

## AUSTRIA, NATIONAL REPORT, QUESTION A, LIDC 2019

Author **Gerhard Fussenegger**, LL.M. (King's College, London),  
Partner bpv Hügel Rechtsanwälte Brussels / Vienna  
(with special thanks to Michal Truszczynski, Associate bpv Hügel)

### Preliminary Remark

*Austria is part of the European Union and therefore also bound by EU Competition law, if trade between Member States may be affected. However, as all national reports from EU Member States have such a background, the Austrian report, in the following, will exclusively focus on Austrian law and precedents. Only complimentary, reference will be also made to the respective equivalents of EU competition law.*

### I. The notion of discrimination in national / regional substantive competition legal framework

The term discrimination is variously reflected in Austrian legal provisions and respective case precedents.

#### I.1. Competition Law Provisions

The wording of the respective provisions of the Cartel Act is identical with the equivalent clauses of the Treaty on the Functioning of the European Union ("TFEU", cf., Art 101 (1) d. and Art 102 c TFEU). Therefore, also concerning the interpretation of the Austrian Cartel Act, reference can be made to Art 102 TFEU and the respective EU case law (Supreme Cartel Court, 16 Ok 11/04).

- Antitrust Law

Concerning discrimination and antitrust provisions, reference can be made to § 1 (2) 4 of the Austrian Cartel Act ("*Österreichisches Kartellgesetz 2005*", thereafter "*Cartel Act*")<sup>1</sup>, following which all agreements, decisions by associations of undertakings and concerted practices, which "*apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*" are prohibited.

So far, § 1 (2) 4 of the Cartel Act, has not been applied in practice in Austria, therefore also Austrian legal commentary refers to EU precedents (based on Art 101 1 (d) TFEU).<sup>2</sup> A typical example would be an illicit coordination between a supplier and some of its retailers regarding the granting of a rebate scheme or other benefits in a discriminating manner. Further examples of discrimination covered by this clause could be standardisation and granting access to Intellectual Property agreements under FRAND terms. Finally, also different and unsubstantiated treatment in vertical selective distribution system<sup>3</sup>, different price and terms & condition (including tying)<sup>4</sup>, geographical discrimination based on customer location (geo-blocking)<sup>5</sup>, and online sale discrimination<sup>6</sup> could be arguably covered by this special norm.

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<sup>1</sup> Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz 2005 – KartG 2005, as amended).

<sup>2</sup> Gruber, *Österreichisches Kartellrecht*<sup>2</sup>, p. 101 para. 4.

<sup>3</sup> Gugerbauer, *KartG und WettbG Kommentar*<sup>3</sup>, p. 55 para. 112.

<sup>4</sup> Reidlinger und Hartung, *Das österreichische Kartellrecht – Ein Handbuch für Praktiker* (4), p.94 et seq. (for horizontal) and Gugerbauer, *KartG und WettbG Kommentar*<sup>3</sup>, p. 54 et seq. (for vertical).

<sup>5</sup> Petsche, *Urllesberger und Vartian, Kartellgesetz*<sup>2</sup>, p. 39 para. 110; Gruber, *Österreichisches Kartellrecht*<sup>2</sup>, p. 101, para. E, Z4; 16Ok1/18k (16Ok2/18g); <https://www.bwb.gv.at/verbraucherbehoerdenkooperation/geoblocking/>.

<sup>6</sup> <https://gettingthedealthrough.com/area/41/jurisdiction/25/vertical-agreements-austria/>

Furthermore, irrespective of dominance, at least based on the wording of the law, also unilateral behavior can result in an antitrust infringement. According to § 1 (4) Cartel Act, recommendations (and therefore unilateral behavior) on adherence to prices, price limits, calculation guidelines, trading margins or discounts, which have the object or effect of restricting competition, are to be considered as an antitrust infringement unless explicit reference is made to the non-binding character of the recommendation, in the implementation of which no economic or social pressure is exercised.<sup>7</sup>

- Abuse of dominance

The Austrian concept of market dominance and abusive practices is very similar to those contained in Article 102 TFEU, however, there are also national specifics, which, in difference to EU law, have to be taken into consideration.

Concerning dominance, § 4 (1) of the Cartel Act states that an undertaking is dominant on a particular market if it (i) is exposed to no or only insignificant competition, or (ii) has a predominant market position in relation to other competitors. In this regard, financial strength, relations to other undertakings, access to suppliers and markets as well as entry barriers for other undertakings have to be taken into consideration.<sup>8</sup>

Notably, the Austrian concept of dominance also refers to “relative dominance”. Pursuant to Section 4 (3) of the Cartel Act, an undertaking is also deemed to be dominant if it has a predominant position in relation to its competitors, 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. Furthermore, the Cartel Act contains several presumptions of market dominance.<sup>9</sup> Where one of these presumptions is fulfilled, the burden of proof is shifted to the undertaking allegedly dominant, which has to then prove that the requirements for the existence of a dominant position are not met.

