regard to digital markets. However, also dominant undertakings may use MFNs if it is justified on objective reasons (such as the prevention of free-riding in the above mention booking platform cases).

2.9. Network Cooperations in the Telecommunication Sector

So far (and besides case-related investigation in filed merger transactions), network cooperation as such has not been made subject to a sector inquiry of the BWB.

In general, the responsible authority is RTR, which is established by Austrian law. Its core mandate is to promote competition in the broadcasting, telecommunications and postal markets as well as to achieve the goals set out in the KommAustria Act and the Telecommunications Act. RTR also serves as an administrative agency, providing support to the Austrian Communications Authority (KommAustria), the Telekom-Control-Kommission (TKK) and the Post-Control-Kommission (PCK). Furthermore, the RTR offers alternative dispute resolution services, which can also be provided via its officially recognized consumer arbitration centers.

In its role as the administrative agency of the TKK, RTR is active in matters including the regulation of competition, managing broadcasting frequencies, spectrum awards, approving providers' terms of business, net neutrality and the electronic signature system. RTR's activities on behalf of the PCK specifically involve postal service points, providers' terms of business, regulation of competition and legal supervision.

However, as clearly defined by precedents and the law, any approval of the tariff by RTR does not necessarily mean that the tariff is admissible under competition law (cf. 16Ok13/08 h, 16 Ok 4/11 and also § 2 (4) Telecommunication Act ("TKG")). Therefore, e.g., the BWB, but also undertakings in private enforcement are entitled to initiate proceedings against undertakings which rely on approved tariffs by the RTR.

2.10. Abuse without Dominance?

In Austrian competition law enforcement, there seems to be a broad range of legal sources, following which undertakings can be pursuit for unilateral behaviour without necessarily having a dominant market position (based on market shares).[46]

[45] KOG, case 16 Ok 2/15b.

[46] In detail concerning Austria's approach on dominance and abuse, but also alternative legal concept, where dominance is not necessarily requested for pursuing an abuse, reference can be made to the national Austrian LIDC report, G. Fussenegger, F. Schuhmacher and R. Tahedl, Abuse of Dominant Position and Globalization &

In its above-mentioned Amazon investigations, the BWB did not finally define the relevant market. Nevertheless, the authority - "regardless of the market definition ultimately chosen" - came to the conclusion that Amazon has market power towards its Amazon retailers. In a footnote, the authority hereby refers to the Commission. When analysing multi-faceted markets, the Commission apparently[47] advises to focus less on a precise market definition, but rather primarily on a plausible damage theory.

Furthermore, pursuant to Section 4(3) of the Cartel Act, an undertaking is also deemed to be dominant if – regardless of its market shares - it has a predominant position in relation to its customers or suppliers. This is the case in particular when customers and suppliers are obliged to maintain business relations with the dominant company in order to avoid serious economic disadvantages.[194]

In addition to the cartel law regulations concerning the abuse of a market-dominant position the Austrian Act on Local Supply (Federal Law on Improvement of Local Supply and Competitive Conditions, hereinafter "Act on Local Supply")[48] includes provisions on "good business behaviour" ("*Kaufmännisches Wohlverhalten*"). According to the general clause in Section 1 (1) Act on Local Supply business practices between any undertakings among each other (thus, despite the title of the Act, not only undertakings involved in local supply) can be interdicted (by the Cartel Court) as far as they are likely to threaten the performance-related competition.

Pursuant to Section 1 (2) Act on Local Supply such behaviour are particularly the "*offering or requesting, granting or accepting of money or other benefits, also of discounts or special conditions, among suppliers and retailers that are not objectively justified, especially if the additional benefits are not offset by appropriate compensation*". This provision was created primarily to counteract the "tapping" of suppliers by market-powerful companies on the demand side. It can be seen as a supplement of the cartel law-prohibition of abuse and does not require the undertaking concerned to hold a market-dominant position (the Austrian Supreme Cartel Court left open whether at least a certain amount of market power was required.)[23]

Section 2 Act on Local Supply provides for a ban on discrimination similar to Section 5 (1) No. 3 Cartel Act (*disadvantaging of contractual partners in the competition by applying dissimilar conditions to equivalent transactions* – which is corresponding to Article 102 TFEU), whereby a market-dominance, again, is not required: *(1) Who, in spite of the same conditions prevailing as a supplier grants or offers different conditions to authorized resellers without objective justification, can be claimed for cease-and-desist. (2) In the same way also a reseller can be claimed for requesting or accepting objectively unjustified conditions from suppliers.* In this context, "condition" actually stands for "price" (including the granting of discounts), thus, judicial practice so far has focused on unjustified price discrimination.

Another notable provision is Section 4 (1) Act on Local Supply which refers to the abuse of a market-dominant position by refusal to deal: According to this provision, undertakings who usually deliver to final sellers may be obliged to conclude a contract, if the non-supply would threaten the local supply or would significantly affect the competitiveness of the final seller on the market of the type of goods not supplied.[49] The Austrian Supreme Court recently stated that if behaviour of a market dominant undertaking is objectively justified (and therefore does not constitute an abuse of dominance), this behaviour must be also justified under the Act on Local Supply (16Ok1/18k).

