



Annual Report on Competition Policy Developments in Austria 2019

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Executive Summary

2019 again was an eventful year. Concerning investigations, 24 dawn raids were conducted in various industries. Four companies received fines of about € 1.3 million in total due to price fixing, customer allocation or exchange of sensitive information.

For the first time, dawn raids based on audio records accepted as evidence were carried out by the BWB. Furthermore, the BWB continued to investigate in close cooperation with the Public Prosecutor's Office against Corruption and the Federal Bureau of Anti-Corruption the complete clarification of all issues relating to antitrust law in the construction sector. Moreover dawn raids on the basis of cooperation with the Court of Auditors were conducted. Further investigations and proceedings for example in the construction sector are still ongoing.

Another major achievement was the modification of terms and condition of Amazon Services Europe S.à.r.l. (Amazon) based on investigations carried out by the BWB. In this case, the BWB dealt with a large number of individual complaints by marketplace traders as well as concerns regarding the provisions of the Amazon terms and conditions. The revised terms and conditions are generally suitable both to essentially address stated concerns regarding individual provisions and to help keep the majority of the contested terms and conditions in the future. Amazon confirmed that and the contract changes took effect on August 16, 2019.

There is also a new record for merger notifications. 495 national mergers and 370 EU merger were notified. In 7 cases merger notifications contained misleading information or weren't notified to the BWB. As a result this undertakings received a fine of € 494.500 in total by the Austrian Cartel Court.

Another important topic was and still is transparency. Therefore, the BWB again published four guidelines regarding the Austrian Pharmacy Market, National and European Champions in Merger Control, Cartel Law and Arbitration and Intra Group Exemption. All of the published guidelines can be downloaded on the BWB's website and were well accepted by the companies.

Background

The authorities responsible for competition law enforcement in Austria are the Bundeswettbewerbsbehörde (Federal Competition Authority, BWB), the Federal Cartel Prosecutor ("FCP", jointly referred to as "the Official Parties") and the Cartel Court.

Mergers are notified with the BWB and investigated in phase I by BWB and FCP. In merger proceedings the Official Parties have the exclusive right to initiate proceedings for an in-depth review of merger cases (phase II) before the Cartel Court, which is the sole decision making body. Also in antitrust proceedings, the Official Parties have no decision-making power but are empowered to take up and investigate cases which they can bring before the Cartel Court (as can individuals and other statutory parties). Parties can however offer remedies to the Official Parties to either convince them not to open a proceeding with the Cartel Court or to withdraw their application with the Cartel Court. These remedies are binding upon the parties and non-compliance is subject to fines. Decisions by the Cartel Court may be appealed against before the Supreme Cartel Court.

1 Enforcement of competition laws and policies

While most cases were dealt with by the Federal Competition Authority BWB (BWB) and the Federal Cartel Prosecutor (FCP) jointly, some were followed only by the BWB or the FCP. The annual report of the FCP for the year 2019 can be viewed at <https://www.justiz.gv.at/home/justiz/justizbehoerden/bundeskartellanwalt~36c.de.html>. The annual report of the BWB can be found in German at: <https://www.bwb.gv.at/recht/publikationen/taetigkeitsberichte/der/bundeswettbewerb/behoerde/>

1.1 Action against anticompetitive practices, including agreements and abuses of dominant positions

a) Summary of activities

In the period under review (1 January - 31 December 2019) 39 new cartel cases were examined, leading to several dawn raids. In addition, 21 new cases concerning the abuse of a dominant market position were examined. In several cases the Cartel Court has not rendered a decision yet.

b) Description of significant cases, including those with international implications on Agreements, recommendations and sector inquiries

Ongoing investigations in the construction sector

As already reported in last years' reports, BWB launched an investigation in the construction sector after tax inspectors had found a suspicious file in a Carinthian company. The documents in the file suggested price fixing arrangements and the exchange of competition-sensitive information in connection with invitations to tender for construction projects. BWB's ongoing investigations into suspected anti-competitive behaviour in relation to construction tenders are extensive and cover a large number of differently sized construction projects.

