

LIDC 2015, Question A: Abuse of a Dominant Position and Globalization**Austrian Report****by the national reporters:¹*****Mag. Gerhard Fussenegger, LL.M. (London)******Univ.-Prof. Dr. Florian Schuhmacher, LL.M. (Columbia)******Dr. Rainer Tahedl*****1. Introduction****1.1. Legal regulation in the Austrian Cartel Act**

The Austrian Cartel Act 2005 (Federal Law against Cartels and other Restraints of Competition, hereinafter “Cartel Act”)² contains a general prohibition of the abuse of a market-dominant position. The relevant provision (Section 5 Cartel Act) reads as follows:

Section 5. (1) The abuse of a market-dominant position shall be prohibited. Such an abuse may, in particular, consist in the following:

- 1. claim for purchase or selling prices or other terms and conditions which differ from those which would highly likely arise if effective competition existed, whereby, in particular, the behaviour of undertakings in comparable markets, with effective competition, shall be taken into account,*
- 2. limiting production, markets or technical development to the prejudice of consumers,*
- 3. disadvantaging of contractual partners in the competition by applying dissimilar conditions to equivalent transactions,*
- 4. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts,*
- 5. sale of goods below cost price without objective justification.*

(2) In the case of (1) No. 5, the dominant undertaking bears the burden of proof for the rebuttal of the appearance of a sale below cost price, as well as for the objective justification for such a sale.

This provision prohibiting the abuse of a market-dominant position thus can be found in a statute exclusively concerning competition law. For similar provisions in other Austrian laws see below, point 1.4.³

¹ *Gerhard Fussenegger* is an attorney-at-law and partner at bpv Hügel Rechtsanwälte OG; *Florian Schuhmacher* is professor at the Institute for Civil and Business Law at the Vienna University of Economics and Business (Wirtschaftsuniversität Wien) and Senior Legal Consultant at DLA Piper; *Rainer Tahedl* is an emeritus attorney-at-law and lawyer at the Austrian Protective Association Against Unfair Competition (Schutzverband gegen unlauteren Wettbewerb).

² Kartellgesetz 2005, KartG, BGBl. (Federal Law Gazette) I No. 61/2005 as last amended by BGBl. I No. 13/2013.

³ The ban on abusive practices in Section 5 Cartel Act is complemented by a ban on retaliatory measures in Section 6 Cartel Act: Proceedings in order to terminate an abuse of a market-dominant position ... may not be taken as a reason by the market-dominant undertaking to exclude the undertaking directly affected by the abuse from further supply or demand on reasonable conditions.

Due to its origin context (see the brief historical outline in point 1.3.) Section 5 Cartel Act is virtually identical to Article 102 TFEU (see on deviations in point 1.2.), which – on an European level – bans the abuse of a market-dominant position within the internal market or in a substantial part of it by one or more undertakings if it may affect trade between Member States. It has been impliedly confirmed by the extension of the definition of a market-dominant position in Section 4 (1a) and (2a) Cartel Act (joint dominance) by the last amendment to the Cartel Act in 2013 that Section 5 Cartel Act shall – like Article 102 TFEU – also apply to collaborative abusive behaviour by two or more undertakings.⁴

1.2. Indicative list of abusive behaviour

Section 5 (1) Cartel Act contains an indicative list of abusive behaviour. The abusive practices listed as examples of offence in Section 5 (1) No. 2 (*limiting production, markets or technical development to the prejudice of consumers*), No. 3 (*disadvantaging of contractual partners in the competition by applying dissimilar conditions to equivalent transactions*) and No. 4 (*making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*) correspond to the practices listed in Article 102 b-d TFEU.

The first difference between the list of abusive behaviour in the Austrian Cartel Act and the list in the TFEU arises from the fact that since the last amendment to the Cartel Act in 2013 Section 5 (1) No.1 Cartel Act no longer refers to “*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*” (like Article 102 a TFEU) but – according to the model of the German Act Against Restraints of Competition (GWB) – to “*claim for purchase or selling prices or other terms and conditions which differ from those which would highly likely arise if effective competition existed, whereby, in particular, the behaviour of undertakings in comparable markets, with effective competition, shall be taken into account*”. This amendment suggests a competitive-based review by

⁴ The Cartel Act provides for a specific definition of market-dominance in Section 4 (which goes back to the historical registration obligation for market-dominant undertakings and is also relevant for merger control):
Section 4. (1) An undertaking shall be regarded as market-dominant for the purpose of this Federal Act, who, as a supplier or demander

1. is not exposed to any or only negligible competition or

2. has a superior market position compared to the other competitors; thereby considering, in particular, the financial strength, the relations to other undertakings, the access possibilities to the procurement and sales markets as well as the circumstances that limit market access for other undertakings.

(1a) Two or more undertakings shall be regarded as market-dominant, if there is no substantial competition between them and if they, in their entirety, fulfil the conditions of (1).

(2) If an undertaking as a supplier or demander on the relevant market

1. has a market share of at least 30% or

2. has a market share of more than 5% and is exposed to the competition by not more than two undertakings or

3. has a market share of more than 5% and belongs to the four biggest undertakings on this market, which together have a market share of at least 80%, then it bears the burden of proof, that the conditions of (1) are not fulfilled.

(2a) If an entirety of undertakings as suppliers or demanders on the relevant market

1. has a market share of at least 50% and consists of three or fewer undertakings or

2. has a market share of at least two-thirds and consists of five or fewer undertakings,

the undertakings involved bear the burden of proof, that the conditions of (1a) are not fulfilled.