Protection and Disclosure of Trade Secrets and Know-How, In LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition, Springer 2017, pp 27-44, by Mag.

[47] In its source, the BWB does not refer to Commission's practice, but to a publication, i.e., S. Wismer, and A. Rasek, Market definition in multi-sided markets, OECD 2017, pp. 4 f., available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2017)33/FINAL&docLanguage=En.

[194] *See, e.g.*, KOG, case 4 Ob 214/97t, *Filmverleihgesellschaft I*; Austrian Cartel Court, case 25 Kt 48, 49/99, *Leiner/Kika/Michelfeit*.

[48] Nahversorgungsgesetz, NahVersG, BGBl. (Federal Law Gazette) No. 392/1977 as last amended by BGBl. No. 50/2012.

[23] *See* KOG, case16 Ok 3/08, *Sägerundholz*.

[49] See also Section 3 Act on Local Supply (which corresponds to Section 6 Cartel Act), which provides that proceedings pursuant to Sections 1 and 2 Act on Local Supply may not be taken as a reason by the defendant to exclude the undertaking affected (by a conduct as defined by those provisions) from further supply or demand on reasonable conditions.

The Austrian Act Against Unfair Competition (Federal Law Against Unfair Competition)[50], constituting the substantial regulation of the Austrian law on unfair practices, does not include any provision which would expressly refer to the exercise of market power or the abuse of a market-dominant position like the ban on abuse does in the Cartel Act. However, as can be seen from case-law, abusive exercise of market power may well (under certain circumstances) constitute a violation but of this law, since various conducts of market-powerful companies such as tapping of suppliers, discriminative practices, refusal to supply and certain exclusivity obligations have been repeatedly considered as unfair business practice within the meaning of the general clause of Section 1 Act Against Unfair Competition or Section 1a Act Against Unfair Competition (aggressive commercial practices). Furthermore, according to the jurisdiction relating to the case law group of "breach of law" an infringement of the prohibition of the abuse of a market-dominant position stipulated in Section 5 Cartel Act can also be considered as "other unfair practice" within the sense of Section 1 (1) No. 1 Act Against Unfair Competition. Pursuant to Section 2 (1) No. 7 Competition Act (Federal Law on the Establishment of a Federal Competition Authority)[51] the Austrian Federal Competition Authority[52] ("Bundeswettbewerbsbehörde", "BWB") is entitled to claim for injunctive relief under the Act Against Unfair Competition.

Lastly, the Austrian Telecommunications Act[53] includes provisions relating to "undertakings with significant market power"[54]. These articles state that under specific conditions such undertakings can be obliged by the regulatory authority to stop certain practices, as there are in particular (cf. Section 43 (2) Austrian Telecommunications Act): Excessive pricing, hampering the entry of new market participants, predatory pricing to eliminate competition, inappropriately preferring certain end users or unjustifiably bundling services.

2.11. Consumer Protection

Until the beginning of 2020, the BWB was the responsible independent Austrian authority for Cooperation of EU Authorities in Consumer Protection (Consumer Authorities Cooperation Act - VBKG). Within this cooperation the BWB was entitled to remedy intra-EU (cross-border) infringements of certain relevant consumer protection rules that harm collective interests (i.e., interests of a large number of consumers).

At the request of a requesting authority, the BWB had to take all necessary enforcement measures to bring about a cessation or prohibition of the intra-Community infringement without delay or, at the request of the requesting authority, had to provide all relevant information necessary to establish whether an intra-Community infringement has occurred or whether there are reasonable grounds to suspect that such an infringement might occur. The BWB hereby could file civil court claims against undertakings for an injunction against a suspected intra-Community infringement. In addition, the Federal Competition Authority could obtain a cease-and-desist order.

However, as of 17 January 2020, the new Regulation 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection lawscame into force. Since the national law, which grants these cooperation rights to the BWB, exclusively refers to the old EU Regulation 2006/2004, the BWB lost all its authority to act in these matters as of 17 January 2020.

[50] Bundesgesetz gegen den unlauteren Wettbewerb 1984 - UWG, BGBl. (Federal Law Gazette) No. 448/1984 as last amended by BGBl. I No. 49/2015.
[51] Bundesgesetz über die Einrichtung einer Bundeswettbewerbsbehörde (Wettbewerbsgesetz - WettbG), BGBl. (Federal Law Gazette) I No. 62/2002 as last amended by BGBl. I No. 129/2013.
[52] Bundeswettbewerbsbehörde (BWB).
[53] Telekommunikationsgesetz 2003 - TKG, BGBl. (Federal Law Gazette) I No. 70/2003 as last amended by BGBl I No. 44/2014.
[54] Pursuant to Section 35 (1) Telecommunications Act an undertaking is considered having a significant market power, if this undertaking either alone or together with other undertakings holds such a strong economically position, that it has the possibility of acting, to a considerable extent, independently of its competitors, its customers and ultimately the consumers.