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**Austrian Country Report on Question A**

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**Is the concept of the abuse of relative market power beyond market dominance necessary to ensure a functioning competition, and what criteria should be used to assess it?**

**1. Introduction**

Specific rules dealing with relative market power have been introduced into Austrian law with the *1988 amendment to the Austrian Cartel Act*. Prior to this amendment, undertakings were obliged to register with the Cartel Court if they met certain quantitative criteria (mostly market shares) indicating absolute market power. However, even in situations of absolute market power, there were hardly any enforcement activities, as the abuse of dominance was not prohibited per se at that time. Rather, only upon application of certain privileged institutions (primarily employer and employee associations), the Cartel Court was able to intervene against abusive behaviour.

In 1988, the legislator expanded the concept of "market dominance" with regard to relative market power in two ways:

Firstly, the Austrian parliament added qualitative criteria to the definition of market dominance. § 34(1)(4) Cartel Act (now § 4(1)(2) Cartel Act) provides that an undertaking is dominant if it has a market position that is superior to that of other competitors. In this context, in particular financial strength, relationships with other undertakings, access to procurement and sales markets, as well as circumstances that restrict market access for other suppliers shall be taken into account. In the preparatory materials to the 1988 amendment, the legislator explained that this definition serves to capture *relative market power on a horizontal level*, i.e. in relation to specific other suppliers. In 2021, with a view to the digital economy, the legislator added that also the importance of an undertaking's intermediary services for the access of other firms to procurement or sales markets, or to competitively relevant data, and the benefits derived from network effects shall be considered when assessing relative market power.

In addition, Austrian law was supplemented in 1988 by specific rules on *relative market power in vertical relations*. In (nowadays) § 4a Cartel Act, Austrian law provides that an undertaking is (irrefutably) deemed to be dominant if it has a superior market position in relation to its customers or suppliers. This is particularly the case (quote) *"if the customers or suppliers depend on maintaining the business relationship in order to avoid serious economic disadvantages"*. In 2021, this definition was also complemented by special rules for the digital economy. Since then, an undertaking which operates as an intermediary on a multi-sided digital market is deemed to be dominant if the customers depend on the establishment of a business relationship with the respective firm in order to avoid serious economic disadvantages.

The 1988 Cartel Act Amendment did not render the rules on unilateral behaviour directly applicable. Still, abusive behaviour was only prohibited once the Cartel Court had issued an injunction. This changed when the Cartel Act was amended again in *2002*. At that time, the *Federal Competition Authority* was installed as a specialized agency for the public enforcement of antitrust law in Austria (along with the Federal Cartel Prosecutor), and the sanctioning system was fundamentally changed. It was in this context that the Austrian legislator declared the abuse of a dominant market position to be automatically prohibited.

Against this background, prior to 2002, the enforcement of antitrust rules against unilateral conduct (generally, not only with regard to relative market power) was in practice limited to contractual disputes where one of the parties claimed that it was treated unfairly by its business partner, contrary to the spirit of the antitrust regime on abusive behaviour.

§ 4(1)(2) and § 4a Cartel Act are not the only rules enacted in Austria with a view to control for relative market power. Already in 1977, the Austrian parliament passed the so-called *Local Supply Act* (*Nahversorgungsgesetz*; recently renamed into "Act on Fair Conditions of Competition"; *Faire-Wettbewerbsbedingungen-Gesetz; FWBG*), with the specific intention to protect small retail stores against their larger competitors operating multi-store chains. The FWBG contains a general obligation to behave fairly in B2B relations, for instance by refraining from tapping (*Anzapfverbot*), or by a general prohibition to discriminate B2B customers without objective justification. While the FWBG, in this context, does not refer to absolute or relative market power (i.e. the respective rules apply to any market player, irrespective of its market position), the act was specifically designed to capture imbalances in B2B negotiation situations.

Beyond the abovementioned provisions in the Cartel Act and the FWBG, many other legal provisions exist in Austria which serve to protect the weaker party against the abuse of power in *asymmetric negotiation situations*. First but not least, already the *General Civil Code* (*ABGB*), which dates back as far as 1811, contains specific rules on refusal to supply or usury. According to § 879(2)(4) ABGB, usury exists if a contract is characterized by an easily recognizable, significant disproportion between service and consideration. If the disadvantaged parties are unable to cure this disproportion because they find themselves in (inter alia) an economic predicament, the contract which suffers from the imbalance is considered null and void. Other provisions against imbalances in negotiating power may be found, for instance, in the Austrian *Consumer Protection Act*, in *sector regulations* (e.g. telecommunications or energy), or in the Austrian implementation of the EU's *Unfair Trading Practices Directive* (Directive 2019/633).

Against this background, a preliminary question to be answered before discussing Question A is what type of legal provisions that capture situations of relative market power form part of competition law, and which rules with a similar objective pertain to other areas of law (such as consumer protection or sector regulation). For an EU Member State such as Austria, this question needs to be answered in a specific constitutional context. According to *Article 3(1)(b) TFEU*, the EU has exclusive competence to pass legislation concerning "*the establishment of the competition rules necessary for the functioning of the internal market*". This rule of primary Union law also applies to unilateral conduct. To the extent that competition rules governing relative market power are necessary to preserve and promote the internal market, the respective legislation should in principle be passed by the EU legislator, and not on the Member State level. Having that in mind, the convergence rule in Article 3(2)(2) Regulation 1/2003 effectively amounts to an empowerment of the Member States. Under Article 3(2)(2) Regulation 1/2003, the Member States (while being obliged to apply Article 102 TFEU whenever they apply national competition law to an alleged abuse), they are not precluded from adopting and applying stricter national laws on their territory which prohibit or sanction unilateral contact engaged in by undertakings.