(3) An undertaking shall also be regarded as market-dominant, if it has a superior market position in relation to its demanders and suppliers; such position is, in particular, deemed to exist, if those are dependent on maintaining the business relationship to avoid severe economic disadvantages.

using a comparable market concept. According to legislation materials, this rewording should allow a more severe prosecution of price abuse.⁵

Another difference to the indicative list of abusive practices in Article 102 TFEU is that Section 5 (1) No. 5 Cartel Act additionally specifies the "*sale of goods below cost price without objective justification*" as an example for unlawful conduct. Pursuant to Section 5 (2) Cartel Act, the market-dominant undertaking bears the burden of proof for the rebuttal of the appearance of a sale below cost price, as well as for the objective justification for such a sale. The behaviour indicated in this point can be seen as a subcategory of, in general, not cost-covering sales and does only apply to goods and not to services. The jurisdiction so far did not call on this provision very often, but did more likely refer to the more differentiated and sophisticated criteria for predatory pricing developed by ECJ-case law along the general clause of price abuse stated in Article 102 a TFEU.

1.3. Historical development and amendments to the statutory regulations

Since the Cartel Act of 1972, which came into force on 1 January 1973, the Austrian cartel law contains a regulation concerning the abuse of a market-dominant position. According to Section 46 Cartel Act 1972, the Cartel Court, at the request of a party, at this time *had to interdict* the abuse of a market-dominant position, whereby the then-listed examples of abusive behaviour were almost literally agreed with those of EU competition law. This results from the fact that the main reason for issuing the Cartel Act 1972 was the conclusion of free trade agreements between Austria and the (then) European Communities on 22 July 1972. Because the relevant provisions of this free trade agreement were aligned to Article 86 EEC Treaty (later Article 82 EC-Treaty respectively Article 102 TFEU) the Austrian legislators decided to establish a control of abusive practices based on this model, however, without at the same time adopting the ex lege-prohibition of abuse related with this EEC-provision.

The ban on abuse of a dominant market position in Section 46 Cartel Act 1972 then first was transposed unchanged to Section 35 Cartel Act 1988 (which came into force on 1 January 1989). The amendment to the Cartel Act in 1993 brought a further harmonisation with Community law: To enable the Cartel Court to order also an active conduct, like, for example, the conclusion of a contract, the provision was reworded insofar as the Cartel Court, on request, from now on *had to order* cessation of the abusive behaviour.

By the amendment to the Cartel Act in 1999 the catalogue of sample facts was extended to the sale of goods below cost price without objective justification. This did not mean any fundamental change of the legal situation since such conduct could be subsumed under the general clause of price abuse in Section 35 (1) Cartel Act 1988 yet, and like it had already been done by jurisdiction.⁶ Furthermore, by this amendment to the Cartel Act the wording of the prohibition of unfair trading conditions in Section 35 (1) No. 1 Cartel Act 1988 was supplemented by the words "*as, in particular, inappropriate terms of payment and default interests*".

The amendment to the Cartel Act in 2002 brought a rewording of Section 35 (1) first sentence Cartel Act 1988: From that time on an abuse of a market-dominant position could not only be interdicted or

⁵ Erläuternde Bemerkungen (Explanatory remarks) RV (Regierungsvorlage, government bill) 1804 BlgNR (SupplementsNo.) 24. GP.

⁶ However, see – as mentioned above (point 1.2.) – the provision concerning the reversal of the burden of proof to the detriment of the market-dominant undertaking, which has been introduced in the law together with this additional example in 1999.

prohibited (by order of cessation) by the Cartel Court on request but was immediately deemed as illegal by the law. This new wording had the aim to make clear that any behaviour contrary to this provision would be, by itself, an immediate breach of the law not requiring any previous order or injunction by the Cartel Court.

Without any substantive change this provision subsequently was converted into Section 5 Cartel Act 2005⁷. As described above (see chapter 1.2.), since the amendment to the Cartel Act in 2013 Section 5 (1) No. 1 Cartel Act no longer refers to *“directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions”* but to *“claim for purchase or selling prices or other terms and conditions which differ from those which would highly likely arise if effective competition existed, whereby, in particular, the behaviour of undertakings in comparable markets, with effective competition, shall be taken into account”*.

1.4. Other statutory provisions

In addition to the cartel law regulations concerning the abuse of a market-dominant position the Austrian Act on Local Supply (Federal Law on Improvement of Local Supply and Competitive Conditions, hereinafter *“Act on Local Supply”*)⁸ includes provisions on *“good business behaviour”* (*“Kaufmännisches Wohlverhalten”*) which indirectly refer to an abuse of market power. According to the general clause in Section 1 (1) Act on Local Supply business practices between any undertakings among each other (thus, despite the title of the Act, not only undertakings involved in local supply) can be interdicted (by the Cartel Court) as far as they are likely to threaten the performance-related competition.

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

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

Another notable provision is Section 4 (1) Act on Local Supply which refers to the abuse of a market-dominant position by refusal to deal: According to this provision, undertakings who usually deliver to final sellers may be obliged to conclude a contract, if the non-supply would threaten the local supply

⁷ The Cartel Act 2005, which entered into force at 1 January 2006, is still the current Austrian Cartel Act.

