

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN AUSTRIA 2018

Executive Summary

2018 again was an intensive year. With regard to investigations, four dawn raids were conducted in various industries. Fines totalling about € 2.2 mio were imposed on four companies due to price fixing, customer allocation or exchange of sensitive information. Further investigations and proceedings for example in the construction sector are still ongoing.

There is also a new record for merger notifications. 481 national mergers and 388 EU merger were notified. In 3 cases merger notifications contained misleading information or were not notified to the Austrian Competition Authority (Bundeswettbewerbsbehörde; BWB). As a result, fines totalling € 195.000 were imposed on these undertakings by the Austrian Cartel Court.

In February 2018, the BWB implemented the whistleblowing system. With this system, it is possible to anonymously contact the BWB to report potential antitrust violations. First experiences show that it can be considered a valuable tool. About 15 notifications are still in an intensive phase of examination.

Another important topic was and still is transparency. Therefore, the BWB again published four guidelines. They concern fairness in business - guidance for fair conduct in business; the transaction value thresholds for mandatory pre-merger notification; a first interim-report on the Austrian Pharmacy Market; and the Austrian Funeral Market.

All of the published guidelines can be downloaded on the BWB's website and were well accepted by the companies. Also this shows that the BWB is on the right track.

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.

I. 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 2018 can be viewed at <https://www.justiz.gv.at/web2013/html/default/8ab4a8a422985de30122a92c3e89637f.de.html>. The annual report of the BWB can be found at https://www.bwb.gv.at/en/factual_information/annual_report/

I.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 2018) 46 new cartel cases were examined, leading to several dawn raids. In addition, 19 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

ba) Agreements, recommendations and sector inquiries

Ongoing investigations in the construction sector

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.

Based on these documents, BWB cooperated with the Central Public Prosecutor for Economic Crime and Corruption (WKStA) and the Federal Bureau of Anti-Corruption (BAK), searching the premises of numerous Austrian construction companies in May 2017. Further dawn raids were carried out in June 2018.

The Supreme Cartel Court confirmed that the seized documents raised serious suspicions that anti-competitive agreements had been used widely and systematically for years and in at least 80 cases (after reply to the appeal: 93 cases). The Court found no basis for the assertion that these agreements were restricted to certain sectors of the construction industry, as the companies involved according to the documents were active in several sectors (e.g. surface, road, bridge and underground construction). It was also unclear from the respondents' arguments why these agreements should have been limited to two provinces and one single construction sector, namely the underground construction sector.

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. The construction projects that might be affected by such agreements, as currently known, were put out to tender by both the public sector and private companies, and they also relate to various different construction sectors, as already found by the Supreme Cartel Court. As things now stand, the primary victims are public buyers and therefore the taxpayer. No unequivocal conclusion has been drawn about the affected regions; it appears that as good as the whole country is affected.

BWB is working closely with WKStA and BAK to fully resolve the issue of anti-competitive practices in the construction sector.

Online sale restrictions: Devolo and Ingram Micro

BWB again focused on online selling in 2018. Following applications filed by BWB, the Cartel Court fined Devolo Austria GmbH and Ingram Micro GmbH a total of € 511,888.

In August 2018 the Cartel Court, at the request of BWB, imposed a fine of € 223,000 on **Devolo** Austria GmbH. Devolo had agreed resale prices relating to connectivity devices with various retailers/resellers during the period from March 2012 to December 2015. The arrangements were intended to influence resellers' pricing in order to restrict or avoid intrabrand competition, i.e. competition among providers of the same brand, and thereby secure certain prices. This type of vertical fixing of resale prices constitutes a material infringement of Article 101 TFEU and § 1 KartG. The decision is final.

At BWB's request, the Cartel Court imposed a fine of € 288,888 on **Ingram** Micro GmbH in November 2018. Ingram Micro had agreed resale prices for lifecycle services (mobile end devices) with various retailers and resellers during the period from March 2012 to October 2017. The arrangements were intended to influence resellers' pricing in order to restrict or avoid intra-brand competition, i.e. competition among providers of the same brand, and thereby secure certain prices. On account of the direct impact on price competition, this is a hardcore restriction and therefore a severe violation of cartel law. Repeatedly "leaning" on retailers with the clear aim of making them follow a price recommendation rules out the possibility of the recommendation being considered as non-binding. The decision is final.