On the other hand, internal market law is not an exclusive competence of the EU legislator. Rather, pursuant to Article 4(2)(a) TFEU, the Union shares the competence to regulate the internal market with the Member States. If harmonization of the laws of the Member States is required to promote the internal market, the respective Union measures are primarily based on Article 114 TFEU. To provide an example, the UTP-Directive was not based on Article 103 TFEU (i.e. on EU competition law), but on Article 43 TFEU, which provides the Union with competences in the area of agriculture and fisheries. By taking recourse to this competence, the Union legislator indicated that it does not consider the prohibition of unfair trading practices as a matter of competition law, but rather as a different topic. The same applies for example to the directive's passed by the Union legislator in the field of unfair competition.

To this date, the ECJ has not handed down judgements which provide for a clear delineation between competition rules, as referred to in Article 3(1)(b) TFEU, and internal market rules which also have a bearing on the competitive process. Without discussing this in detail in this paper, there are sound reasons to believe that (as noted by the GC in para 362 of its judgment in Case T-399/16 *CK Telecoms*), EU competition rules are intended to protect the competitive process as such. Having that in mind, neither the protection of certain market players (such as small and medium sized companies) is an *objective of competition law*, as understood in the European Union, nor is the protection of contracting parties (be it businesses or consumers) in imbalanced negotiation situations. More broadly speaking, even avoiding exploitation of businesses or consumers is arguably not an objective of EU competition law. Rather, consumers are protected from exploitation only indirectly, via the working of an effective competitive process, and businesses are protected against exploitation only if the obstructive measures limit their possibilities to innovate or otherwise to act as an effective competitive constraint for other market players.

Against this background, the following *observations* will *focus on § 4(1)(2) Cartel Act and on § 4a Cartel Act*. The question to be answered is to what extent these provisions have contributed to ensure the functioning of the competitive process.

This question is particularly pertinent as, historically, the rules on relative market power have been introduced into Austrian law not as a means to preserve the competitive process but rather as an instrument to cure exploitation. In the preparatory materials to the 1988 amendment to the Cartel Act, the legislator explicitly stated that the new rules shall provide a substitute to the working of competition. If an undertaking, because of its relative market power (be it horizontally vis-à-vis certain suppliers or vertically, vis-à-vis suppliers or customers), is able to impose its will in an objectively unjustified manner upon its business partners, the Cartel Court shall be able to intervene. This is a fundamentally different starting point to "pure" competition law thinking. Nevertheless, it is of course possible (and shall be analysed in the following) that, while the starting point may differ, the result (protection of competition) is still the same.

Much of the above discussion found its way into the *2024 evaluation of Regulation 1/2003* by the EU Commission. In its evaluation (Commission Staff Working Document SWD (2024) 217 final of 5 September 2024, at pp 234) the Commission reports that the convergence rule concerning the application of stricter national laws on unilateral conduct in Article 3(2)(2) of Regulation 1/2003 have received critical feedback from a number of stakeholders. Several company representatives and lawyers pointed out that different national rules or legal tests in relation to unilateral conduct pose challenges from a level playing field perspective. They observed an evolving proliferation of stricter national rules and new competition tools with different legal requirements that may lead to diverging outcomes across the internal market and legal uncertainty for undertakings operating cross-border. Allegedly, there is a need for harmonizing Member States' laws on unilateral behaviour in order to promote the internal market, be it under Article 103 TFEU or under Article 114 TFEU.

Also from an *economic perspective*, stricter national law on unilateral conduct, as compared with Article 102 TFEU, is ambivalent. On the one hand, the recent ECJ case law in abuse cases indicates that the burden of proof for competition authorities to find an infringement of Article 102 TFEU is quite high, which (according to some commentators) might lead to underenforcement. Stricter national rules (for instance with regard to the finding of dominance, the definition of abusive behaviour, or the level of proof) might help to overcome such deficiencies.

On the other hand, it has been observed that stricter national rules on unilateral behaviour tend to protect competitors rather than competition. In economic terminology, the selective process, which is crucial for a free-market economy to produce the best outcome for consumers and businesses alike, is obstructed. While, in the short run, this may seem to be beneficial (at least for the protected competitors), the competitive process might be harmed in the longer run. Further, overly strict national rules against unilateral behaviour may restrict the ability or incentive of companies with significant market power to innovate, which is also not in the consumers' interest. To put it bluntly, overenforcement of antitrust law is not necessarily better for competition than underenforcement.

Finally, it was observed that stricter national rules on unilateral behaviour sometimes serve as a protectionist instrument, shielding national suppliers against their (larger) competitors from other EU Member States. If that happens, this will undermine the very idea of an internal market whose protection is at the forefront of EU competition law.

In the following, we take a look at the Austrian case law on the abuse of relative market power, focusing on the most pertinent last instance decisions of the Austrian Supreme Court.[[2]](#footnote-3) In our conclusions, we explore the question whether Austrian experience rather speaks in favour of these rules as an instrument to protect the competitive process, or whether these rules, as applied in Austria, support the view of the critics, as quoted above. The case law is grouped into industries (film distribution; car distribution; sports equipment; travel agencies), and within the industries chronologically.