⁸ Nahversorgungsgesetz, NahVersG, BGBl. (Federal Law Gazette) No. 392/1977 as last amended by BGBl. No. 50/2012.

or would significantly affect the competitiveness of the final seller on the market of the type of goods not supplied.⁹

The Austrian Act Against Unfair Competition (Federal Law Against Unfair Competition)¹⁰, constituting the substantial regulation of the Austrian law on unfair practices, does not include any provision which would expressly refer to the exercise of market power or the abuse of a market-dominant position like the ban on abuse does in the Cartel Act. However, as can be seen from case-law, abusive exercise of market power may well (under certain circumstances) constitute a violation but of this law, since various conducts of market-powerful companies such as tapping of suppliers, discriminative practices, refusal to supply and certain exclusivity obligations have been repeatedly considered as unfair business practice within the meaning of the general clause of Section 1 Act Against Unfair Competition or Section 1a Act Against Unfair Competition (aggressive commercial practices). The market position of the company concerned, in particular, is also taken into account when assessing the lawfulness of tying agreements (package deals) or the granting of free gifts. Furthermore, according to the jurisdiction relating to the case law group of “breach of law” an infringement of the prohibition of the abuse of a market-dominant position stipulated in Section 5 Cartel Act can also be considered as “other unfair practice” within the sense of Section 1 (1) No. 1 Act Against Unfair Competition. Pursuant to Section 2 (1) No. 7 Competition Act (Federal Law on the Establishment of a Federal Competition Authority)¹¹ the Austrian Federal Competition Authority¹² (“Bundeswettbewerbsbehörde”, “BWB”) is entitled to claim for injunctive relief under the Act Against Unfair Competition.

In its fifth chapter (“Competition Regulation”) the Austrian Telecommunications Act¹³ includes provisions relating to “undertakings with significant market power”¹⁴. These articles state that under specific conditions such undertakings can be obliged by the regulatory authority to stop certain practices, as there are in particular (cf. Section 43 (2) Austrian Telecommunications Act): Excessive pricing, hampering the entry of new market participants, predatory pricing to eliminate competition, inappropriately preferring certain end users or unjustifiably bundling services.

2. Definition of the abuse of market power

2.1. No legal definition in the Cartel Act

The Austrian Cartel Act does not provide for any definition of the term “abuse”. Concerning its content and interpretation the wording “abuse of a market-dominant position” provided here is just

⁹ See also Section 3 Act on Local Supply (which corresponds to Section 6 Cartel Act), which provides that proceedings pursuant to Sections 1 and 2 Act on Local Supply may not be taken as a reason by the defendant to exclude the undertaking affected (by a conduct as defined by those provisions) from further supply or demand on reasonable conditions.

¹⁰ Bundesgesetz gegen den unlauteren Wettbewerb 1984 - UWG, BGBl. (Federal Law Gazette) No. 448/1984 as last amended by BGBl. I No. 49/2015.

¹¹ Bundesgesetz über die Einrichtung einer Bundeswettbewerbsbehörde (Wettbewerbsgesetz - WettbG), BGBl. (Federal Law Gazette) I No. 62/2002 as last amended by BGBl. I No. 129/2013.

¹² Bundeswettbewerbsbehörde (BWB).

¹³ Telekommunikationsgesetz 2003 - TKG, BGBl. (Federal Law Gazette) I No. 70/2003 as last amended by BGBl. I No. 44/2014.

¹⁴ Pursuant to Section 35 (1) Telecommunications Act an undertaking is considered having a significant market power, if this undertaking either alone or together with other undertakings holds such a strong economically position, that it has the possibility of acting, to a considerable extent, independently of its competitors, its customers and ultimately the consumers.

LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE
INTERNATIONAL LEAGUE OF COMPETITION LAW
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

defined by an indicative list of abusive behaviour. The legislative materials to Section 46 (1) Cartel Act 1972¹⁵, by which provision the control of abusive practices was introduced into Austrian law, merely note that the definition of “abuse” corresponds to Article 86 EEC Treaty.

2.2. Definition by the competition authority

The BWB determines the term “abuse of market power” on its website (www.bwb.gv.at; English version) as follows: “Abusive practices by dominant companies may lead to disadvantage for other companies and customers that would not naturally occur or be possible in a setting of effective competition. Abusive practices include: imposing unfair prices, restriction of sales, deprivation of certain contractors, and selling goods below cost.” Any additional, explicit definition of the term “abuse” by the BWB cannot be seen yet.

2.3. Definition by case law

In accordance with the definition of the term “abuse of a dominant position” (referred to in Article 102 TFEU) by the European Court of Justice this term in Austria (see Section 5 (1) Cartel Act) generally is defined in settled case-law as follows:

“Any behaviour of an undertaking in a dominant position, which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition, is considered as abusive.”¹⁶

Furthermore, in Austrian jurisdiction the term of “abuse” has been repeatedly defined as follows:

“It is an abuse of a market-dominant position, if an undertaking economically superior in relation to the other market participants takes influence on the market in a way, which is likely to evolve negative effects on the market and competition conditions”¹⁷ or “... is suspected to cause negative effects on the market and competitive conditions”¹⁸.

“Any behaviour of a market-dominant undertaking that tends and is likely to threaten the structure of a market by non-performance-related means in competition should be considered as abusive, irrespective of whether the competitors are able to withstand this behaviour”.¹⁹

“An infringement of the law does not require any wilful intention of the market-dominant entrepreneur to affect the competition conditions in a negative way; the objective ability of the conduct in question to lead to this result is sufficient to infringe the law”.²⁰

¹⁵ Erläuternde Bemerkungen (Explanatory remarks), RV (Regierungsvorlage, government bill) 473 BgNr. (SupplementsNo.) XIII. GP, 36.