Illegal price fixing of filling station leaseholders

The Cartel Court imposed a fine of € 70,000 on A1 Tankstellenbetriebs GmbH for a breach committed during the period from April 2015 to February 2018.

A1 Tankstellenbetriebs GmbH entered into brand and supply agreements with individual filling station leaseholders that included illegal price fixing. Furthermore, the filling station leaseholders also used a POS system from A1 Tankstellenbetriebs GmbH into which the latter was able to input its selling prices directly.

These selling prices were also shown on the price display signs (totem displays) and the filling stations' petrol pumps, which constitutes illegal price fixing in accordance with § 1 KartG. The company did not contest the decision. The decision is final.

Distribution of surgical instruments

A public hospital provider submitted a complaint, thereby instituting proceedings on the definition of active and passive sales in connection with a (Europe-wide) procurement process for surgical instruments that was subject to the Federal Public Procurement Act (BVerG).

Applicable EU rules, specifically Article 101 TFEU and Article 4 of Commission Regulation (EU) No 330/2010 (Block Exemption Regulation), permit restrictions of active sales within the scope of exclusive distributorship as long as a market share threshold of 30% is not exceeded. Passive sales, particularly fulfilling unsolicited orders, however, must always be possible.

The question of whether participation in an official award procedure constitutes an active or passive sale is yet to be resolved by the courts and legal literature. BWB opined that it merely constitutes a passive sale transaction that must not be subject to any kind of restriction as a result of distribution agreements.

BWB argued that the initiative to conclude a contract comes from the customer, and a tender or request to participate was always only submitted by the bidder in reaction to an invitation to tender. Otherwise, public buyers would be disadvantaged while, in accordance with EU procurement rules, they should benefit from receiving bids from the entire EEA, creating an

insoluble inconsistency with European antitrust rules. The situation in relation to the internal market is similar. If it was considered an active sale, companies would be able to uphold the foreclosure of their national markets, particularly where public buyers were concerned.

The parties undertook to consider participation in public-sector invitations to tender as passive sales in future. In October 2018 the Cartel Court declared these commitments to be binding pursuant to § 27 KartG.

Sector inquiry in health care sector

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 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, interest groups and other institutions that are engaged in the healthcare market have been interviewed in depth.

The objective of the inquiry is to identify possible restrictions of competition and to demonstrate opportunities for liberalisation that create more latitude for companies and benefits for consumers. Studies have shown that a certain degree of competition may also be beneficial to the healthcare market as it improves supply and results in a higher quality of products and services.

The first interim report published by BWB analyses possible restrictions of competition in the community pharmacy market in the areas of:

- Market entry for pharmacies (needs assessment)
- Ownership of pharmacies (e.g. prohibition of third-party ownership, wholesalers, branch pharmacies)
- Provisions on operating a pharmacy (e.g. opening hours, additional services, online selling, prerogative of pharmacies to sell OTC medicines)

The report examined whether existing restrictions of competition are necessary to ensure the reliable supply of medicines to the population or whether liberalisation of the pharmacy market would bring greater efficiency for consumers.

The report can be downloaded from the BWB website in English (https://www.bwb.gv.at/en/news/detail/news/the_austrian_federal_competition_authority_publishes_the_first_interim_report_on_the_austrian_pharm/).

Fairness in business - Guidance for fair conduct in business

In October 2018, BWB's Director General, Theodor Thanner, and Federal Minister for Sustainability and Tourism, Elisabeth Köstinger, together presented the Guidance for fair conduct in business, prepared by BWB and dealing with competition issues in the supply chain and unfair trading practices (UTPs).

Through this initiative, BWB made a valuable contribution to Austria's Council presidency, one of the central aims of which was to establish a legal framework to tackle UTPs.