**2. Case Law**

**2.1 OGH 09.09.1997 4 Ob 214/97t – *Filmverleih I***

*Facts:* The first judgement in which the Austrian Supreme Court (*OGH*) invoked the rules on relative market power concerned a dispute between the operator of a large movie theatre in Linz (plaintiff) and Constantin film (defendant), which was at that time one of the major film distributors in Austria and which also operated a large chain of cinemas. The dispute arose in 1996, when the plaintiff booked a copy of the picture *"Workaholic"* from Constantin and promised to show the picture on its screens three times a day. However, on four days in July 1996, the movie theatre had shown the picture just two times. Constantin therefore requested a pecuniary penalty, which the plaintiff refused to pay. The dispute escalated, and Constantin blocked its opponent from all further supplies with film copies, including presumed blockbusters, until the penalty was settled. On that account, the movie theatre operator took Constantin to court and requested an interim injunction against the refusal to supply.

*Decision:* The OGH confirmed the finding of the lower instances that Constantin did not meet any of the quantitative or qualitative criteria for absolute market dominance, as defined in the Cartel Act. Competition from other film studios and distributors was too strong. However, the OGH held that Constantin enjoyed relative market power towards the movie theatre operator. As film distribution is based on the principle of exclusive distribution rights, the plaintiff could obtain copies for films licensed to Constantin only from its opponent. Some of these films were (based on the promotional plans of the distributor) presumed blockbusters, i.e. pictures that would attract a large audience and which would account for a large portion of the movie theatres’ box office income once released. Against this background, the OGH held that the plaintiff would suffer serious economic disadvantages (as defined in § 4a Cartel Act) if it were cut off from further film supplies by Constantin.

The OGH went on to decide that Constantin had abused its relative market power by imposing a delivery ban upon the movie theatre operator. In the court's judgement, Constantin's motivation to enforce payment of the previously imposed contractual penalty did not meet the requirements for an objective justification of the refusal to supply, as the delivery ban was considered disproportional, looking at the diverging interests of the parties in dispute. Based on these considerations, the requested injunction against Constantin (i.e. the obligation to supply the plaintiff with film copies), was imposed.

*Conclusion:*This case demonstrates how the 1988 Cartel Act amendment introducing the relative market power doctrine addressed a gap in traditional competition law, establishing a new analytical framework for vertical relationship dependencies beyond conventional market definition constraints.

The case illustrates the fundamental limitation of absolute dominance analysis in industries characterized by exclusive distribution rights and product differentiation. Despite Constantin's insufficient market share for traditional dominance, the Court recognized that exclusive licensing creates structural dependencies that can potentially be exploited even though there exists competition on a broader market. This represents a shift from market structure analysis toward economic reality assessment, focusing on actual competitive constraints rather than abstract market boundaries.

The Court's finding that Constantin's delivery ban was disproportionate to the underlying contractual dispute introduced a crucial proportionality test for relative market power abuse. This prevents dominant parties from leveraging their superior negotiating position to extract disproportionate remedies for unrelated contractual disagreements.

By recognizing how exclusive distribution systems create exploitable dependencies, the case establishes a framework for analysing competition in industries where traditional substitutability analysis fails to capture genuine competitive constraints. This approach proves particularly valuable in creative industries, distribution networks, and other sectors characterized by exclusive dealing arrangements.

* 1. **OGH 18.07.2000 4 Ob 114/00v – *Filmverleih II***

In this subsequent case to *Filmverleih I*, the OGH argued that particularly promising films (blockbusters) can be viewed as separate markets. A key factor in affirming Constantin's obligation to supply was that the case involved "promising first-run releases" which, if withheld, would result in the loss of substantial revenues forming part of the cinema operators’ business planning, and which are essential for the continued operation of the movie theatres. This was assessed as a serious economic disadvantage within the meaning of § 4a Cartel Act, and as a factor forcing the cinema operators to maintain their business relationship with Constantin. According to this decision, under specific circumstances, certain products may constitute a separate market solely due to their characteristics, price level, or intended use, particularly when they benefit from strong consumer preferences.

*Conclusion:*The case *Filmverleih II* shows the importance to distinguish between the two key analytical steps of the economic delineation of the market on the one hand and the subsequent analysis of (relative) market power on the other hand. The task of analysing a firm’s potential to ascertain market power in relation to another firm should not be confused with an alteration of the market definition e.g. the definition of markets in a narrower sense.

* 1. **OGH as KOG 01.07.2002 16 Ok 5/02 - *Village Cinemas***

In this case as well, a movie theatre operator requested an injunction to be regularly supplied by Constantin with film copies. However, in this case, the order sought was not restricted to promising first-run releases.

*Facts:* Film distribution agreements in Austria are regularly based on “Standard Film Licensing Conditions for Public Screenings”, as established by the interest groups of film distributors and movie theatres. These conditions require a written film order and a response from the distributor within three weeks. In practice, orders are usually placed 2 to 6 weeks before the film’s release. The number of film copies made available for first run releases varies depending on the film’s expected success (ranging, at that time, from 5 to 80 copies). Since capacity is limited, not all cinemas receive the desired copies. Rather, the film distributors apply some form of quota allocation, usually based on box office income (i.e. cinemas with a better box office income are given preference) regional factors (location of the movie theatre), and facilities (i.e. how well the movie theatre is equipped), rather than on the order date ("first come first serve"). The distribution fee is revenue-based and ranges between 40% and 50.1% of box office receipts.