¹⁶ Decision of the Cartel Supreme Court (“Kartellobergericht”, KOG), 11 October 2012, 16 Ok 1/12 - ÖBB/Westbahn II; see also Cartel Supreme Court, 19 January 2009, 16 Ok 13/08 - Telekom “KombiPaket”; for further evidence see Gruber, Österreichisches Kartellrecht², § 5 KartG E 31.

¹⁷ Cartel Supreme Court, 16 July 2008, 16 Ok 6/08 - Asterix bei den Olympischen Spielen, with further references.

¹⁸ Cartel Supreme Court, 19 January 2009, 16 Ok 13/08 - Telekom “KombiPaket”, with further references.

¹⁹ Cartel Supreme Court, 17 October 2005, 16 Ok 43/05 - Die NEUE Zeitung für Tirol.

²⁰ Cartel Supreme Court, 19 January 2009, 16 Ok 13/08 - Telekom “KombiPaket”; with further references.

According to these specifications of the term "abuse of a dominant position" by the Austrian jurisdiction the central content of the regulation in Section 5 (1) Cartel Act is the ban on using non-performance-related means in competition by a market-dominant undertaking, if this behaviour, from an objective point of view, is likely to affect the competition conditions on the market already dominated.

3. The distinction between exploitative and exclusionary abuse

3.1. Legal Basis

As outlined above Section 5 Cartel Act is modelled after Art 102 TFEU. As in Art 102 TFEU the categories of exploitative and exclusionary abuses are not defined in the text of the provision. However, it is undisputed that Section 5 Cartel Act covers both categories of abuse.

The indicative list of examples of abusive behaviour in Section 5 Cartel Act contains both types of abusive behaviour:

According to Section 5 (1) No. 1 Cartel Act it is abusive for a dominant undertaking to impose purchase or selling prices or other trading conditions, which differ from those that would likely arise under effective competition. On the other hand, Section 5 (1) No. 5 Cartel Act covers predatory prices as an example of an exclusionary abuse. Section 5 (1) No. 2 Cartel Act corresponds with Art 102 b TFEU by declaring the limitation of production, markets or technical development to the prejudice of consumers as abusive covering both exclusionary and exploitative practices.

3.2. Decisional Practice

The Competition Authority follows the distinction described above in its application of Section 5 Cartel Act. Its decisions are based on European Case Law and the practice of the European Commission, which incorporate the distinction.

The Austrian Supreme Court has expressly recognized the two different categories of abuse and follows the distinction in its decisional practice.

The Supreme Court has held:

“Jurisprudence and Doctrine distinguish between two general forms of abuse: The impediment of chances of competitors and along with it the impairment of competition (market structure) on the one hand and acting to the detriment of customers (suppliers) on the other hand. This distinction has been recognized under the terms of ‘exclusionary abuse’ and ‘exploitative abuse’”²¹

²¹ „Rechtsprechung und Lehre unterscheiden zwei grundsätzliche Missbrauchsvarianten: Die Beeinträchtigung von Wettbewerbschancen und damit Gefährdung von Wettbewerb (Marktstrukturen) einerseits und die davon unabhängige Übervorteilung von Abnehmern (Lieferanten) andererseits. Für die Unterscheidungen haben sich die Bezeichnungen „Behinderungsmisbrauch“ und „Ausbeutungsmisbrauch“ durchgesetzt“, e.g. Supreme Court („Oberster Gerichtshof“, OGH), 28 January 2009, 9 Ob 66/07g - *Donaukreuzfahrten*.

Exclusionary and exploitative practices are recognized as independent forms of abuse.²² In addition, the courts have also recognized that the two types of abuse are not isolated from each other and that behaviour by a dominant undertaking can fall under both categories.²³

3.3. Summary

The distinction between exclusionary and exploitative abuses forms an essential part of the prohibition of the abuse of a dominant position. The prohibition contained in Section 5 Cartel Act is in line with decisional practice under Art 102 TFEU.

4. Treatment of price-based and non-price-based abuse and stricter rules compared to Art 102 TFEU

4.1 Price-based and non-price-based abuse

Section 5 Cartel Act does not distinguish between price based and non-price based abuse. Both forms of abuse are covered by the prohibition. As in Art 102 TFEU the prohibition prohibits the abuse of a dominant position regardless of the form the behaviour takes.

The indicative list of abusive practices in Section 5 Cartel Act includes price-based and non-price-based types of abuses. Section 5 (1) No. 1 Cartel Act covers unfair prices and trading conditions and treats them in the same manner. Section 5 (1) No. 2 Cartel Act prohibits the limitation of production, markets or technical development to the prejudice of consumers regardless of whether price or non-price elements are part of the practice. Section 5 (1) No. 3 Cartel Act prohibits unjustified discrimination regardless of whether the discriminatory practice concerns prices or other trading conditions. The same applies for tying and bundled rebates under Section 5 (1) No. 4 Cartel Act as price-based and non-price-based forms of abuse.

The Competition Authority and the courts also do not distinguish between price-based and non-price-based forms of abuse. They base their decisions on the principles adopted by the European Courts and the European Commission.

4.2 Stricter rules for unilateral conduct than Art 102 TFEU?

4.2.1. No stricter rules in respect to abusive behaviour

As outlined above Section 5 Cartel Act is based on Art 102 TFEU. In respect to the definition of abuse and the practices covered, the prohibition is interpreted in line with the case law of the European Courts.²⁴ Therefore, Section 5 Cartel Act does not contain stricter rules for unilateral behaviour than Art 102 TFEU.

²² See e.g. Cartel Supreme Court, 5 September 2001, 16 Ok 3/01 for exclusionary abuse and Cartel Supreme Court, 14 June 1993, Okt 3/93 for exploitative abuse.