BWB is working closely with Central Public Prosecutor for Economic Crime and Corruption (WKStA) and the Federal Bureau of Anti-Corruption (BAK) to fully resolve the issue of anti-competitive practices in the construction sector.

Ongoing investigations in submetering

In July 2019, BWB conducted multiple dawn raids in the market of submetering. Submetering includes the individual registration and billing of heating, hot water and cold water costs in buildings for private or commercial use. BWB suspected anti-competitive behavior such as agreements between companies and exchange of sensible information. The investigation and analysis of the secured evidence is still ongoing.

Amazon: revision of terms and conditions

The BWB initiated an investigation in 2019 into alleged infringements of cartel law by Amazon. The Authority had received a large number of individual complaints from marketplace sellers and also had to deal with concerns raised about some of Amazon's terms of business.

As a consequence, the BWB conducted an extensive market survey, in which a representative selection of major Austrian marketplace sellers stated that Amazon was controlling the market.

Amazon subsequently revised its terms and conditions and submitted them to the AFCA for examination. The Authority found them essentially suitable for dispelling the concerns relating to individual terms and for helping to avoid most of the practices that were being complained about. The revised terms entered into force on 16 August 2019.

A detailed case report was published at https://www.bwb.gv.at/fileadmin/user_upload/Fallbericht_20190911_en.pdf

Eyeo/Google - Adblock Plus: change of contractual terms

Since 2013, the BWB has received several complaints about the ad blocker Adblock Plus, which is operated by Eyeo GmbH based in Germany.

The free ad blocker Adblock Plus suppresses online advertising after its installation. At the same time, Adblock Plus activates the display of qualified advertising from cooperation partners who have contractually committed themselves to adhering to the criteria for acceptable advertising specified by Eyeo ("whitelisting") via a software preset. The default setting can be manually deactivated by the user. In the investigation proceedings, it was

examined in detail whether Eyeo's product design and expansion possibilities are restricted under competition law. It should be noted that the business model of the adblocker is not objected to by the BWB for reasons of antitrust law, as things stand at present.

Companies that market online advertising on their own homepages have various options to limit the effectiveness of an ad blocker and thus to limit the adverse effects on their advertising business. They can install software solutions on their websites that prompt users with installed adblockers to switch off their adblockers as soon as they access these homepages or to subscribe to an ad-free version of the homepage. In addition, it is possible to subject online advertising that meets the criteria for acceptable advertising to a whitelisting process (<https://acceptableads.com/en/get-whitelisted/>). Whitelisting is in principle accessible to the operators of homepages, advertising networks, but also to advertising customers and companies providing ad server services. According to BWB, Austrian companies are now also making use of these possibilities.

Nonetheless, adblockers can restrict or distort competition in the concrete design of their business or their relationships with cooperation partners and may realize an abuse of market power. BWB investigated with regard to contractual clauses of the whitelisting agreement between Google and Eyeo. The preliminary analysis showed that the agreement with Google restricted Eyeo from further developing products, expanding in the market or making investments.

As the concerns of the competition authorities could be resolved by the companies making appropriate adjustments to the contractual clauses, the investigation was concluded by mutual agreement.

RPM: Bose, Specialised and AnkerSnak

BWB again focused on online selling in 2019.

At BWB's request, the Cartel Court imposed a fine of € 650,000 on Bose Ges.m.b.H for vertical agreements on resale prices for consumer electronics products in the period from November 2014 to March 2018. The decision is final.

At BWB's request, the Cartel Court imposed a fine of € 378,000 on Specialized Europe B.V. in June 2019 for resale price maintenance and restriction of the sale and distribution of products via the Internet (restriction of passive sales) in the period from January 2011 to November 2016. The decision is final.

At BWB's request, the Cartel Court imposed a fine of € 210,000 on Anker Snack & Coffee Gastronomiebetriebs GmbH for the continued infringement in the period from January 2006 to August 2017 in the form of vertical agreements on resale prices (minimum and fixed prices) with franchisees in relation to the products they distribute, which are mainly pastries and beverages. Also this decision is final.