The film *Chocolat* was originally projected to attract 60,000 to 80,000 viewers but ultimately reached 225,000. For Austria, only 20 first run release copies were made available by Constantin, acting as the exclusive film distributor. The applicant expressed interest in securing a copy for Vienna but was only offered it on the condition that it also books a copy for Wiener Neustadt, which the applicant declined. Ultimately, screenings of *Chocolat* in Vienna took place exclusively in cinemas belonging to the respondent. Among the twelve Austrian film distributors, the respondent had a market share of 11.6% (measured as a percentage of box office income in the last year prior to the alleged infringement).

*Decision:* The OGH's judgment in this case continued the line of thinking established in *Filmverleih I and II*, but with a different outcome. While the court affirmed that the applicant is economically dependent on the exclusive film distributor regarding blockbusters, it found that the applicant had sufficient alternative sources of supply for "regular" films. As *Chocolat*, prior to its release, was by no means considered within the industry to be particularly promising, the court denied that Constantin possessed relative market power.

The OGH went on to examine whether Constantin enjoys absolute market power. In doing so, the court examined the available sources of supply in the overall film distribution market, i.e. looking upon "regular" films. As on the overall market for film distribution, the legal presumption for (collective) dominance was not met, the injunction was denied.

*Conclusion:*This case demonstrates the analytical pitfalls that arise when market definition is conflated with market power assessment, particularly in the context of essential facility-type scenarios. The court applied a bifurcated approach, acknowledging the applicant's economic dependence on Constantin for "blockbusters" (suggesting a narrow market for premium content) while simultaneously examining market power across the broader "regular films" segment.

The court's finding that *Chocolat* was not considered "particularly promising" prior to release (i.e. in an ex ante assessment), leading to a denial of relative market power, while the film's actual success (225,000 viewers vs. projected 60,000 - 80,000) demonstrated Constantin's control over a valuable asset (ex post reality), highlights the temporal mismatch in the analysis.

By treating blockbusters as a separate category when applying general market analysis, the court failed to recognize that market power can be exercised selectively. Constantin's ability to foreclose Vienna entirely for *Chocolat* demonstrated precisely the kind of leverage that the relative market power doctrine is designed to address.

**2.4 OGH as KOG 04.04.2005 16Ok 20/04 – *Multiplex***

This is another case in the film industry where movie theatre operators requested an injunction to be regularly supplied by Constantin with film copies.

*Facts:*The applicants are various operators of large cinemas (Multiplexes). The first respondent operates a film distribution business throughout Austria (Constantin). It holds 98% of the shares in the second respondent and all of the shares in the third respondent, both of which operate cinemas across the entire federal territory.The respondent did not attain a market share that would give rise to the legal presumption of absolute market dominance.

The dispute raised in the proceedings was the supply of new films to the applicants, which typically operate with at least eight screens and require a continuous flow of attractive films to remain commercially viable.The applicants argued that Constantin, as a group, was dominating both the Austrian market for film distribution as well as the movie theatre market. According to the applicants, the respondents continuously abused their relative market power over other cinema operators by, among other things, refusing to supply them with first-run films without sufficient objective justification, unduly delaying confirmations or rejections so that cinema programming could not be easily planned, and, in cases where films are supplied, imposing unreasonable conditions.

*Decision:* The Cartel Court established that for each first-run release, only a limited number of film copies are made available to the Austrian market. The number of copies primarily depends on the revenue expectations associated with the film. The market is divided into three segments: blockbusters, the mid-range segment, and the art house/niche segment.In the mid-range segment, which is of interest to commercial cinema operators and comprises films released with at least 10 copies, the respondent annually distributes the largest number of films. Competition between movie theatres is based less on ticket prices and more on film selection. Multiplex cinemas must offer an attractive "film mix" in order to remain economically viable. The competitive environment for first-run films is characterised by very narrow timeframes. Only a small number of new films are released each week, and these films compete with each other for only a short period of time, often just a few weeks, before they are replaced by newer titles. Film studios, for strategic reasons, avoid releasing films of the same genre at the same time, even if those films are of only average commercial potential. As a result, cinemas are frequently left with very few competing options at any given time.The Court found that the respondent distributor released nearly one commercially exploitable film each week throughout the year. This consistent and regular presence in the market meant that cinemas were effectively dependent on the distributor’s offerings all year round. As a result, the Court concluded that the distributor held a dominant position, not only in narrow, weekly market segments, but in the broader context of the entire year. These findings indicate that market dominance can exist even without a particularly high market share, notably when customers (here: cinema) have limited alternatives and face structural dependency. The case underlines that dominance may be based on a combination of consistent market presence and the economic realities of a particular industry.

On appeal, the OGH largely confirmed the assessment made by the Cartel Court. The respondent was considered to be dominant within the meaning of § 4a Cartel Act in the relevant market segment, which in this case was the mid-range segment of commercial film distribution. The injunction granted by the Cartel Court against Constantin's abusive behaviour was upheld.

*Conclusion:*The Multiplex case showcases a sophisticated evolution in Austrian competition law's approach to market definition and dominance assessment, effectively resolving the analytical inconsistencies evident in earlier Constantin decisions. The Supreme Court decision demonstrates how relative market power doctrine can serve as a practical tool for addressing competitive concerns in industries where traditional market definition proves inadequate.