With regard to abuse of dominance, § 5 (1) 3. Cartel Act explicitly states that a prohibited abuse of dominance arises if “*dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*” are applied by the dominant undertaking(s). § 5 (1) 3. Cartel Act does not provide an exhaustive list of instance. The clause is to be, applied, e.g. (i) when a dominant undertaking imposes different prices to its customer, which are in comparable situation, for equivalent goods or services, (ii) offers different terms & conditions for its goods or services, or (iii) when a dominant firm is a buyer/customer for equivalent goods or services and offers its suppliers

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<sup>7</sup> Recently, there had been doubts raised in an obiter dictum decision of the Supreme Cartel Court (“Kartellobergericht”), whether also recommendations under § 1 (4) Cartel Act must at least have some minimal effects in order to exercise “economic pressure” as requested by law. The Supreme Cartel Court denied this requirement with regard to a bonus of only 1.5%, which was granted to retailers, who took over the supplier’s recommended retail prices as the factual retail price (16 Ok 1/13).

<sup>8</sup> Since the 2013 amendment also two or more undertakings are considered to hold a (collective) dominant position, if there is no significant competition among them and if they, as a whole, fulfil one of the preconditions set out in Section 4 (1): (i) either not facing significant external competition or (ii) enjoying a predominant market position. As stated in the travaux préparatoires, this new provision was introduced in order to take account of recent trends with regard to collective dominance.

<sup>9</sup> Section 4 (2) of the Cartel Act lays down three presumptions of single market dominance. According to this provision, an undertaking is presumed to be dominant if it: (i) has a market share of more than 30%; or (ii) is exposed to competition from not more than two other companies and has a market share of more than 5%; or (iii) is one of the four largest undertakings which together have a market share of at least 80%, provided that it has itself a market share of more than five percent of the relevant market. Further, Section 4 (2a) of the Cartel Act stipulates that a dominant position is also presumed where up to three undertakings hold together a market share of at least 50% or where up to five undertakings have a market share of at least two thirds of the market.

different considerations (rewards). More specifically, examples of discriminatory behaviour might cover margin squeeze, lack of objective criteria in qualitative selective distribution system, geographic discrimination, refusal to supply and denied access to an essential facility (for details, see Section II of this report).

As confirmed by case precedents, § 5 (1) 3. Cartel Act protects only actual customers, while potential customers of the dominant undertaking are not covered by this legal norm (cf., 16 Ok 1/12 and, with regard to EU law, C -7/97, Bronner/Mediaprint, para. 30). However, the general “abuse of dominance prohibition” clause in § 5 (1) Cartel Act encompasses also the refusal to supply towards potential contract partners. If, therefore, the dominant undertaking has already entered into a contract with others, a discriminatory refusal to enter into a business relationship with a suitable third party may result in an infringement of § 5 para 1 Cartel Act.

In terms of different types of abuses, § 5 (1) 3. Cartel Act encompasses “primary line” as well as “secondary-line” (although not explicitly laid down) of abusive discriminatory conducts.<sup>10</sup> Nevertheless, so far, the primary object of the investigations and court proceedings were secondary line abusive conducts.

- Act on Local Supply / NVG

In addition to cartel law, the Austrian Act on Local Supply (“*Nahversorgungsgesetz*”, “Federal Law on Improvement of Local Supply and Competitive Conditions”, thereafter “NVG”)<sup>11</sup> includes provisions on “good business behaviour” (“*Kaufmännisches Wohlverhalten*”). In difference to § 5 Cartel Act, which prohibits abuse of dominance (see above), the NVG also applies to behaviour of non-dominant undertakings.

According to the general clause in § 1 (1) NVG, business practices between undertakings (despite the title of the “Local Supply” Act, the NVG does not only concern undertakings involved in local supply) can be interdicted as far as they are likely to threaten the performance-related competition.

Moreover, § 2 (1) and (2) NVG provide for a ban on discrimination similar to the above cited § 5 (1) 3 Cartel Act, namely:

*“(§ 1 (1) NVG) 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. “(§ 1 (2) NVG) In the same way also a reseller can be claimed for requesting or accepting objectively unjustified conditions from suppliers”.*

Another notable provision of the NVG is § 4 (1). According to this provision, undertakings who usually deliver to retailers 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 respective market.<sup>12</sup>

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<sup>10</sup> Gugerbauer, KartG und WettbG Kommentar<sup>3</sup>, p. 204 para. 1; Petsche, Urlesberger, Vartian, Kartellgesetz<sup>2</sup>, p. 135 para. 23, 24; “Fairnesskatalog für Unternehmen Standpunkt für unternehmerisches Wohlverhalten“ available at [https://www.bwb.gv.at/fileadmin/user\\_upload/BWB\\_Fairnesskatalog\\_final.pdf](https://www.bwb.gv.at/fileadmin/user_upload/BWB_Fairnesskatalog_final.pdf); 4 Ob 60/09s para. 4. 2.

<sup>11</sup> Nahversorgungsgesetz, NahVersG, BGBl. (Federal Law Gazette) No. 392/1977 as last amended by BGBl. No. 50/2012.

<sup>12</sup> See also § 3 NVG (which corresponds to § 6 Cartel Act), which provides that proceedings pursuant to § 1 and 2 NVG 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.

- Antitrust, Soft Law

Concerning soft law, the Austrian Federal Competition Authority ("*Bundeswettbewerbsbehörde*", thereafter "FCA") published in October 2018 a "Fairness Catalogue for Enterprises – Point of View for Corporate Good Behaviour" ("*Fairnesskatalog für Unternehmen, Standpunkt für unternehmerisches Wohlverhalten*", thereafter "Catalogue").<sup>13</sup> The declared aim of the (legally-non binding) Catalogue is "*above all to create awareness of fair behaviour*" and to "*provide comprehensive guidance on how to proceed when affected by unfair business practices*".

