

National Reports

Austria

ANTI-COMPETITIVE PRACTICES

Judgment—abuse of a dominant position—automotive sector—motor vehicle distribution—economically dependent businesses—unfair conditions

☞ Abuse of dominant position; Austria; Distribution agreements; Motor dealers; Repairs; Vertical agreements

Austrian Supreme Court: Peugeot Austria abused its market power against its independent dealers

The Austrian Supreme Court, in its capacity as the Supreme Cartel Court, ruled in its Decision of 22 March 2021 that Peugeot Austria (PSA), the general importer for Peugeot vehicles in Austria, had abused its market power vis-à-vis its dealer “Büchl”, in violation of Austrian and European competition law.¹ The Supreme Court upheld most of the findings of the Cartel Court’s earlier decision of 12 May 2020.

The Supreme Court’s decision has drawn a lot of attention throughout Europe, since the court banned commonly used conditions manufacturers impose on their dealers and stressed that its decision applies to all contractual relationships with similar economically dependent undertakings.

The background was a long struggle between PSA and its independent car dealers who claimed to suffer from unfair, non-transparent and suffocating conditions imposed on them by PSA.

The Supreme Court ruled that PSA had a dominant market position towards its dealers with respect to the sale of new cars as well as the repair and service of cars, since the dealers depended economically on PSA.

Given this dominant market position, it was held that PSA had infringed competition law by:

- tying the dealers’ entitlement to premium payments to customer satisfaction surveys;
- making the dealers’ margins dependent on excessive sales targets;
- competing with its dealers on the end customer market through PSA’s vertically integrated daughter company applying abusively low selling prices, while at the same time any losses incurred by the daughter company were borne by PSA;
- implementing an elaborate control system under which dealers had to carry out guarantee and warranty work despite economically unviable and unprofitable conditions for the dealer, at hourly rates, and with refunds for spare parts not covering the costs; and
- passing on the costs of mystery shopping, mystery leads and standard criteria audits to the dealers.

On the other hand, the Supreme Court found that the following did not constitute infringements of competition law:

- PSA’s demand for corporate identity investments at the expense of the dealers;
- the practice of charging high prices for testing and diagnostic equipment necessary to perform warranty and guarantee work, and imposing an annual fee for access to technical documentation;

¹ OGH 17 February 2021, 16Ok4/20d.

- exerting economic pressure to process as few warranty cases as possible;
- the general demand for prices or for other business conditions differing from those that would most likely result from effective competition; and
- charging a high training fee in new car sales and in the repair shop sector.

The Austrian Supreme Court referred the case back to the Cartel Court for further findings with respect to forcing dealers to take part in PSA's promotions, thereby restricting the dealers' freedom to set their own prices.

The decision applies to all contractual relationships with similar economic dependencies. Thus, considerable changes throughout the industry are awaited, especially with regard to the remuneration systems in the automotive industry.

At this stage it is not yet clear whether affected dealers will claim compensation from PSA for any losses suffered by the abuse of PSA's dominant market position.

Dr Georg Huber, CIPP/E, LLM (University of Chicago)

Attorney at Law (Austria and New York), Greiter Pegger Kofler & Partners, Innsbruck

Denmark

ANTI-COMPETITIVE PRACTICES

Sector analysis—online advertising—barriers to entry due to presence of tech giants on market—Parliamentary Bill under discussion

☞ Advertising; Barriers to entry; Denmark; Media; Online intermediaries; Online services; Search engines; Sector inquiries; Social media

Analysis: Google and Facebook weigh heavily on the market for online advertising

The Danish Competition and Consumer Authority (the "DCCA") has published an analysis of online advertising in Denmark undertaken by KPMG. The analysis shows that both Google and Facebook have acquired a significant position on the Danish market for online advertising over recent years, with Google being the most prominent player on this market.

It is clear from the analysis that there has been enormous growth in the advertising industry, specifically for online advertisements, where Google and Facebook are the clear market leaders with a combined market share of approx. 40 per cent of the total market. There is an increasingly high demand for these tech giants' products, and the vast majority of online advertisements appear on search engines and social media websites, where Google and Facebook prevail.

According to the analysis, research shows that Google's position on the market for online advertising may have a negative impact on competition, especially as a result of closed ecosystems and so-called "walled gardens", which make it difficult for other market players to compete as effectively as the tech giants, as they are at a disadvantage from the get-go. For example, companies are only able to advertise on YouTube if they use Google's advertising tools.

The analysis demonstrates the strength of Google and Facebook as clear market leaders and their ability to influence the market in terms of their steering position in setting prices and co-operation modalities. Their strong market position is based on the fact that they make attractive services available to consumers free of charge, thus enabling them to collect a wide range of valuable user data, which is imperative in the advertising industry. The widespread availability and the characteristics of their services have provided these tech giants with a role as gatekeepers, and both Google and Facebook often act as intermediaries between consumers and the media.