The preparation of the Fairness in business publication was preceded by BWB receiving numerous complaints about problematic practices relating to the design of terms and conditions as a result of an imbalance in the supply chain. No court action had been taken as the complainants had been afraid of retaliation (delisting) if they cooperated with BWB. With weaker contracting partners being at a disadvantage, SMEs in particular may be hindered from fully

developing their businesses. This in turn impacts negatively on market development because there is then less innovation and a less diverse product offer for consumers. The Competition Commission, advisory body for the BWB, has examined this issue in the food retail industry and recommended the preparation of a guidance document for market participants.

Right at the start of the initiative, BWB decided not to limit its guidance to specific branches of industry but to prepare guidance on how to design supplier/buyer relationships that would apply across all sectors. An economic imbalance can positively or negatively affect the supplier or the buyer side, depending on sector. Stakeholders were closely involved in the preparation of the guidance document, ensuring it included many practical examples from real business life. A draft was published in June 2018, and a round of public consultation launched and comments invited.

The guidance should provide unambiguous information on how to evaluate corporate behaviour and on what is understood by good conduct. Its central part is a list of business practices that are deemed to be incompatible with good conduct, irrespective of their legal interpretation by the courts in the individual case. General principles of interpretation should help in the assessment of individual practices. Finally, the guidance provides a non-exhaustive overview of various pieces of legislation including practical examples, which should help with the legal classification of individual cases. It concludes with recommendations for companies that are affected by unfair practices.

Shortly after publication, six well-known food retail companies that are members of the Austrian Retail Association, and which together cover around 90% of the market, signed a document expressly committing themselves to the content of the guidance. BWB invites companies from all sectors to follow suit and also voluntarily commit to the guidance.

The guidance document can be downloaded from the BWB website also in English (https://www.bwb.gv.at/fileadmin/user_upload/Downloads/standpunkte/BWB-Guidance_Fairness_in_business.pdf).

Position on Funeral Services

BWB has been observing the funeral market for some time now and published recommendations including on how price transparency could be improved for consumers back in 2011. The funeral market was liberalised in 2002. However, the restrictions of competition in this market are not insignificant in number, distorting competition as a result.

Since 2006, there have been 16 suspected cases of market dominance being abused. Accusations that a dominant position is being abused relate to 3.2% of the 500 or so funeral parlors operating in Austria.

An evaluation of funeral parlors' websites showed that only about 3.5% gave price details online.

For these reasons, BWB decided to review its position of 2011, publishing the updated version in December 2018.

The position provides an overview of numerous issues:

- Prohibited business practices in cartel law
- The market participants in Austria's funeral market including problems and trends
- Appropriate and fair access to chapels of rest
- Recommendations for municipalities and churches as lessors of chapels of rest
- Concrete explanations of problems using practical examples

The position's target group include funeral parlors, municipalities, churches, nursing homes and hospitals, as well as consumers. It describes the current funeral market, its market participants

and resulting competition issues. The position also details how to proceed as a funeral parlor or consumer when encountering excessive prices or other competition issues.

The Position on funeral services can be downloaded from the BWB website (currently available in German only: https://www.bwb.gv.at/fileadmin/user_upload/Downloads/standpunkte/BWB_Standpunkt_Bestattungswesen_final.pdf).

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.

First experiences show that it can be considered a valuable tool: By the end of 2018, 39 notifications had been submitted, of which

- 16 notifications were immediately classified as irrelevant to the BWB and other authorities,
- 6 notifications were classified irrelevant to the BWB after an in-depth review
- 4 notifications have been forwarded to the substantive competent authorities, and
- 13 notifications are still in an intensive phase of examination.

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 2018 a total of 481 national concentrations were notified. In addition, nearly 390 mergers notified with the European Commission were dealt with.

In two cases the parties withdrew the notification of the merger 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

Knauf/Armstrong

Following initial pre-notification talks, BWB was notified of the proposed merger of Knauf/Armstrong in January 2018. Knauf International GmbH intended to acquire Armstrong World Industries' entire ceilings business outside the Americas. The merger related to the market for modular suspended ceilings.