Although the Catalogue mainly focuses on other unfair corporate behaviour such as the "*the refusal to conclude in writing contracts*", "*the unilateral retroactive amendment of contractual obligations*" or "*demanding payments or other monetary benefits without appropriate consideration*", reference is also made to the fact that "*discrimination*" (in pursuit of unfair purposes, use of illicit means or if otherwise contrary to the law) might be considered as an unfair corporate behaviour.

## **I.2. Unfair Competition / UWG**

§ 33 d (1) of the Austrian Unfair Competition Act („Gesetz gegen den Unlauteren Wettbewerb“, thereafter “UWG”)<sup>14</sup> refers to the fact that those who do not comply with the non-discriminatory provisions of Articles 3 to 5 of the EU’s Geoblocking Regulation (Regulation 2018/302<sup>15</sup>), commit an administrative offence and will be fined by the district administrative authority with a fine of up to 2900 €.

However, also in general, discrimination might be considered to infringe the general clause in § 1 of the UWG, following which "*Anyone who in the course of business resorts to an unfair commercial practice or another unfair practice, which is likely to distort not only insignificantly [=materially] the competition to the detriment of enterprises [...] may be sued for a cease-and-desist order and in case of fault for payment of damages*". In this regard, in case 4Ob60/90s, the Supreme Court stated that a dominant undertaking, which abuses its dominance based on the prohibition of discrimination and hereby interferes with competition at its own economic level and, consequently, impairs the competition of other undertakings within the meaning of Section 1 (1) (1) UWG (4Ob60/09s).

## **I.3. EU-Regulations**

Besides the EU’s Geoblocking-Regulation, which already in its title refers to "*unjustified geo-blocking and other forms of discrimination*", various other regulations of the EU refer to the prohibition of discrimination.

For instance, Regulation No 1008/2008 on common rules for the operation of air transport services, prohibits discrimination on grounds of nationality, residence or place of establishment of the travel agent. Its Article 23 (2) states that "*access to publicly available fares and rates for air services from an airport situated in the territory of a Member State to which the Treaty applies must be granted without discrimination as to the nationality or place of residence of the customer or the place of establishment of the air carrier's agent or other ticket vendor within the Community*".

## **1.4. Civil Law**

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<sup>13</sup> Catalogue only available in German, cf., [https://www.bwb.gv.at/fileadmin/user\\_upload/BWB\\_Fairnesskatalog\\_final.pdf](https://www.bwb.gv.at/fileadmin/user_upload/BWB_Fairnesskatalog_final.pdf)

<sup>14</sup> Bundesgesetz gegen den unlauteren Wettbewerb 1984 – UWG (as amended)

<sup>15</sup> The Geoblocking-Regulation (EU) 2018/302 prohibits discrimination against consumers and, in limited cases, against businesses, based on their nationality, place of residence or establishment when they buy goods or services.

Lastly, also under general civil law aspects, the principle of contractual freedom applies (cf., 4 Ob 214/97t) meaning that it is at the discretion of undertakings whether and with whom they wish to contract. However, again, in exceptional cases, there is a general "obligation to contract", where the factual "superiority" of one participant enables him to apply in practice a "determination" over others. Furthermore, also in civil law, the obligation to conclude a contract is also affirmed where a monopolist exploits its position in an immoral manner by refusing to conclude a contract. However, even a monopolist is not obliged to conclude every contract desired by a third party; he could rather refuse to conclude a contract based on objectively justified reasons (cf., SZ 44/138; SZ 59/130).

Generally, an infringement of competition law and therefore also an abuse of dominance, is considered to be an offence against common decency. If such an abuse is based on an agreement, the respective clause is therefore void also according to civil law (cf § 879 (1) ABGB).

## II. The notion of discrimination in practice by competition authorities / courts

### II.1. Public Enforcement

The FCA was established in 2002. Together with the Federal Cartel Prosecutor ("*Bundeskartellanwalt*", "FCP"), the FCA is exclusively entitled to apply for a fine at the Cartel Court. Since 2002, there had been only 4 cases, in which undertakings got fined for abuse of dominance. Notably, the most recent decision is from 2009.

Year	Undertaking concerned / Case number	Fine
2009	Telekom Austria 29 Kt 4/09	1.500.000
2007	Europay Austria (Zahlungsverkehr) GmbH 27 Kt 20,24,27/10, 16Ok4/07	7.000.000
2006	Constantin (Filmverleih) 26 Kt 10/08, 16Ok3/06, 16Ok20/04	150.000
2004	Telekom Austria (Tiktak/Minimumtarif) 2004 16 Ok 12/04	500.000

While the 2009 decision is not published, out of the remaining 3 decisions, the only one referring to "discrimination" is the "Constantin Filmverleih" decision from 2006 (the Supreme Cartel Court ruled on the same facts already in 2004). The other abuse of dominance decisions referred to margin squeeze<sup>16</sup> (which, of course, can be also considered of being a "discriminatory" abuse in a broader sense) and tying agreements.<sup>17</sup>

- Constantin (Filmverleih)

Constantin's refusal to supply third party multiplex cinemas (or supply them too late) with copies of films was considered to be an abuse of dominance. Constantin, a film distributor, which was also vertically integrated on the Austrian market with its own cinemas, was fined in the amount of € 150,000. According to the Cartel Court, Constantin's market dominance on the market of the "middle segment" films, i.e. with regard to films classified between "blockbuster" and niche film, was especially based on § 34 Abs 2 KartG 1988 (now § 4 Abs 3 KartG 2005), following which an undertaking, which has a "superior" market position in relation to its customers is also considered to be dominant if, in

<sup>16</sup> Telekom Austria AG (the former public monopolist) hereby offered a tariff system to its end customers, which, financially, could not be reproduced by Telekom Austria's competitors (which were forced to buy upstream input from Telekom Austria). Telekom Austria was considered of abusing its market dominance and, therefore, a fine of € 500,000 was imposed.