Rather than struggling with static market boundaries, the Court adopted a temporally dynamic approach - recognizing that while Constantin's annual market share might not trigger dominance presumptions, its consistent weekly presence in the mid-range segment created structural dependency. This dynamic market definition with a "rolling dominance" concept acknowledges that market power can accumulate through temporal consistency rather than just market share thresholds.

The Court's focus on the economic realities facing multiplex operators - their need for continuous film supply and limited weekly alternatives and hence economic dependency - effectively operationalized the relative market power concept. By recognizing that customers with structural dependencies face different competitive dynamics than occasional purchasers, the analysis moved beyond formalistic market share calculations toward a realistic competitive assessment.

The decision's emphasis on film release scheduling, genre conflicts, and programming constraints demonstrates how competition law can adapt to industry-specific competitive processes. The Court recognized that in creative industries with short product lifecycles and strategic release patterns, traditional substitutability analysis might miss the true competitive dynamics.

The courts' decisions are more stringent regarding market definition and competitive dynamics on the defined market. Rather than artificially narrowing market definition to find dominance or broadening it to avoid intervention, the Court developed a framework that captures genuine competitive constraints without methodological contortions. The focus on structural dependency and temporal market presence provides a more nuanced alternative to binary dominance / non-dominance determinations.

The Constantin line ultimately illustrates how the relative market power doctrine can aid in preserving competitive processes in industries where traditional antitrust tools are not easily applicable.

Following on the *Multiplex* judgment, the Austrian Federal Competition Authority ("*AFCA*") brought a public enforcement case against Constantin before the Cartel Court, which resulted in fines being imposed upon Constantin (OGH as KOG 26.06.2006 16 Ok 3/06). In a further private enforcement case (OGH as KOG 16.07.2008 16 Ok 6/08 – *Asterix*), the OGH issued another injunction against Constantin. The matter was then ultimately resolved by remedies concerning Constantin's film release policy.

**2.5 OGH 15.10.2002 4 Ob 187/02g– *Alfa Romeo***

*In Alfa Romeo* (and also in the subsequent judgment of 20.10.2009 4 Ob 119/09t – *Suzuki*), the OGH applied the concept of relative market power to the relation between authorized car dealers on the one hand and the general importers of the respective car brand on the other hand. The Court reiterated in both decisions that the availability of alternative sources of supply for the applicant is crucial for a finding of dominance in a vertical relation. The OGH instructed the courts of first instance to examine to what extent the authorized dealer also sold vehicles from other manufacturers, and whether maintaining the business relationship with the importer of a specific brand was essential to avoid serious economic disadvantages, even if the brand as such has no particularly high share on the overall Austrian car market.

*Conclusion:* The Alfa Romeo and Suzuki cases crystallize the core economic concept underlying Austrian courts' assessment of relative market power: economic dependency arising from relationship-specific investments and switching costs, rather than traditional market share-based dominance analysis.

These decisions establish that relative market power hinges on whether terminating a specific business relationship would impose "serious economic disadvantages" on the dependent party and establishes economic dependency as the central test. This approach recognizes that market power can exist in bilateral relationships even where the supplier lacks significant market share in the broader market - a fundamental departure from traditional dominance analysis.

The Court's instruction to examine whether maintaining the relationship with a specific brand importer is "essential" reflects economic theory on asset specificity. Authorized dealers typically make brand-specific investments (showrooms, training, inventory, customer relationships) that cannot be easily rebranded to other manufacturers. This creates economic lock-in effects that generate dependency regardless of the brand's overall market position.

The Court's emphasis on examining whether dealers sell vehicles from other manufacturers demonstrates understanding of portfolio effects in mitigating dependency. Dealers with diversified brand portfolios have greater bargaining power and exit options, reducing their vulnerability to exploitation by any single importer.

This framework effectively operationalizes relative market power by focusing on genuine economic constraints and dependencies rather than formalistic market definition exercises, providing a more nuanced tool for addressing vertical relationship imbalances.

* 1. **OGH as KOG 17.02.2021 16 Ok 4/20d – *Büchl/Peugot***

*Facts:*Büchl, an authorized dealer for Peugeot vehicles, applied for an injunction to terminate the abuse of a dominant market position by the respondent, which is the Austrian general importer for Peugeot vehicles. For nearly 30 years, Büchl had been dealing with Peugeot vehicles, as well as with other car brands. **68% of Büchl's new car sales** and **60% of its workshop revenues** derived from Peugeot vehicles. The application covered various aspects, including unreasonable corporate identity investments, coercion to participate in promotional campaigns, the tying of bonus payments to customer satisfaction surveys, excessive sales targets, and the handling of warranty and guarantee claims at non-cost-covering conditions.

*Decision:* The Cartel Court found that the loss of the respondent as a contractual partner would be **existentially threatening** for the applicant both regarding the sale of new cars as well as after sale services, due to the associated loss of customers and the investments already made in the Peugeot brand. No adequate alternative sales or procurement channels were deemed available. The respondent was presumed to enjoy **relative market power** overthe respondent in the meaning of § 4a Cartel Act.

The OGH confirmed these findings. It added that economic disadvantages resulting from the termination of a business relationship are to be considered serious **not only** when the very existence of a business is threatened, but already when **substantial losses in revenue or the loss of a significant portion of a company’s customer base** are likely to result from the disruption. Thus, the OGH concurred with the court of first instance that Peugeot holds a dominant position vis-à-vis Büchl. Peugot was ordered to cease the relevant abusive practices within three months.