Modular suspended ceilings are pre-fabricated products consisting of a grid (including suspension and fastening material) and ceiling tiles placed in that grid structure. Both Knauf and Armstrong operate in the area of modular suspended ceilings. Accordingly, depending on the definition of the relevant product and geographic market, there was quite a significant horizontal overlap between the companies' activities.

Initial investigations conducted in a highly cooperative manner with other European competition authorities, the German Bundeskartellamt and the European Commission in particular, found that competition concerns were not limited to Austria. Since the proposed merger threatened to significantly affect competition within the countries and given that Knauf and Armstrong held high market shares in several Member States, the Austrian Federal Competition Authority submitted a referral request to the Commission pursuant to Article 22 of the EU Merger Regulation in February 2018. This request was subsequently joined by the authorities in Germany, Lithuania, Spain and the United Kingdom, with the Commission accepting it in March 2018.

The merger was notified to the Commission in June 2018 but subsequently withdrawn shortly before the end of Phase I. The transaction was notified to the Commission again in October 2018. In December 2018 the Commission approved the acquisition subject to conditions. Competition concerns were raised in Austria, specifically that the proposed acquisition would significantly reduce the level of competition in the markets for mineral fibre tiles for modular suspended ceilings and for grids. Similar concerns were also raised in Lithuania, Spain and the UK.

The proposed remedies are structural in nature:

- Armstrong's sales business (including sales teams and customer base) for mineral fibre tiles and grids in Austria and the other relevant countries must be transferred.
- Armstrong's plants for the production of mineral fibre tiles and grids located in Team Valley, UK must be divested.
- The buyer may sell mineral fibre tiles under the Armstrong brand without paying licence fees for a period of five years.

Air traffic

As reported in detail in last year's annual report, 2017 and early in 2018 BWB worked hard to prevent monopoly routes and price increases in the event of parts of Air Berlin being taken over by other air carriers.

Lufthansa Group proposed a merger with Air Berlin subsidiary Niki, which met with negative signals from the market and also received similar feedback from national competition authorities and the Commission; it finally withdrew its offer at the end of 2017/in early 2018. Laudamotion subsequently acquired the insolvent Air Berlin subsidiary in February 2018.

Following Ryanair's acquisition of a 75% stake in Laudamotion in August 2018 and with new companies entering the market throughout 2018, new routes opened up for Vienna Airport, with price advantages of 36% compared with the autumn of 2017. This is a direct result of increased competition.

BGO Holding/hali - Svoboda

In February 2018 BGO Holding GmbH (Vienna) notified BWB of its acquisition of all of the shares in the Austrian companies hali GmbH and svoboda büromöbel GmbH. The proposed transaction related to the development, production and distribution of office and seating furniture.

BWB held intensive pre-notification talks with all parties to the transaction. Following notification, the Authority conducted a market test asking 300 customers to provide information as well as submitting 172 requests for information to national and international competitors. The effort involved was higher in this case as neither the Commission nor any national competition authority had previously reached decisions pertaining to the office furniture market.

BWB held intensive talks and studied numerous comments, positions and expert opinions. To address potential competition issues, the companies offered a package of commitments.

These commitments are:

- To keep production sites
- To maintain brands
- To keep prices and quality unchanged for existing customers (except for inflation adjustments)
- To ensure that Hali and Svoboda are free to write their own quotes and set their own prices
- To provide regular reports to BGO Holding GmbH

Based on these commitments, BWB cleared the merger in March 2018.

Joint guidance on the new transaction value threshold

In 2017, additional merger control thresholds based on the transaction value were introduced in Austria and Germany as reported in last year's annual report. In the context of the close cooperation between BWB and Germany's Bundeskartellamt (BKartA) and as the thresholds are identical or very similar in both countries, they decided to publish a joint guidance on the application of the new threshold. The aim is to provide users with a basic guide on interpreting the statutory rules. After having published a consultation version in May 2018, comments have been taken into consideration and incorporated in the guidance. The final document was published in July 2018. It apparently reduces legal uncertainty as the number of requests whether mergers are notifiable under the new threshold decreased considerably after the publication of the guidance.