<sup>17</sup> In 2007, the Supreme Cartel Court imposed a fine of €7 million on Europay, the Austrian licensee of today's Mastercard system, for infringement of Art 101 and 102 TFEU. Europay concluded an agreement with its shareholders (banks) that made investments by its shareholders in competing payment system subject to its approval and committed its shareholders to charge users of competing payment systems with too high fees.

particular, the customer is dependent on the maintenance of the business relationship in order to avoid serious economic disadvantages.

Constantin's strategy consisted of a refusal to supply (or a very short-term commitment) to supply third party multiplex cinemas without any objective justification. While avoiding the term "discrimination", the Court hereby referred to the fact that monopolists and dominant undertakings have an obligation to contract, unless the refusal is based on objectively justified reasons. Consequently, the Court, by cease and desist order, ruled that the refusal of Constantin to supply films (or the supply of films under different conditions as for its own cinemas) was only possible if objectively justified. The mere reference to the supply of its own rental revenues was not however considered to meet this requirement.

## II.2. Private Enforcement

As outlined above, public enforcement concerning fines of abuse of dominance is quite limited. However, Art 102 TFEU (and § 5 Cartel Act) has been variously applied in public enforcement actions in Austria, not only in proceedings in front of the Cartel Court, but also in front of the Civil Courts.

In several of these proceedings, the alleged abuse of dominance was based on discrimination. While only proceedings initiated by public enforcement can result in a fine, not only the competition authorities, but also any undertaking having a legal or economic interest may apply to the Cartel Court to (i) order a dominant undertaking to cease and desist from abusing its dominant position (including an obligation to actively take steps), (b) in certain cases order the restructuring of an undertaking or (c) hold that there has been an abuse of a dominant position.

Based on private enforcement, the legal approach concerning discrimination, as defined by case precedents, in order to fulfil a discriminatory abuse can be summarized as follows:

In substance, a dominant company/monopolist is not obliged to (a) contract and to (b) apply similar conditions to all of its buyers. However, discrimination and/or refusal of a dominant undertaking are considered to be an abuse of dominance unless an undertaking can objectively justify its application of different conditions to its trading partners (cf, 16 Ok 1/12). In this regard, it is thus necessary to identify dissimilar conditions imposed to equivalent transactions that create a disadvantage in competition in order to characterize and possibly sanction discriminatory behaviour. On the other hand, the unequal treatment of different situations is not considered to be a prohibited discrimination. Accordingly, the differentiation of conditions vis-à-vis business partners is justified, if these business partners differentiate in terms of objective standards and essential characteristics (16 Ok 1/03).

For the purpose of establishing discrimination, the courts and authorities in Austria generally apply the same test as under EU law.<sup>18</sup> The equivalence is thus established by examining (i) the comparability of contractual partners, (ii) whether services/products offered are comparable and (iii) possible objective justification.<sup>19</sup> Comparability hereby depends on whether services/products can be regarded as interchangeable from the point of view of the opposite side of the market. To this end, it is indispensable that the respective products or services belong to the same relevant product and geographic market.<sup>20</sup> The anti-competitive effect occurs where (a) certain undertaking(s) is/are at competitive disadvantage vis-à-vis others.<sup>21</sup>

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<sup>18</sup> Gugerbauer, KartG und WettbG Kommentar<sup>3</sup>, p. 230 para. 63.

<sup>19</sup> While, concerning specific types of abuses, such as rebates, refusal to deal, etc, Austrian courts apply the specific test to these practices; cf., Gugerbauer, KartG und WettbG Kommentar<sup>3</sup> p. 227, 232, 233 para. 58-60, 68-70.

<sup>20</sup> Gugerbauer, KartG und WettbG Kommentar<sup>3</sup>, p. 230 para. 63.

<sup>21</sup> 4 Ob 60/09s.

- Objective justification

Objective justification, has been, inter alia, based on the following reasons:

- Substantial differences in the consideration (payment) of the customers – difference in the time of performance and in the costs and the quality.<sup>22</sup>
- A refusal to supply was considered to be admissible if the goods in question are not available in sufficient quantity. In such case, even a dominant company is not obliged to distribute the available quantity evenly among all customers, but is entitled to favour regular customers over occasional customers (see, e.g., 16 Ok 23/04, which also refers to the ECJ decision C-77/77, B. P. v Commission [1978] ECR 1513 para. 29-34).
- Furthermore, larger discounts to customers of the Austrian Post concerning delivery of postal goods, which were based on a better “mix” of distribution areas i.e. which also include more cost-covering areas, were objectively justified and therefore did not qualify as an abusive discrimination (16 Ok 9/04).
- A refusal to supply might be also objectively justified for subjective reasons i.e., reasons related to the person/undertaking, whose supply was refused; precedents hereby refer for example to insolvency, belated payments, serious breaches of contractual obligations or business damaging behaviour combined with a loss of trust (cf, 16 Ok 22/97). Similarly, a limit to the obligation to contract might result from the suitability/eligibility of the party initiating the transaction to carry out the transaction (16 Ok 1/12).
- A refusal to supply might be also based on the limited capacities of the dominant company (16 Ok 1/12).
- The discrimination of requesting a bank guarantee from an undertaking which is planning to enter the market and waiving such a request towards an undertaking, which had been for years successfully in business relations with the dominant undertaking, is objectively justified (16 Ok 1/03).
- The refusal to offer direct supply to undertakings outside the monopolist’s distribution network can also be objectively justified. Furthermore, as Independent repairers or other independent market participants are not burdened with the costs incurred by authorised repairers as a result of the objective criteria of their qualitative selection, these different circumstances must be taken into account in the remuneration and conditions (16 Ok 1/15f).
- In a recent judgement, different production, transport and marketing costs were named as a possible justification for discrimination by a dominant undertaking (16 Ok 1/18k).

- Discriminatory abuse in § 5 (1) 3 Cartel Act

Concerning the special discriminatory abuse provision in § 5 (1) 3 Cartel Act, until today, there were only few cases brought in front of the courts.<sup>23</sup> In this regard, the most often occurring (alleged)

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<sup>22</sup> N. Gugerbauer, KartG und WettbG Kommentar<sup>3</sup> p. 230 para. 63.

<sup>23</sup><https://www.ris.bka.gv.at/Ergebnis.wxe?Abfrage=Justiz&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&AenderungenSeit=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=&VonDatum=&BisDatum=05.06.2019&Norm=kartg+%C2%A75+Abs1+Z3&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Position=1>.

discriminatory practices is price discrimination<sup>24</sup>, discriminating terms & conditions,<sup>25</sup> discrimination against access to, for instance, technical data and the supply of spare parts as compared to the manufacturer's authorised network distributors.<sup>26</sup> The facts of some of the Court decision, where a discriminatory abuse was confirmed, can be summarized as follows:

- (16 Ok 1/18k). In 2018, based on a cease and desists claim of the association of Austrian travel agencies, the Supreme Cartel Court prohibited Lufthansa from charging Austrian travel agencies higher prices than for travel agencies located outside Austria, for otherwise equivalent booking enquiries (with regard to route, booking time and ticket category/transport class) for the Graz-Frankfurt route. The Court considered this discrimination of being an abuse of dominance based on the specific discriminatory abuse according to § 5 (1) (3) Cartel Act. Notably, the discriminatory pricing was applied by GDS, an independent booking platform. However, the Court found that Lufthansa unlawfully refrained from putting pressure on GDS to charge the same prices. In the Court's view, dominant companies may naturally protect their own interests, but only by means of market-conform means.
- (4 Ob 60/09s). In a civil proceeding in front of a civil court, the market leader on the Austrian market for lawyer software (whose products were then used by approx. 55% of all law firms) was found to abuse its dominant position by charging different prices to its customers, inter alia, dependent on whether the respective law firms used software of a smaller competitors, in which case these law firms had to pay significantly lower prices for the products of the market leader.
- (9Ob66/07g). In another civil proceedings, the alleged discriminatory abuse of dominance according to § 5 (1) (3) Cartel Act by the port of Vienna was rejected on factual grounds, as passenger tariffs were the same for passengers on all cabin ships, while only non-cabin ships benefited from significantly lower tariffs.
- (16 Ok 1/12). ÖBB, the Austrian former monopolist train operator, was considered of abusing its dominance by not including the train schedule of Westbahn, a private train operator, into its published (online and hard copy) train schedule information (while, e.g. the train schedule of Deutsche Bahn was included). As Westbahn was only a potential customer, the abuse was not based on the alleged specific discriminatory abuse according to § 5 (1) 3 Cartel Act, but the general clause embedded in § 5 (1) Cartel Act (and Art 102, first sentence , TFEU).
- (16Ok1/15f). A car manufacturer refused to supply spare parts and technical information, which was needed in order to provide servicing and repair for motor vehicles. The refusal was however considered to be justified because (i) the potential buyer, a garage, was outside the selective distribution system of the manufacturer (allowing discriminatory supply as compared with garages within the selective distribution), (ii) there were reasonable supply alternative possibilities and (iii) there was access to all spare parts and technical information needed via the supplier's distribution network.

- Remedies

Any abusive conduct has to be remedied by the least possible intervention in the position of the customers.<sup>27</sup> In general, the common remedies applied are injunctions (including interim injunctions<sup>28</sup>)

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<sup>24</sup> 16Ok1/18k (16Ok2/18g); 4Ob60/09s; 9Ob66/07g.

<sup>25</sup> 16Ok1/12; 4Ob60/09s; Reidlinger / Hartung, Das österreichische Kartellrecht – Ein Handbuch für Praktiker (4), p.139 et seq.

<sup>26</sup> 16Ok1/15f.

<sup>27</sup> 16Ok13/08.

<sup>28</sup> 4Ob283/04b.

e.g. granting access to supply or ordering not to engage in and put an end to an abusive behaviour (an injunction can be either behavioural or, at the last resort, structural).<sup>29</sup>

In the above summarized 16 Ok 1/18k decision, Lufthansa was obliged to ensure that GDS, as a market participant, which Lufthansa uses to distribute its products, will not create anti-competitive effects by charging discriminatory prices for the same service to travel agencies (as customers of the defendant).