Sharing sources of supply: fine for Banner

At BWB's request, the Cartel Court imposed a fine of € 60,000 on Banner GmbH for the continued infringement of Section 1 (1) Cartel Act in the period from October 2008 to July 2013. Banner GmbH, MG Metall und Recycling GmbH and its parent company Eco-Bat Technologies Limited infringed competition law by sharing the sources of supply for the collection of waste vehicle batteries. BMG Metall und Recycling GmbH and Eco-Bat Technologies Limited filed an application for leniency with the BWB. The companies fulfilled all the conditions for the granting of leniency. For this reason, no fine was imposed on these two companies. The decision is final.

BWB appeals against Cartel Court decision on territorial agreements in connection with the sale of industrial sugar

In the cartel case on territorial agreements in connection with the sale of industrial sugar, Vienna Higher Regional Court sitting as the Cartel Court issued its decision on 15 May 2019, dismissing BWB's applications of 1 September 2010 in the first instance.

In 2010 BWB had applied to the Court to have sugar producers fined or declared to be in breach of the law as a result of territorial agreements on the sale of industrial sugar products in Austria. Investigations had been initiated by BWB after it received information from one of the companies involved in the capacity of principal witness. The companies had agreed not to hinder each other in their respective territories by avoiding aggressive pricing (home-market principle).

The German Bundeskartellamt had imposed fines of some € 280 million on three major German sugar producers on 18 February 2014 because of the impact their conduct has had in Germany.

Due to this decision in Germany, the Austrian Cartel Court applied the principle "ne bis in idem" and refrained from declaring an infringement and imposing a fine.

BWB appealed to the Supreme Cartel Court against this decision. The decision is therefore not final.

In BWB's view a basic understanding of the cooperation mechanisms among competition authorities according to Council Regulation (EC) No 1/2003 and, consequently, the effectiveness of the enforcement of Union law needs to be established.

Sector inquiry in health care sector: second report on health services in rural areas

Since 2017 BWB has been analysing the Austrian healthcare market as part of its sector inquiries, which examine the competitive conditions on certain submarkets.

The first interim report published by BWB in May 2018 analyses possible restrictions of competition in the community pharmacy market in the areas of market entry, ownership and provisions operating a pharmacy.

Following this first report, BWB presented the second report in October 2019, dedicated to health services in rural areas. The report highlights the challenges faced due a partial deterioration of basic medical care in rural areas, in particular due to growing problems filling vacant permanent posts for general practitioners under contract to health insurance funds. In view of how these developments have recently been intensifying, the BWB has therefore decided to focus its second report on the above-mentioned aspect of healthcare in rural areas from a competition perspective. The inquiry is based on information received from market participants, academic literature, as well as experience reports and investigation findings of other national competition authorities. Additionally, businesses, stakeholder groups and other institutions that are engaged in the healthcare market have been interviewed in depth.

The aim is to provide market participants with more leeway, and to ensure that patients are well cared for. Some of BWB's conclusions are that improving the status of and support for general practitioners would be recommendable, as well as matching the authorisation requirements for doctors' dispensaries to those for community pharmacies taking account of the needs of rural areas and advancing primary healthcare facilities.

The report can be found in English at:

https://www.bwb.gv.at/en/news/news_2019/detail/news/bwb_publishes_second_interim_report_on_health_services_in_rural_areas/.

With this second report, the BWB aims to initiate a general discussion on increased competition in the rural healthcare market.

Sector inquiry in taxi market

BWB launched a sector inquiry into the taxi and private hire car market in September 2019. The inquiry is an economic and legal analysis of the taxi and private hire car market. It focused on the two regions of “City of Salzburg” and “City of Vienna as there is increased competition in the market due to different business models being pursued.

The legal analysis included a comparison of the various regulations with the situation in other EU countries. BWB also looked into the relevant laws with a view to determining their potential impact on competition. With regard to the economic part of the inquiry, 200 taxi operators, private hire care companies and online intermediary platforms were asked to complete a questionnaire. The response rate was satisfactory. One striking result was that online intermediary platforms’ market data was more readily available and of a better quality than that provided by more traditional companies.

The sector inquiry is ongoing, and BWB also plans to conduct a customer survey to look into related consumer benefits. The inquiry’s final report will also include an analysis of the potential impact of various different forms of pricing (minimum fares, maximum fares or fixed fares) on competition, on the companies, on the taxi and private hire car market, and on innovation, as well as on consumers.