²³ E.g. Supreme Court, 30 June 1998, 4 Ob 165/98p - *Reparatur von Leasingfahrzeugen*.

²⁴ See e.g. Cartel Supreme Court, 9 October 2000, 16 Ok 6/00 - *Abonnementpreise*; Cartel Supreme Court, 11 October 2012, 16 Ok 1/12 - *ÖBB/Westbahn II*; Cartel Supreme Court, 19 January 2009, 16 Ok 13/08 - *Telekom "KombiPaket"*.

4.2.2. Definition and Presumption of Dominance

Austrian law contains stricter rules in respect to the existence of a dominant position broadening the applicability of the prohibition of abusive behaviour. In addition, there are several presumptions of dominance shifting the burden of proof to the undertakings concerned.

4.2.2.1. Dominance in relation to customers or suppliers

According to Section 4 (3) Cartel Act an undertaking is dominant if it holds a preeminent position in respect to its customer or suppliers. Such a position exists if customers or suppliers are dependent on the ongoing supply relationship with the undertaking concerned. This so-called “relative dominance” broadens the applicability of the prohibition of abusive behaviour and includes undertakings that would not be considered dominant under a conventional dominance standard.

4.2.2.2. Presumption of dominance

In addition to the general definition of a dominant position Section 4 Cartel Act contains several presumptions of dominance shifting the burden of proof to the undertaking concerned. Different presumptions apply to single dominance and collective dominance.

Pursuant to Section 4 (2) Cartel Act an undertaking is deemed to be dominant if

- it has a market share of 30 % or more,
- it has a market share of more than 5 % and has only two competitors in the market, or
- it has a market share of more than 5 % and is one of four competitors in the market holding a combined market share of 80 % or more.

If one of these presumptions applies, the undertaking concerned has to prove that it does not hold a dominant position.

Section 4 (2a) Cartel Act was introduced in 2013 and contains additional presumptions of dominance for a collective dominant position. Undertakings are deemed to hold a collective dominant position if they

- three or less undertakings hold a combined market share of 50 % or more or
- five or less undertakings hold a market share of 2/3 or more.

If one of these presumptions applies, the undertakings concerned have to prove that they do not hold a collective dominant position.²⁵

The provisions lead to a broader application of the prohibition of abusive behaviour since the burden of proof shifts to the undertakings concerned. In the light of modern economic theory the thresholds can be criticized in two respects. First, it can be argued that market shares are not a conclusive

²⁵ Notably the amendment was not based on European Law but was modelled after the German provision Section 19 GWB, which has been criticized for containing strict formal criteria not in line with European practice, e.g. *Säcker/Gosse/Wolf* in *Münchener Kommentar Kartellrecht* (2008) § 19 GWB para 39; on consequences see *Schuhmacher/Muntean*, *Die Kartellgesetznovelle 2013 – Eine Beurteilung der wesentlichen materiell-rechtlichen Änderungen*, wbl 2013, 181 (187).

indicator for market power and therefore strict thresholds are not a suitable tool for measuring dominance. Second, the market share threshold seem to be too low as a signal for market power, leading to a risk of overenforcement of the prohibition of abusive behaviour without establishing market power.

4.2.2.3. Conclusion

Austrian law on the prohibition of the abuse of a dominant position does not contain stricter rules in respect to abusive behaviour but extends the applicability of the prohibition by the concept of relative dominance and presumptions of dominance linked to market share thresholds.

5. Enforcement

5.1. Decision-Making Practice

5.1.1. Proceedings and decisions in the last five years

In the last 5 years, there had been one decision of the Cartel Court²⁶, where the Court found that an undertaking had abused its market dominance:

Westbahn, a private railway company, which provides passenger transport connections between Vienna and Salzburg, claimed that *ÖBB*, the state owned Austrian railway operator, abused its dominance on the Austrian railway market by rejecting to include the travelling times of *Westbahn* in its time schedule publications.

The Cartel Court followed the arguments of the claimant. In the Court's view, *ÖBB* was dominant on the market for time schedule media (based on the fact, that *ÖBB* had an outstanding and therefore dominant market position on the market for railway passenger transport in Austria).

In the Cartel Court's view, *ÖBB*, by rejecting to include *Westbahn's* travelling times, hereby infringed the principle of equal treatment (as, e.g., the travelling times of *Deutsche Bahn* were included in *ÖBB's* publications).

Based on both, the specific non-discrimination clause of Art 102 c TFEU (and Section 5 (1) No. 3 Cartel Act) and the general prohibition-to-abuse-clause of Art 102 TFEU (and Section 5 (1) Cartel Act), the Cartel Court obliged *ÖBB* by interim injunction to include the travelling times of the incumbent *Westbahn* in its published timetables (e.g., on *ÖBB's* website, but also on printed publications).²⁷

On appeal, the Cartel Supreme Court confirmed the outcome of the judgment of the court of first instance.²⁸ However, the Cartel Supreme Court overruled the court of first instance in so far as potential customers of the dominant undertaking are not covered by the specific non-discrimination clause of Art 102 c TFEU, but by the general clause of Art 102 TFEU only. The Cartel Supreme Court hereby referred to EU case law²⁹, following which the customer must be already in a business relationship with the dominant undertaking in order to apply Art 102 c TFEU.

²⁶ In Austrian cartel law, it is the Cartel Court and not the Federal Competition authority which rules on antitrust infringements – for details, reference is made to Chapter 5.2.