Remedies might also result in a withdrawal of particularly advantageous contract conditions, as agreed between dominant undertaking and its customers, if such a withdrawal is the only possibility of eliminating the effects of the abuse on the market structure (16 Ok 13/08). To this, in the Cartel Court's view, a conversion to earlier tariffs for existing customers of the dominant undertaking appears, in principle, conceivable as this is only the inevitable consequence of the discontinuation of the maintenance of abusive conditions. Such a measure also does not constitute an unjustified encroachment on the legal position of customers. In the case of a particularly serious abuse of a dominant market position, a prohibition on the application of tariffs favouring customers would also be in line with civil law, as these contracts could also be null and void under civil law, because of the particularly reprehensible circumstances in which they came into existence, namely the infringement of fundamental principles of the common market (cf. 3 Ob 115/95 = SZ 71/26).

Structural measures (which are in any case only permissible on a subsidiary basis) could result in the division of the dominant undertaking and e.g. the transfer of affected customer contracts to the new company (16 Ok 13/08).

- Per se infringement / Analysis of Effects

§ 5 Cartel Act, similarly to Art 102 TFEU, is not based, in *stricto sensu*, on a per se prohibition. It is always possible to rebut an allegation by, for example, an objective justification or contesting the fulfilment of the conditions for discriminatory practices.<sup>30</sup>

The more effects-based approach, especially in the event of exclusionary practices (e.g. exclusive rebates), was confirmed in the recent ECJ's Intel Judgment.<sup>31</sup> The ECJ stated that an "efficiency" defence must be applicable and therefore the Commission had to analyse "*the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking.*"<sup>32</sup> In terms of discriminatory (exploitative) practices, based on the recent ECJ judgment in Meo, the effects-based approach is equally necessary. In Meo, the ECJ confirmed that all the relevant circumstances (e.g. strategy to exclude from the downstream market a trading partner which is at least as efficient as its competitors, negotiating power, duration, the condition and arrangement for tariffs, or any other relevant interest of one or more of affected parties) need to be examined in order to determine whether price discrimination produces or is capable of producing a competitive disadvantage.<sup>33</sup>

- Act on Local Supply / NVG

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<sup>29</sup> Reidlinger und Hartung, Das österreichische Kartellrecht – Ein Handbuch für Praktiker (4), p. 94 et seq. and Gugerbauer, KartG und WettbG Kommentar<sup>3</sup>, p. 217-232.

<sup>30</sup> <https://gettingthedealthrough.com/area/10/jurisdiction/25/dominance-austria/>.

<sup>31</sup> C-413/14 P (exclusionary) *Intel* ECLI:EU:C:2017:632.

<sup>32</sup> C-413/14 P *Intel*, para. 141.

<sup>33</sup> *Meo* C-525/16 ECLI:EU:C:2018:270; *Intel* C-413/14 P. Recent Meo Judgment concerned differentiated price treatment in secondary line of abuses. The effects analysis equally concerns discriminatory practices which affects competition between the dominant company and its direct competitors (primary line of abuses) as per C-209/10 *Post Denmark*.

As mentioned above in Section I.1., the NVG is a remarkable, supplementary and far reaching special act, which aims to improve local supply and competitive conditions. It is of particular importance since it allows the prosecution of unfair practices and agreements (*e.g.* discriminatory prices) even where no market dominance can be established. This has been confirmed by the Supreme Cartel Court, which left open, whether at least a certain amount of market power of the undertaking acting unfairly was required.<sup>23</sup>

In § 2 NVG it is stated that suppliers, which offer different conditions to its “commercially authorized resellers” (“gewerberechtlich befugte Wiederverkäufer”) in equivalent situations and without objective justifications, can be addressees of an injunctive relief claim from discriminated resellers. In addition, Section 3 prohibits any non-delivery as a retaliatory measure in reaction to a respective injunctive relief claim invoked by discriminated resellers.

Based on § 2 , there had been an (in)famous decision of the Supreme Cartel Court (16 Ok 3/08) following which the Bavarian state forests, based on a cease and desist order submitted by the Austrian association of sawmills, had to terminate long-lasting supply agreements with Bavarian (!) sawmills based on the fact that the respective price level was more than 5% under the prices in comparison to what other buyers (amongst them Austrian sawmills) had to pay.

The essential question in that case was the definition of the term “commercially authorized resellers”. The Court of First Instance referred to standards of Commercial Law and defined “resellers” accordingly as undertakings which purchase goods with the aim of reselling them within the framework of a trade. Therefore, the Court of First Instance considered the sawmill business of not being covered by the definition of the term of reseller. Consequently, the Court of First instance rejected the application of the NVG.

However, the Supreme Cartel Court reversed the judgment of the Court of First Instance. It stated that “commercially registered resellers” are defined as all undertakings which are not final consumers but resell purchased goods, even if the respective goods have been processed (the Supreme Cartel Court hereby also referred to its decision 16 Ok 8/00, whereby it had already applied the prohibition of discrimination laid down in § 2 of the NVG to an industry recycling company, even though that company was neither a “commercially registered reseller” nor a trader). By including all undertakings which resell their (also processed) goods under the term “commercial reseller”, the scope of the prohibition of discrimination under § 2 of the NVG has been therefore widely defined.