The Guidance on transaction value thresholds was submitted to the Antitrust Writing Awards 2019 and won in the categories "Best Soft Law" and "Best Soft Law Readers Vote".

II. 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 Albania, Georgia and the Eurasian Economic Commission were invited for study visits and bilateral exchanges to Vienna and a meeting with the competition authorities from Switzerland, Germany and Liechtenstein took place in Austria.

At the November 2018 meeting of the Competition Committee, Natalie Harsdorf from BWB was unanimously selected by all delegations as new OECD/UNCTAD coordinator. This appointment is a great honour for BWB and once again confirms the Authority's commitment to international cooperation.

A first Workshop for Competition Officials organised by the OECD was held in Vienna in December 2018. Tackling the theme of complex cartel case management, this workshop marked the start of a new series of OECD events aimed specifically at the national competition authorities in the OECD member countries in order to promote exchange. BWB was the first cooperation partner in this new venture, designing and implementing the workshop together with the OECD. A total of 30 competition experts from 20 different countries travelled to Vienna for this workshop, with the delegates and speakers including employees and managers from various European competition authorities, as well as from Canada, Israel, Japan and Mexico.

III. 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.

The position on funeral services, the guidance for fair conduct in business as well as the sector inquiry in the health care sector are examples to be mentioned. Further details on these positions can be found under point I.1.

The BWB started to organise the so-called "**Competition Talks**" in October 2012. Since then the Lunch Debate Event is taking place every second month 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 2018 more than 250 representatives from companies, lawyers and public offices were attending the events in which 20 experts of different special fields discussed hot topics. During the reporting period the competition talks tackled topics such as digitisation and competition, the joint guidance on the transaction value thresholds in Germany and Austria, compliance, the economy for the common good and competition, competition along the value-added chain as well as arbitration and competition.

BWB organised the fourth **Competition Law Moot Court** in 2018, 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 focused on competition issues related to the selective distribution of tablet computers. The distribution contracts in question included a rebate system as well as an online platform through which one manufacturer collected sales information, which was then used to generate individual, algorithm-based price recommendations. The intention of the Moot Court is to increase awareness and interest for competition law with students. Eight teams each consisting of 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, the Cartel Court 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 Johannes Kepler University in Linz convinced the jury and were awarded as the best team. The best speaker was a student of the Vienna University of Economics and Business.

The **2018 European Competition Day** was held in Vienna in September 2018. The event, which focused on competition law, issues in the value chain and the health market, was opened by Margarete Schramböck (Austrian Federal Minister for Digital and Economic Affairs), Margrethe Vestager (European Commissioner for Competition) and Theodor Thanner (Director General of BWB). BWB organised the panel on "Competition & Health Care Markets". This panel's debate touched on the potential of more intensive competition in the strongly regulated health sector, with calls for the interests of consumers and producers to be balanced against each other. Reference was also made to BWB's sector inquiry in the health market, with its report on the Austrian pharmacy market.

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.

IV. Changes to competition laws and policies

Geo-blocking Regulation

Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 (Geo-blocking Regulation) seeks to end unjustified discrimination in online purchases for reasons related to a customer's nationality, place of residence or place of establishment within the internal market. The regulation obliges to deliver goods to all EU citizens on the same terms (unless there are objective reasons such as sales tax, delivery costs or prohibitions of certain products in the country). However, the customer himself must take care of the transport.

The BWB, as the competent authority in the field of consumer protection cooperation, has been responsible in Austria since December 2018, among other things, for the adequate and effective enforcement of the Geoblocking Regulation for cross-border violations in the B2C (Business to Consumer) area.

V. Resources in competition enforcement

By end of 2018 - additional to the Director General and the Deputy Director General - 24 lawyers, 6 economists, one other professional, one IT forensic expert and 7 persons as support staff, i.e. all together 41 persons, were working at the **BWB**. Each case handler is responsible for all cases (mergers and antitrust) in specific sectors. As the number of employees grew it became necessary to restructure BWB. Consequently, a legal service department and a litigation department were set up in August 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.