²⁷ Cartel Court, 28 November 2011, 26 Kt 70-72/11-21 - *ÖBB-Westbahn II*.

²⁸ Cartel Supreme Court, 11 October 2012, 16 Ok 1/12 - *ÖBB/Westbahn II*.

²⁹ ECJ, 26 November 1998, C-7/97 - *Bronner/Mediaprint*, para 30.

In another proceeding, based on Section 27 Cartel Act, the Cartel Court declared in 2011 commitments legally binding, following which *Constantin* (film distribution) was obliged to provide, if requested, each movie operator in Austria with copies of its film premieres. These commitments were based on various abuse-of-dominance proceedings in the past (inter alia in 2008).³⁰ Following the outcome of the latter, *Constantin* had abused its market dominance by not providing a sufficient number of copies of its blockbusters to all interested movie operators in Austria.

In further eight proceedings (as far as known in public³¹) the claimants (either private parties or the Austrian Competition Authorities) did not get through with their claim against the respective defendant concerning alleged abuse of dominance practices. These cases encompass different business areas such as sportswear³², liquefied petroleum gas (LPG; the first collective dominance case in Austria, currently on appeal)³³, the court's commercial register³⁴ or waste disposal³⁵.

Concerning Cartels, i.e., infringements of Art 101 TFEU (and Section 1 Cartel Act as the national equivalent), there had been approx. 40 proceedings at the Cartel (Supreme) Court in the last 5 years, whereby in approx. 30 cases a fine was imposed. The majority of these cases was linked to agreements / concerted practices on vertical price-fixing in the grocery sector. Almost all of these proceedings were closed by settlement.

5.1.2. The proportion of exploitative and exclusionary abuses

Based on the 10 abuse of dominance cases mentioned above, there had been 9 exclusionary and 3 exploitative abuses. These figures take into account that some of the alleged abuses encompass both, exploitative and exclusionary aspects. E.g., in the LPG case the BWB argued that 5 established providers of LPG for heating purposes had abused its collective dominance by requesting exploitative fees based on long-term contracts from its customers. In the BWB'S view, the LPG providers hereby also excluded competitors from the market. As mentioned, the Cartel Court came to the conclusion, that the LPG providers concerned did neither hold single nor collective dominance on the market. Consequently, the request of the BWB was rejected.

5.2 Competent Courts and Authorities

5.2.1. Courts and authorities dealing with competition infringements

³⁰ See, e.g., Cartel Supreme Court, 16 July 2008, 16 Ok 6/08 - *Constantin Filmverleih*.

³¹ Until March 2013, only decisions of the Cartel Supreme Court were published (in an anonymous version), while decisions of the Cartel Court (as court of first instance) were in general not disclosed. With the reform of the Cartel Act in 2013, summaries of legally binding rulings of the Cartel Court (as court of first instance) have to be published (cf. Section 37 Cartel Act). However, e.g., if parties agree on settlements in a private enforcement proceeding (i.e., the claim of abuse of dominance was submitted at the Cartel Court by a private party and not the BWB) or if a claim is withdrawn, there is still no obligation to publish. Furthermore, pursuant to Section 37 Cartel Act, decisions of the Cartel Court are only published when the Court actually finds an infringement of competition law. Consequently, a rejection of a claim is not reflected in the summary of decisions of the Cartel Court, but only, on anonymous basis, if the Cartel Supreme Court on appeal decides so.

³² Cartel Supreme Court, 26 June 2014, 16 Ok 12/13 - *Sports Direct/Adidas*.

³³ Cartel Court (in first instance), 28 October 2014, 27 Kt 23, 24/09 - *LPG*.

³⁴ Cartel Supreme Court, 28 February 2011, 16 Ok 4/10 - *Firmenbuch*.

³⁵ Cartel Supreme Court, 26 June 2014, 16 Ok 10/13 - *Reclay/Altstoff Recycling*.

Austrian cartel law provides for a strict separation of powers between investigatory and decision-making authorities. The BWB has broad investigatory powers. In particular, it can request information and the production of documents, hear witnesses, and conduct dawn raids (though for the latter it must obtain a court warrant). Upon conclusion of its investigation, the BWB may bring proceedings in the Cartel Court, and request the imposition of a fine on the members of an alleged cartel.

In addition, the Federal Cartel Prosecutor (“Bundeskartellanwalt”, “BKA”), who reports to the Minister of Justice, also has the power to request fines. Though, unlike the BWB, he does not have proper investigatory powers. The BWB and the BKA together form the so called “official parties”.

All substantive decisions in competition matters, from cease-and-desists orders to the imposition of fines for infringements of the antitrust rules, are exclusively dealt by the Cartel Court and the Cartel Supreme Court on appeal. However, the Cartel Court must not impose a fine which is higher than the amount requested by the BWB or BKA.

5.2.2. Regulators enforcing competition rules?

Specialized regulators are “authorities established by federal law for the purpose of regulation of specific sectors” (Section 36 (4) No. 2 and Section 46 Cartel Act). E.g., regulators were set up for Energy (“E-control”), Broadcasting and Telecommunications (“RTR - Rundfunk & Telekom Regulierungs-GmbH”), Railway Transport (“SCG - Schienenkontroll GmbH”) and Banking and Insurance (“FMA - Finanzmarktaufsicht”).