In a more recent judgment, the Supreme Cartel Court stated that § 2 only applies, if different conditions are granted (without objective justification) between actual customers. Therefore a total refusal to supply to a potential customer cannot be subsumed under this Article, (16Ok1/15f).

Furthermore, § 4 of the NVG obliges wholesalers to deliver to retailers, if otherwise the local supply is threatened or the competitiveness of the retailer in the market concerned would be essentially limited. In 2015, SportsDirect tried to oblige Asics to continue its supply of running shoes, inter alia, based on § 4 of the NVG (16 Ok 12/13). However, the Supreme Cartel Court, by referring to the fact that the obligation to contract based on § 4 has to be exercised restrictively, rejected this claim. It argued that sports shoes cannot be assessed as necessary goods for daily living, so that their lack of availability would endanger local supplies. Moreover, in the Court’s view, a significant impairment of competitiveness, by refusal of further deliveries, cannot be assumed, if the non-delivered goods only accounted for a small proportion of the turnover of the relevant type of goods of (here) SportsDirect (which procured 10% of its running shoes from Asics).

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<sup>23</sup> See Case No. 16 Ok 3/08, *Sägerundholz*.

### III. Objective justifications to discriminatory practice

As mentioned above, the general approach is that an unequal treatment of different situations is not considered to be a prohibited discrimination (16 Ok 1/03). For reasons which can be applied, in order to confirm “different situations” and therefore justify discrimination, a reference can be made to Section II above.

Following legal commentaries (see also the reference above to the ECJ Meo judgment, C-525/16), for example, (price-) discrimination can be justified, if this measure promotes competition e.g. in the case of special introductory offers.<sup>34</sup> However, in the author’s view, such discrimination is again based on a different basis (e.g. by comparison of a product, which has been successfully introduced and a product, which will be introduced on the market). Once conditions are considered to be the same, and once, e.g. retailers get supplied by the dominant undertaking, it is not possible to justify discriminatory practice anymore.

An interesting case dealt, inter alia, with the question, whether a dominant undertaking, which, without objective justification, refuses to include a potential retailer meeting all qualitative selection criteria in his selective distribution network, abuses its dominance per se (as in this case, the discrimination would be based on an equivalent basis besides the fact that the potential retailer is not a customer yet). Following the Supreme Cartel Court (16 Ok 1/15f), as a consequence of such refusal, the selective distribution system is no longer qualitative, but quantitative. According to the Court, this does not automatically result in an infringement. However, the Supreme Cartel Court does not provide any specific guidance, under which circumstances a dominant undertaking can rely on such justification for discrimination. In the author’s view, in this case, a defense based on efficiency would be admissible (cf., Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty).

In another decision, the Supreme Cartel Court, again, generally refers to the fact that if a potential customer is discriminated by the dominant undertaking, which selectively supplies to others and refuses to enter into a commercial relationship with the potential customer, such conduct may be anti-competitive under the general abuse clause and may give rise to an obligation to contract (16 Ok 1/12).

### IV. Objectives justifying the prohibition of discriminatory practices

In Austria, based on the general reference that abuse of dominance is prohibited, the justification in order to prohibit discrimination is quite stereotypical. Repeatedly, reference is made to, inter alia, discriminatory conduct, which may influence the “structure of a market in which competition is already weakened” precisely because of the presence of the undertaking in question and which impedes the maintenance of competition still existing on the market or its development through the use of means which deviate from the means of normal product competition. Furthermore, the conduct may likely to have “negative effects on market and competitive conditions” (cf. 16 Ok 1/12, 16 Ok 6/08).

Notably, the fact that the responsible regulatory authority has approved the respective conduct (e.g. tariffs) does not preclude the monopolist to abuse its dominance; proceedings before the regulatory authority and antitrust proceedings do not affect each other. However, a regulatory approval might be considered as a mitigating factor in antitrust proceedings (cf. 16 Ok 11/03).

Concerning “Fairness”, the Supreme Cartel Court accepts that dominant undertakings take decisions, which are deemed to be necessary to safeguard their business interests. However, these measures

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<sup>34</sup> Gugerbauer, KartG und WettbG Kommentar<sup>3</sup>, Verlag Österreich, Wien, 2017, p. 232, para. 67.

must be “fair” and proportionate (cf, 16 Ok 12/03). Furthermore, abuse might be also assessed on the basis of fairness (which, in itself, is considered a legal and not a factual question, 16 Ok 23/04). However, no further explanations in terms of how to assess fairness are provided.

## **VI Future of the prohibition of discriminatory practices / concept of an abuse of dominance as such**

It is inherent in the provisions of the TFEU relating to competition, that each economic operator must determine independently the policy which he intends to adopt on the common market (cf, CJEU, AC Treuhand, C-194/14, para. 32). Such independence must be of course qualified, if it comes to unilateral behaviour of dominant undertakings, as such dominant undertaking is acting on a “weakened” market.

However, even in this case, there are strong arguments that a (dominant) undertaking must have some margin concerning its unilateral market behaviour.

For instance, in the European Commission’s view, *“any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property”*. Therefore, an obligation to supply *“may undermine undertakings” incentives to invest and innovate and, thereby, possibly harm consumers. The knowledge that they may have a duty to supply against their will may lead dominant undertakings — or undertakings who anticipate that they may become dominant — not to invest, or to invest less, in the activity in question. Also, competitors may be tempted to free ride on investments made by the dominant undertaking instead of investing themselves. Neither of these consequences would, in the long run, be in the interest of consumers.*<sup>35</sup>

Following such an approach, Courts regularly do stress that dominant undertakings are not subject to any obligation to enter into contracts (16 Ok 23/04). However, in fact, such independence concerning refusal to supply or discrimination is strictly limited; it can only be justified, if there are objective reasons.