*Conclusion:* The Büchl case establishes a comprehensive operational framework for relative market power assessment, demonstrating how Austrian competition law addresses exploitative conduct in vertical relationships through a nuanced economic dependency analysis.

The case provides practical benchmarks for measuring economic dependency, with 68% revenue concentration in new car sales and 60% in workshop services establishing substantial (though not total) reliance. This quantified approach offers predictable guidance for assessing when vertical relationships cross the threshold into exploitable dependency.

The OGH's crucial clarification that serious disadvantages include "substantial revenue losses" and "significant customer base erosion" – and not merely existential threats - significantly broadens the doctrine's protective scope.

The Court's analysis encompasses multiple dependency factors: sunk brand-specific investments, customer relationship assets, revenue concentration, relationship duration (30 years), and absence of adequate alternatives. This multi-dimensional approach captures the full spectrum of switching costs and lock-in effects that create exploitable dependencies.

The Court ordered cessation of specific exploitative practices (unreasonable investments, coercive campaigns, tied bonuses, excessive targets, below-cost warranty terms) within a defined timeframe as targeted behavioural remedies. This approach preserves efficient vertical relationships while addressing harmful conduct.

Following on the Büchl-judgment, the AFCA requested the Cartel Court to impose fines upon Stellantis, the group to which Peugeot pertains. The matter was settled in June 2024 with a fine of EUR 15 million, the highest penalty imposed in Austrian antitrust enforcement against unilateral behaviour to date (cf Cartel Court 04.06.2024 26 kt 5/23i).

* 1. **OGH as KOG 26.06.2014 16 Ok 12/13 – *Sports Direct/Asics***

*Facts:*The applicant, Sports Direct (originally Sport Eybl), was Austria’s largest sporting goods retailer, with a market share of approximately 25%, operating around 50 stores throughout the country. The applicant, Asics, is part of a group that is globally active in the production and distribution of athletic footwear, sports apparel, lifestyle shoes, and lifestyle clothing. Following a change of control at Sports Direct, Asics terminated the contractual relationship, based on a change-of-control-clause in the distribution agreement, and refused to make further deliveries to the applicant. Sports Direct argued that the refusal to supply threatened its ability to compete effectively. Due to the absence of a full product range, Sports Direct allegedly faced the risk of reputational loss and image damage and requested that the respondent be obliged to resume deliveries.

*Decision:*The court of first instance rejected to find for the existence of a dominant market position. The argument that the applicant could suffer irreparable harm due to the refusal to supply was not considered convincing, given that Asics running shoes made up only 10% of the applicant's respective product range. Moreover, the applicant should have been aware that a termination of the contractual relationship was imminent in the event of a change of control. Therefore, Sports Direct had sufficient time to make alternative arrangements.

The OGH confirmed that the criterion of a superior market position towards suppliers and customers refers to **relative market dominance, i.e. goes beyond absolute market power**, and stressed that § 4a Cartel Act focuses on the need to maintain a business relationship. At the same time, the OGH pointed out that § 4a Cartel Act is by no means intended to generally restrict the freedom of contract of market participants. The decisive factor is whether there are economically viable alternative sources of supply or distribution channels. In contrast to *Multiplex*, this was the case here. Emphasis was placed on the requirement that the economic disadvantages associated with the termination of a business relationship must be **significant**. Since only 10% of the running shoes sold by the applicant originated from the respondent, and as no assortment dependency (i.e. that a specialist retailer must be able to offer all leading brands) was established, the economic disadvantages were deemed insufficient to establish relative market power.

*Conclusion:*The Sports Direct case establishes important limiting principles for the relative market power doctrine, demonstrating that Austrian competition law maintains meaningful boundaries around economic dependency claims while preserving contractual freedom in vertical relationships.

The Court's emphasis on Asic's 10% revenue share in the respective product range (footwear) establishes that relative market power requires substantial, not merely nominal, economic dependency. This proportionality analysis prevents the doctrine from being weaponised in relationships where genuine dependency is absent, maintaining a meaningful threshold for intervention. OGH's explicit statement that § 4a "is by no means intended to generally restrict the freedom of contract" establishes clear boundaries. This ensures that relative market power intervention remains exceptional, preserving normal commercial relationship dynamics while protecting against genuine exploitation.

The Court's explicit finding that no "assortment dependency" existed - rejecting the notion that specialist retailers must necessarily offer all leading brands - represents a significant doctrinal clarification. This prevents relative market power claims based on theoretical completeness requirements rather than demonstrated economic necessity.

The Court's consideration of Sports Direct's advance knowledge of potential termination (via change-of-control clauses) introduces a foreseeability element that requires dependent parties to mitigate their dependency where possible. This prevents the doctrine from protecting parties which fail to take reasonable steps to reduce their vulnerability.

The contrast with Multiplex - where limited weekly film alternatives created dependency versus Sports Direct's access to alternative athletic footwear suppliers - demonstrates how industry structure informs the dependency analysis. The availability of viable alternatives remains the crucial distinguishing factor between exploitable dependency and normal competitive relationships.

This decision prevents relative market power doctrine from becoming an overly broad constraint on commercial relationships while maintaining its protective function in genuine dependency situations.