These authorities mainly have regulatory powers. I.e., also within their respective sectors, the regulators’ competences do not effect or limit the competences of the Cartel Court or of the BWB (principle of parallel applicability of regulatory and cartel provisions). E.g., in 2003, the Cartel Court found that an Austrian Telecommunication operator had abused its market dominance with regard to its tariffs invoiced to competitors for the use of its network infrastructure, although the RTR had approved the tariffs before.³⁶

These specialized authorities are therefore not entitled to enforce competition law, e.g., also within their respective sector, they may not impose a fine based on an infringement of cartel law. However, in general cartel law proceedings, the regulators have certain rights of requests (e.g., to request a cease-and-desists order) and may submit opinions.

5.2.3. Guidelines concerning the enforcement or interpretation of the prohibition?

The BWB so far did not provide any guidelines or point of view with regard to its approach of Art 102 TFEU.

However, in Austrian Cartel Law practice (at least following legal commentaries) it is accepted that even in cases, where trade between Member States is not affected and where therefore Art 102 TFEU will not apply, the Commission’s vertical Block Exemption Regulations apply “de facto”.³⁷

³⁶ Cartel Supreme Court, 11 October 2004, 16 Ok 11/04 - *Telekom Austria Minimumtarif*.

³⁷ *Reidlinger/Hartung*, Das österreichische Kartellrecht², p. 85.

Therefore, it seems arguable, that in cartel proceedings in Austria reference, at least in analogy, can be made to the European Commission's „Guidance on enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings“³⁸. To the authors' knowledge, the Cartel Court itself so far did not clarify whether such a reference to the Commission's Art 82 guidance will be accepted.

5.3 Approach Followed by Competent Courts and Authorities

5.3.1. No particular approach to the interpretation of 'abuse'

Reference can be made to chapter 2. There does not seem to be a particular approach regarding the concept of “abuse”.

In the above mentioned rail-operator decision, the Cartel Supreme Court defined an abuse as “*all behaviour of an undertaking in a dominant position, which may influence the structure of a market, where competition is already weakened by the presence of that dominant undertaking and where the maintenance or growth of the remaining competition on that market is hindered by the dominant undertakings with methods different from those which are normally applied on a competitive product or service market*”.³⁹

It has to be further noted that Austrian Cartel Courts in general very often follow the case law of the EU-Courts in Luxembourg. In the cited rail-operator decision, the Cartel Supreme Court explicitly states that also with regard to the application of national cartel law, the case-law of EU-Courts concerning abuse of dominance under Art 102 TFEU must be taken into account.

5.3.2. Objective/aim of the prohibition of anticompetitive unilateral conduct

Based on the law itself and the respecting case law, the objective is to reject “*behaviour of an economic superior undertaking, which influences market conditions in a way which enables it to have a negative impact on the market and competition conditions*”.⁴⁰

The aim of abuse supervision is to “*terminate market disturbance of the dominant undertaking*”⁴¹.

5.3.3. Effect of the Commission's Guidance on enforcement priorities?

See above, in the authors' view, the Commission's Guidance might be applied, at least in analogy. However, apparently the Cartel Court so far did not explicitly refer to it.

5.3.4 Criticisms directed towards the decisional

As outlined above, there had been a limited number of abuse-of-dominance proceedings in Austria within the last five years. Within these cases, the Cartel Court only once confirmed an abuse, while in various other cases the request of private parties or the BWB for a cease and desist order and/or for a fine was rejected.

³⁸ EC (No.) 2009/C 45/02.

³⁹ Cartel Supreme Court, 11 October 2012, 16 Ok 1/12 - *ÖBB/Westbahn II*.

⁴⁰ Cartel Supreme Court, 16 July 2008, 16 Ok 6/08 - *Constantin Filmverleih*.

⁴¹ Cartel Supreme Court, 16 December 2002, 16 Ok 10/02 - *Wintertarif*.

LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE
INTERNATIONAL LEAGUE OF COMPETITION LAW
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

However, in the authors' view, this small output is rather based on the complex economic concept of an abuse of dominance than on the Austrian cartel law enforcement and the Cartel Court's approach. Of minor importance might also be the fact that an abuse of dominance (by its nature?) is not covered by the Austrian concept of leniency. Last, the limited number of cases could be also connected with the BWB's focus on vertical infringements in the last years, resulting in a record number of decisions and fines imposed (often by settlement).

In substance, one of BWB's general points of criticism on cartel procedural law especially affects abuse-of-dominance proceedings:

The BWB's criticism is based on the fact that Austrian Cartel law proceedings consist of a two-step-approach: Once the Cartel Court decides, only one appeal can be made to the Cartel Supreme Court. The right of appeal is hereby strictly limited on points of law, i.e. the Cartel Court as court of first instance is the only instance which decides on the factual circumstances of a case.

Concerning abuse of dominance proceedings the essential point hereby is that the findings of the Cartel Court very often rely on an opinion of a court expert, who, e.g., investigates whether the undertaking(s) concerned is (are) dominant on the respective market. Based on the concept that an appeal is only possible on points of law, challenging an expert opinion as such on appeal is essentially limited:

The Cartel Supreme Court in this regard confirmed that "*findings of an expert opinion can be checked only within narrow limits*". E.g., with regard to a market definition (as the essential tool in abuse of dominance proceedings) chosen by an expert, the Cartel Court is hereby limited to check the overall suitability of a particular method of defining the respective market definition. In contrast, the result of applying a suitable method cannot be reviewed by the Supreme Cartel Court.⁴²

Therefore, if the expert complies with the legally prescribed investigation principles, but, for example, bases his statement on a too small number of respondents, this is considered as a question of evidence, on which the Supreme Cartel Court may not rule upon. The same applies, e.g., with regard to an alleged inadequate methodological basis in applying the SSNIP test.