In Austria, such concept is even substantially broadened as (i) the concept of a “relative dominance” is legally inherent (see above, Section I.) and (ii) the NVG, in its § 2 and 4, also prohibits discriminations and refusal to supply even if the undertakings concerned are not dominant (see above, Section I. and II.).

As regards the NVG, as a consequence of the above cited “sawmill” decision, where the Supreme Cartel Court, based on § 2 of the NVG, obliged the Bavarian state forests, by means of a cease and desist order, not to discriminate Austrian sawmills as compared to a Bavarian one (for details see Section II., above), legal commentaries in 2008 predicted an “endless” application of this provision, since it was assumed to oblige “all” foreign suppliers to apply globally the same terms and conditions to its buyers (at least as long as some of them were Austrian).<sup>36</sup> However, interestingly enough, such broad concept did, in fact, not result in a high number of abuse of dominance proceedings, let alone infringement and/or fine decisions in Austria.

Recently, there had been judgments, which limited the scope of the NVG. Furthermore, on the EU Level, the EU Courts (as in the Intel judgment) clearly reconfirmed the effects approach which is also, generally, accepted by Austrian precedents (cf, e.g. 16 Ok 14/04), following which, in general, courts, when examining an alleged abuse of dominance, will have to carefully weigh conflicting interests (16 Ok 14/04).

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<sup>35</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para. 75 (2009/C 45/02).

<sup>36</sup> Cf, Reidlinger, Nageler, Gleichbehandlungszwang für Alle? Weg mit dem Nachversorgungsgesetz, ÖZK 2009, p. 47.

The Austrian (but also the EU) legal system therefore seems to have a well-balanced judicial system, which, on the one side, has clear and strict rules in limiting monopolists and, on the other side, based on an effects approach, competitive conduct of a monopolist does not have to result – per se – in an abuse.

Concerning the “digital revolution”, it has to be seen, whether this traditional legal concept concerning abuse of dominance (which, in its basis, refers to the 1950s) is sufficient or must be adapted accordingly. The European Commission so far is trying to apply traditional legal standards, e.g. with regard to market definition, also to new, digital based issues (cf, the EU Commission’s abuse of dominance proceedings against Google). In this respect, also the Austrian authorities have currently initiated proceedings against Amazon (concerning its so called “gatekeeper” function)<sup>37</sup> and also negotiated with Eyeo and Google certain contractual provision concerning Eyeo’s whitelisting.<sup>38</sup>

However, the Commission does not strictly trust on traditional standards. For example, the 2019 report “Competition Policy for the digital era” by Crémer, Montjoye and Schweitzer, which was commissioned and is now evaluated by DG Competition, is a valuable first step in assessing the limits and possible necessity for amendments based on the digital revolution. Furthermore, especially with regard to discrimination, the adoption of specific EU regulations applicable to the digital sector (e-commerce and geo-blocking) will be of practical relevance in the future.

In this perspective, although criticised, inter alia, by the EU Commission, the decision of the German Bundeskartellamt, which prohibits Facebook from combining user data from different sources based on an (alleged) abuse of market dominance in the market for social networks, has been welcomed by various stakeholders. In its decision, the Bundeskartellamt tried to follow new concepts by prohibiting Facebook’s digital conduct. In this regard, the Bundeskartellamt defined Facebook’s abuse in violating the European data protection rules to the detriment of users (the case is now under appeal). It will be seen however whether, in the view of the courts, such legal developments/new concepts are based on solid grounds.

Moreover, in June 2019, the Higher Regional Court in Düsseldorf ruled that Booking.com, although having market share above 30%, may oblige its cooperating hotels with narrow best-price clauses; a decision that, after some years, aligns the legal approach to narrow parity clauses with the majority of other Member States providing legal certainty and coherency.

Therefore, it seems clear to state that authorities in the EU and in Austria take the challenge to investigate and initiate proceedings also with regard to the new digital economy. Traditional legal standards are hereby taken as basis on which new concepts are tested or will be considered. Following the incredible speed of the changes caused by the digital economy, it might be doubted whether legislators and competition authorities in executing law can react in time. However, such fear concerning a “digital tsunami” is not limited to competition law, since this is equally affecting different areas of our society as such. At least concerning competition law, also based on the speed of the digital evolution, it can be predicted that it will be seen very soon whether the legal standards of competition law as such are sufficient or whether competition law as such has to be changed fundamentally.

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<sup>37</sup> [https://www.bwb.gv.at/news/detail/news/ermittlungsverfahren\\_gegen\\_amazon\\_eingeleitet/](https://www.bwb.gv.at/news/detail/news/ermittlungsverfahren_gegen_amazon_eingeleitet/).

<sup>38</sup> [https://www.bwb.gv.at/news/detail/news/googleeyeo\\_aendern\\_ihre\\_vertragsklauseln\\_bei\\_adblockern\\_ermittlungsverfahren\\_wurde\\_eingestellt/](https://www.bwb.gv.at/news/detail/news/googleeyeo_aendern_ihre_vertragsklauseln_bei_adblockern_ermittlungsverfahren_wurde_eingestellt/).