* 1. **OGH as KOG 12.07.2018 16 Ok 1/18k (16 Ok 2/18g) – *Flugticketbuchung***

*Facts:*Lufthansa holds a market share of just under 12% when looking upon passenger air transport services across Europe. As most other airlines, Lufthansa offers passenger transportation via various sales channels, in particular via Global Distribution Systems (GDS) and via direct sales. GDS are distribution systems in the travel industry that are structured as two-sided platforms. They collect data from several airlines, as well as from hotel and car rentals offers, both on prices and availability. Travel agencies, tour operators and corporate customers can make bookings via the GDS. For each booking, the airlines have to pay a fee to the respective GDS. Travel agencies pay subscription fees to be able to access the GDS data. When travel agencies make bookings, they may receive commissions from the GDS.

In 2015, Lufthansa introduced a Distribution Cost Charge (DCC) of EUR 16 on flight bookings made via a GDS, payable by the travel agency making the booking.

The Austrian Trade Association of Travel Agencies submitted an application to the Cartel Court, requesting that Lufthansa be ordered to cease its practice of levying the DCC. Inter alia, the Association argued that Lufthansa introduced the DCC to promote a direct relationship with its customers, i.e to discriminate sales via intermediaries compared to its direct sales channel.

*Decision:* The Cartel Court affirmed Lufthansa's relative market power over the travel agencies but denied the existence of a dominant market position within the meaning of § 4(1) Cartel Act and Article 102 TFEU due to the insufficient overall market share. The OGH, in effect, confirmed the finding of dominance, but with a different reasoning. It held that relative market power is not a separate concept but is already encompassed under the *essential trading partner doctrine,* as allegedly applied by the ECJ in C-85/76 – *Hoffmann-La Roche* and by the GC in T-219/99 – *British Airways.* By definition, a trading partner that cannot be bypassed by the opposite side of the market holds a dominant market position. In this case, the respondent was regarded as an essential trading partner who could not be bypassed and therefore was in a dominant market position.

However, the OGH held that Lufthansa's request for the DCC was objectively justified, due to the different cost structure of direct and indirect distribution and was therefore not abusive. The injunction requested by the Trade Association was denied.

*Conclusion:*The OGH's finding that relative market power is "already encompassed under the essential trading partner doctrine" rather than constituting a separate concept represents a fundamental re-characterization. This integration suggests that when dependency extends beyond bilateral relationships to affect entire customer segments, traditional dominance analysis becomes applicable even without high market shares.

Unlike previous cases involving individual dealer-supplier relationships, the Lufthansa case illustrates dependency affecting an entire intermediary segment (travel agencies) vis-à-vis a supplier. This collective dependency dynamic - where travel agencies as a group cannot bypass Lufthansa despite its modest 12% European market share - demonstrates how essential trading partner status can emerge from structural market positions rather than just bilateral relationship characteristics.

The GDS context reveals how multi-sided platform dynamics complicate traditional dependency analysis. Lufthansa's ability to impose costs on travel agencies through the DCC reflects its position as an essential input for agencies' business models, even though agencies have alternative airline options. This highlights how dependency can be channel-specific rather than product-specific.

The Court's acceptance of Lufthansa's cost-based justification for the DCC demonstrates that even where essential trading partner status exists, pricing differentials reflecting genuine cost differences remain permissible. This maintains economic efficiency incentives while preventing exploitative conduct.

The case establishes a crucial distinction: relative market power doctrine traditionally addresses bilateral relational dependencies (dealer-supplier), while essential trading partner analysis addresses structural dependencies affecting entire market segments. This framework provides clearer analytical boundaries for competition law intervention in vertical relationships.

**3. Findings**

The Austrian experience with the relative market power doctrine under § 4a Cartel Act presents interesting case studies on the evolution of competition law beyond traditional frameworks. Originally established in 1988 as an anti-exploitation tool rather than a competition protection mechanism, the doctrine has evolved through judicial application into a sophisticated framework that addresses genuine competitive concerns while raising important questions about the boundaries between competition law and broader market regulation.

The Austrian approach fundamentally rejects the notion that competitive harm can only occur where suppliers achieve high aggregate market shares. Instead, it recognizes that economic dependency can create exploitable relationships even where broader market competition exists. This insight proves particularly valuable in modern economies characterized by product differentiation, exclusive dealing, and relationship-specific investments. It also alleviates the burden on proving a specific market definition.

Austrian courts have operationalized relative market power and economic dependency through a sophisticated economic dependency analysis that examines:

- Revenue concentration and switching costs,

- Relationship-specific investments and sunk costs,

- Availability of adequate alternative supply sources,

- Temporal dynamics of dependency (rolling dominance),

- Foreseeability and mitigation obligations.

The case law reveals an evolution from simple bilateral dependencies (individual dealer-supplier relationships) toward the recognition of structural dependencies affecting entire market segments. The Lufthansa decision's integration of relative market power with the essential trading partner doctrine illustrates this evolution, demonstrating how dependency analysis can address collective rather than merely individual competitive concerns.

Austrian courts have shown sensitivity to sector-specific competitive dynamics. The film distribution cases' recognition of temporal market dynamics, the automotive cases' focus on brand-specific investments, and the platform cases' acknowledgment of two-sided market effects demonstrate how the doctrine adapts to different industry structures rather than applying one-size-fits-all solutions.