In the BWB's view, such "*declaration of incompetence*" of the Cartel Supreme Court is difficult and might hinder efficient implementation also with regard to abuse-of-dominance proceedings.⁴³

From a practitioner's side, on the one side, the BWB's "lack of implementation" argument is well understood under fair trial principles. This lack of implementation may also affect the non-authority side. E.g., if the defendant is fined in first instance based on a court opinion or, in private enforcement, if a private party's claim is rejected based on an expert opinion.

On the other side, one main argument against a second instance which might also review facts (and therefore, in detail, e.g. also review opinions based on factual grounds) is the time factor. E.g., in the above mentioned LPG proceedings, the BWB's request to the Cartel Court, which initiated the proceedings, dated from August 2009. Only in March 2015, based on an orally delivered judgment in a hearing in October 2014, the Court of first instance submitted its written rejection of the BWB's claim. Needless to say that such delay does not only essentially affect the respective undertakings in

⁴² Cartel Supreme Court, 12 December 2011, 16 Ok 8/10 - *Radiusklausel IV*.

⁴³ See Annual Report („Tätigkeitsbericht“) BWB, 2011, p. 45.

a financial way, but also hinders them in their daily business development (as, in the given example, current and new strategies are under the threat to be considered as an abuse and may result in a fine imposed). Furthermore, procedural law guarantees a certain “standard of quality” also with regard to facts. I.e., the Cartel Supreme Court might refer the case back to the Cartel Court, if substantial procedural violation of the court of first instance (e.g., if further facts need to be established) request a renewed taking of evidence. Last, the Cartel Supreme Court, under fair trial principles, bears some responsibility not to limit its competence with regard to the review of “points of law” to the last extreme. Also with regard to expert opinions, there seems to be some possibility to extend the Cartel Supreme Court’s right of review, also based on points of law.

Therefore, in the author’s view, the current two instances approach as explained above should be maintained.

Another actual point of criticism on cartel procedural law, which also affects abuse of dominance proceedings, is based on the unclear legal concept of “access to file” / “protection of business secrets” in cartel proceedings.

Austrian national law (Section 39 (2) Cartel Act) hereby essentially limits the “access to file” in cartel proceedings by stating that: *‘Persons, who are not parties to the procedure, may gain access to the files of the Cartel Court only with the consent of the parties.’*

However, this concept was rejected by the European Court of Justice: In C-536/11, 6 June 2013 – *Donau Chemie*, the Court ruled that European Union law precludes a provision, where access to file is made subject solely to the consent of all the parties to those proceedings, without leaving any possibility for the national courts of weighing up the interests involved.

Recently, the Cartel Supreme Court followed this approach also with regard to proceedings which are based on national cartel law only (cf. 16 Ok 9/14f, 28 November 2014). This approach is not only in contradiction to the wording of Section 39(2) Cartel Act, based on these rulings it also remains unclear, whether and to what extent business secrets included in the court’s files may be protected towards third parties. A simple reference to the “weighing of interests” seems to be insufficient.

6. Summary

Since the Cartel Act of 1972 the Austrian law contains a general prohibition of the abuse of a market-dominant position. The relevant provision (Section 5 Cartel Act) is virtually identical to Article 102 TFEU and contains an indicative list of abusive behaviour corresponding to the practices listed in the EU-regulation. Some difference arises from the fact that the wording of the Austrian list suggests a competitive-based review of price abuses and additionally refers to unjustified sales below cost price.

Other statutory provisions concerning the abuse of market power can be found in the Act on Local Supply and in the Telecommunications Act. The Act Against Unfair Competition does not expressly refer to the abuse of market power, however, as can be seen from case-law, such conduct may well constitute a violation of this law.

The Cartel Act does not provide for any definition of the term "abuse". There is also no explicit definition of this term by the Austrian Competition Authority. In Austrian case law the term "abuse of a dominant position" is defined in accordance with the case law of the European Court of Justice.

LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE
INTERNATIONAL LEAGUE OF COMPETITION LAW
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

The distinction between exclusionary and exploitative abuses forms an essential part of the prohibition of the abuse of a dominant position. The prohibition contained in Section 5 Cartel Act is in line with decisional practice under Art 102 TFEU.

Section 5 Cartel Act does not distinguish between price based and non-price based abuse. Also the Competition Authority and the courts do not refer to this distinction.

Austrian law on the prohibition of the abuse of a dominant position does not contain stricter rules in respect to abusive behaviour but extends the applicability of the prohibition by the concept of relative dominance and presumptions of dominance linked to market share thresholds.

In the last 5 years, there had been just one decision of the Cartel Court, where the Court found that an undertaking had abused its market dominance. In further eight proceedings the claimants did not get through with their claim. Concerning cartels there had been approximately 40 proceedings at the Cartel Court in the last 5 years, whereby in about 30 cases a fine was imposed.

There is a strict separation of powers between investigatory (Competition Authority) and decision-making (Cartel Court and Cartel Supreme Court) authorities. The specialized regulators do not effect or limit the competences of those authorities and are not entitled to enforce competition law.

The small output of abuse-of-dominance proceedings in Austria seems to be rather based on the complex economic concept of an abuse of market-dominance than on the Austrian cartel law enforcement and the Cartel Court's approach. It has been criticized, that the Cartel Court is the only instance to decide on the factual circumstances of a case and there is no way to review, e.g., the court expert opinion determining the market-position of an undertaking. However, considering the time factor and procedural law guarantees for accurate fact-finding, the current two instances approach should be maintained. Concerning the protection of business secrets and access of file a clear national legal concept would be highly appreciated.