BWB publishes position paper on debate about European champions and the call to relax EU merger control

There have been heated debates since February 2019 about realigning competition policy and industrial policy in Europe. Against the backdrop of a supposed rise in competition pressure from the USA and China, one of the proposals is that it should be possible for anti-competitive mergers to be cleared by EU merger control if such mergers improve competitiveness and enable the creation of European champions. BWB has looked into the effects of such a “European champions” policy in great detail, and published its findings in a position paper.

The key finding is that the creation of champions, by relaxing EU merger control, would lead to less innovation and therefore have a negative impact overall on the economic development of a country. Introducing the possibility of political intervention in European merger control would severely limit companies’ legal certainty and means of legal

protection. In addition, studies have shown that political intervention usually only favours big players in large Member States. SMEs and companies from smaller Member States are usually not given preferential treatment, but then have to compete against those preferred champions or pay higher prices as their customers.

The BWB advocates a transparent and non-discriminatory approach, one that does not favour individual topical interests but that keeps the effects for competition and consumers in mind when deciding on whether a merger should be approved or not.

In BWB's opinion, initiatives in other areas, such as in relation to trade policy or state aid, would be far more appropriate to protect European companies from unfair competition by state-subsidised companies. It has been the long-term goal, and should continue to be so, to establish tried-and-tested European competition rules and standards among the EU's trading partners as well, creating a truly level playing field for all.

The position paper can be downloaded here:

https://www.bwb.gv.at/en/news/news_2019/detail/news/bwb_publishes_position_paper_on_debate_about_european_champions_and_the_call_to_relax_eu_merger_cont/

Whistleblowing system

As reported last year, the BWB implemented a whistleblowing system in February 2018. With this system, it is possible to anonymously contact the BWB to report potential antitrust violations.

While in 2018, 39 whistleblower notifications have been submitted, this number increased to 45 notifications in 2019. At the same time, the number of notifications that were immediately classified as irrelevant to BWB and other authorities decreased significantly from 16 in 2018 to only 4 in 2019.

Of the 45 notifications,

- 21 notifications are still in an intensive phase of examination,
 - 14 of which comprise possible anti-competitive agreements
 - 7 of which comprise possible abuses of a dominant position
- 20 notifications were taken care of without need to take further measures,
- 4 notifications were immediately classified as irrelevant to BWB and other authorities.

1.2 Mergers and acquisitions

a) Statistics on number, size and type of mergers notified and/or controlled under competition laws

Between 1 January and 31 December 2019 a total of 495 national concentrations were notified, 15 of these due to the new transaction value threshold. In addition, 370 mergers notified with the European Commission were dealt with.

In six cases the parties withdrew the notification of the merger in phase I. In three cases the merger was cleared with remedies in phase I.

In one case an application for in-depth investigations was filed by the FCP leading automatically to phase II proceedings with the Cartel Court. After the commitment to remedies, the FCP withdrew its application and the Cartel Court cleared the merger.

b) Summary of significant cases

Österreichische Post AG / Assets of DHL Paket (Austria) GmbH" approved with conditions

BWB has already familiarized itself in detail with the market situation in pre-notification talks prior to the merger notification, during which the planned project was presented by Österreichische Post AG (ÖPAG), the Austrian postal service provider. In May 2019, ÖPAG submitted a merger notification to BWB according to which they intend to acquire certain assets from the logistics network of DHL Paket (Austria) GmbH (DHL), a subsidiary of Deutsche Post AG (DPAG).

As part of an intensive examination by the BWB, a large number of market participants were surveyed, including competing parcel service providers and customers of the merger candidates.

The merger was finally approved in Phase I with conditions. The aims were the following:

- stimulate the Austrian parcel delivery market so that Austrian consumers can make greater use of the opportunities offered by electronic shopping,
- review the agreed rules in the parcel delivery market for the benefit of consumers by an independent body and, if necessary, implement controlling measures,
- ensure fair market conditions for all parcel delivery companies in the growing Austrian e-commerce market,

- enable a transparent choice for consumers (sender and recipient) in the delivery of parcels based on clear and objective quality and price offers.