The Austrian approach seems to resolve the analytical tension highlighted in the beginning - the problematic mixing of narrow market definition with broad market power considerations. Rather than artificially manipulating market boundaries to achieve desired outcomes, Austrian courts focused directly on economic dependencies and competitive constraints, providing a more effective competitive analysis.

As applied in Austria, the doctrine entails meaningful limiting principles through proportionality tests (Sports Direct's 10% threshold) and objective justification defences (Lufthansa's cost-based pricing differentials). These safeguards prevent the doctrine from becoming an overly broad constraint on commercial freedom while maintaining its protective function for genuine dependency relationships.

Austrian courts consistently favoured targeted behavioural remedies (cessation of specific abusive practices) over structural market intervention. This approach preserves efficient vertical relationships while addressing harmful conduct, demonstrating how competition law can protect competitive processes without disrupting beneficial commercial arrangements and maintaining appropriate limits on regulatory intervention.

The case law provides clear guidance for business relationships through quantified dependency thresholds, multi-factor dependency assessments, and established abuse categories. This legal predictability enables parties to structure relationships appropriately while providing courts with workable analytical tools.

The Austrian experience offers valuable insights for addressing contemporary competition challenges in digital markets, platform economies, and global supply chains. The doctrine's focus on economic dependencies and relationship-specific investments provides analytical tools particularly relevant for addressing competitive concerns in these evolving market structures. The concern that the instrument could be employed for protectionist purposes has not materialized in Austria.

The Austrian experience demonstrates that competition law can evolve beyond traditional market structure paradigms toward more nuanced approaches that capture actual competitive dynamics. This evolution might prove particularly valuable as economies become increasingly characterised by vertical integration, platform mediation, and relationship-specific investments that create dependencies transcending simple market share calculations.

**4. Summary**

The below summary follows the questionnaire issued for question A to be dealt with at the LIDC Congress in Vienna in October 2025. The reporters take the liberty not to answer each question individually, but to focus on those issues that are most relevant for Austria.

*Origin and Development of Rules Relating to Relative Market Power:* As probably in most other jurisdictions, there are many rules in Austrian law dealing with imbalances in negotiating power, from usury rules in general civil law to consumer protection, unfair competition law and sector regulation. Specific antitrust rules embracing the relative market power doctrine were introduced into the Cartel Act in 1988, with no sector-specific focus. While the respective statutes have changed little over time (with some additions concerning digital markets in 2021), the doctrine has been further developed and refined in a number of Cartel Court cases, notably from the film distribution industry and from car distribution. On average, about one relative market power case is decided by the Austrian courts every second year, with most of the applications being brought by private parties, sometimes followed on by public enforcement of the AFCA. Note that all cases decided in Austria so far concerned relative market power in vertical relations. As far as we can see, no horizontal relative market power cases have been litigated in Austria to date (although this concept exists in the Cartel Act).

*Criteria for the Definition of Relative Market Power:* Under Austrian law, economic dependency is the crucial concept for a finding of (vertical) relative market power. The Austrian courts have operationalized the concept through a sophisticated economic dependency analysis that examines:

- Revenue concentration and switching costs,

- Relationship-specific investments and sunk costs,

- Availability of adequate alternative supply sources,

- Temporal dynamics of dependency (rolling dominance),

- Foreseeability and mitigation obligations.

In the case law, we have seen an evolution from simple bilateral dependencies (individual dealer-supplier relationships) toward the recognition of structural dependencies affecting entire market segments, demonstrating how dependency analysis can address collective rather than merely individual competitive concerns.

The Austrian courts have shown remarkable sensitivity to sector-specific competitive dynamics, adapting the doctrine to different industry structures rather than applying one-size-fits-all solutions. The Austrian approach helps to resolve the problematic mixing of narrow market definition with broad market power considerations. Rather than artificially manipulating market boundaries to achieve desired outcomes, the Austrian courts focused directly on economic dependencies and on constraints for switching suppliers, providing a more effective competitive analysis than an analysis that is largely based on market definition.

*Abuse of Relative Market Power:*Austriancase law in relative market power constellations is characterised by meaningful limiting principles through proportionality tests and objective justification defences, preventing the doctrine from becoming an overly broad constraint on commercial freedom while maintaining its protective function for genuine dependency relationships. This is true both for refusal-to-supply cases (which are most frequent) as well as for alleged price and non-price exploitation. So far, Austrian courts consistently favoured targeted behavioural remedies (cessation of specific abusive practices) over structural market intervention, thus preserving efficient vertical relationships while addressing harmful conduct. In a couple of cases, the AFCA strengthened these private enforcement measures by applying for follow-on fines.

*General Assessment:* In Austria, the antitrust regime on relative market power has been a success. The respective rules much facilitate private enforcement against abusive unilateral behaviour in vertical relations and help to overcome the limitations of a traditional competitive analysis that focuses on market definition. This might prove even more valuable in the future, as economies become increasingly characterised by vertical integration, platform mediation, and relationship-specific investments that create dependencies, which are not properly reflected in simple market share calculations.

1. The opinion expressed in this publication is the authors' and does not purport to reflect the opinions or views of the Austrian Federal Competition Authority. [↑](#footnote-ref-2)
2. In about 20 judgements of the OGH, the concept of relative market power was mentioned, however often only *obiter dicta* and without detailed discussion. The 11 decisions dealt with below, from the 1997 *Filmverleih*-case to the 2021 *Peugeot*-case, provide most insight into the Supreme Court's thinking concerning this concept. [↑](#footnote-ref-3)