A central feature was that a minimum quantity contained in the original asset purchase agreement was deleted. This ensured that the minimum parcel volumes provided for in the contract were not effectively withdrawn from competition for delivery in Austria.

This is intended to support competition, and on the other hand, to enable ÖPAG to continue delivering parcels in all regions of Austria, especially in rural areas, at the same high quality level as before.

Rewe`s plan to take over Lekkerland in Austria was not cleared

REWE-ZENTRALFINANZ eG planned the acquisition of all shares in Lekkerland AG & Co KG (Germany) and Lekkerland AG (Ternitz, Austria) by REWE-ZENTRALFINANZ eG (Germany) and REWE-Zentral AG (Germany).

Due to different national competition conditions, the European Commission referred the merger (case M.9142, cleared in August 2019) partially to Germany and Austria. After a pre-notification phase, the merger was officially notified with the BWB in September 2019 and cleared with conditions in an extended phase I.

The intensive investigation focused on the Austrian market situation concerning the supply of filling station shops. In the course of its market test, the BWB primarily interviewed larger operators of filling station shops, competitors, food producers and associations about the competition situation. The Authority also received numerous comments during its in-depth inquiry from various market levels voicing competition concerns, some of which specifically relating to the Austrian market. Throughout the process, the merger parties were given the opportunity to dispel such concerns.

Following the concerns voiced by the BWB and the Federal Cartel Prosecutor, REWE removed the Lekkerland operations in Austria from its planned merger. The shares in the company continue to be owned by the original shareholders.

Spinning off the operational part of the target company in Austria dispels, in the BWB's opinion, the concerns related to competition. The merger parties state that a spin-off is possible since the Austrian business activities have been largely self-sufficient so far and in particular have been operated independently of Lekkerland Germany. In addition, Point IV. of the conditions ensures that any services so far rendered by the Lekkerland group for Lekkerland Austria may be continued for a limited period of time. If, after expiry of

the conditions in five years' time, an acquisition is carried out, new competition proceedings will have to be initiated.

Merger EVENTIM LIVE GMBH - Barracuda Holding GmbH approved with conditions

In October 2019 the acquisition of full control by EVENTIM LIVE GMBH over Barracuda Holding GmbH" was notified to the BWB. The acquirer EVENTIM operates the important ticket service provider oeticket. Barracuda Holding operates some important festivals, e.g. the FM4 Frequency Festival and Nova Rock.

After submitting the merger notification, possible proposals for commitments were discussed. The aim of the commitments is to prevent that services for third parties are no longer available at market conform prices (customer foreclosure) and/or that the access of other ticketing companies to festivals is impeded (input foreclosure).

On the basis of a market test of the commitments, BWB and the Federal Cartel Prosecutor found the commitments proposed by the notifying party to be sufficient to eliminate the competition concerns arising from the proposed merger. As part of the commitments, a monitoring trustee was appointed who can be contacted directly by market participants.

Google - Looker Data Sciences cleared unconditionally

The BWB has approved the acquisition of Looker Data Sciences, Inc. ("Looker") by Google LLC ("Google") in phase I. The transaction relates to the business analytics-software sector.

The proposed transaction was analysed by the BWB in detail. Based on Google's market position in general and BWB's focus on digital issues, the BWB conducted a consultation of Lookers competitors during phase I of the investigation. Furthermore, the BWB analysed possible risks of market foreclosure through Googles position in the field of data warehouses, web analytics services and online and offline advertising.

The extensive investigation conducted by the BWB has shown that the proposed transaction would not lead to the creation or strengthening of a dominant position in Austria. Since Lookers business activities concentrate on the North American market, the major focus of the proposed transaction lies in the USA. The competition authorities in the USA and Australia have cleared the transaction unconditionally.

More detailed information can be found in the case report:

https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Fallbericht_englisch_Google_Looker_final.pdf

2 International co-operation

The BWB puts great emphasis on intensifying international co-operation with other (Non-)European competition authorities both on bilateral and European level. Consequently, several bilateral meetings took place in Austria and abroad. Amongst others, delegations from Armenia, Kosovo, Latvia, Russia and Belarus were invited for study visits and bilateral exchanges to Vienna.

On 13 May 2019 the BWB has joined the Framework on Competition Agency Procedures of the International Competition Network (**ICN CAP**) as a founding member. The ICN CAP provides standards for Competition Authorities in the fields inter alia, confidentiality, a fair hearing, partiality, the right to be represented by a lawyer, written decisions including the obligation to state reasons and as well independent proceedings. The participating Competition Authorities commit to comply with these standard settings. The aim of ICN CAP is to provide an overview of the worldwide different procedural frameworks in the field of Competition Law and to increase the transparency for affected businesses. Thus, these businesses should receive information about their rights and legal basis for a fair procedure. Meanwhile, 72 competition authorities joined ICN CAP. More information can be found at

<https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/>.

3 The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

The BWB may comment on issues of general economic policy from a competition point of view and communicate the implications and benefits of fair competition to the general public, thus covering the field of competition advocacy.

Amongst others a **position paper** on national and European Champions in merger control focusing on the debate about European champions and the call to relax EU merger control, the second report in the sector inquiry in the health care sector and a sector inquiry in the taxi market are examples to be mentioned. Further details on these positions which were also published in English can be found under point I.1.

Furthermore, the **cooperation** between the telecom regulator **RTR and the BWB in digital markets** was intensified. The RTR is currently developing a monitoring system for digital platforms, the aim of which is to cover the most important digital communications platforms used in Austria as well as platforms that greatly influence how the internet is being used generally, and then subjects them to an assessment as to their impact on competition. Such platforms include voice and messaging apps, voice assistants, operating systems and app stores or browsers. RTR and BWB set up a joint task force as part of this monitoring system and work together closely on competition issues.

The BWB started to organise the so-called "**Competition Talks**" in October 2012. Since then the Lunch Debate Event is taking place dealing with hot topics in competition matters. The debates are meant to attract companies' management and antitrust related practitioners in order to raise awareness of competition offenses. In 2019 one competition talk took place tackling the topic of blockchain and competition.

BWB organised the fifth **Competition Law Moot Court** in 2019, doing so in cooperation with the law firm DORDA and the European Law Students' Association (ELSA). Interested

students from Austria had the opportunity to apply for the Moot Court where a fictitious application with the Cartel Court on an antitrust matter is worked on. This year's case concerned an alleged abuse of dominance in the sale of pharmaceutical products. It raised questions related to the market definition and pricing in a regulated market. The intention of the Moot Court is to increase awareness and interest for competition law with students. Six teams each consisting of two or three people from different universities prepared oral and written pleadings for this competition. The teams were supported by law firms and professors. The jury consisted of persons from the BWB and the law firm Dorda Brugger Jordis. The written submissions and oral proceedings were assessed on the basis of the participants' analysis of the case and legal situation, the arguments presented, public speaking skills and teamwork. The jury had the great role to determine the best team and best speaker. The team from the University of Vienna (Juridicum) convinced the jury and were awarded as the best team. The best speaker was a student of the Vienna University of Economics and Business.

Besides numerous press contacts the BWB regularly releases information on important cases. The BWB publishes information on notifications, the application for the examination with the Cartel Court by an official party and the decision clearing a merger under certain remedies. The Cartel Court is obliged to publish information on decisions in other than merger cases.

4 Resources in competition enforcement

By end of 2019 - additional to the Director General and the Deputy Director General - 24 lawyers, 6 economists, one other professional, one IT forensic expert and 8 persons as support staff, i.e. all together 42 persons, were working at the **BWB**. Each case handler is responsible for all cases (mergers and antitrust) in specific sectors. In addition, a legal service department and a litigation department were set up in 2017.

As the decision making body, the **Cartel Court** comprises five panels being composed of two professional judges and two lay judges. The Cartel Court employs currently five professional judges who are partly involved in other matters and are supported by fifteen lay judges. Additionally, the Cartel Court relies on advisory opinions of independent economic experts of its own choice.

The Supreme Cartel Court comprises one panel being composed of three professional judges and two lay judges.

