

National Reports

Austria

COMPETITION LAW REFORM

Austrian Cartel and Competition Act—ECN+ Directive—market power criteria—exemption from ban on cartels—relative market power—merger control—second domestic turnover threshold—exceptional approval of mergers—control of abuse on multi-sided digital markets

☞ Abuse of dominant position; Austria; Competition law; Digital technology; Environmental protection; Market power; Merger control; Strategic alliances

Amendment to the Austrian Cartel and Competition Act comes into force

On 10 September 2021, the amendment to the Cartel and Competition Act of 2021 (Gazette No. I 2021/176) entered into force.

Amongst other things, this amendment to the Cartel and the Competition Act aimed to implement Directive (EU) 2019/1 of 11 December 2018 (to empower the Member States' competition authorities to be more effective enforcers and to ensure the proper functioning of the internal market).

Apart from that, the most important changes are the following:

1. Corporate co-operation for the purpose of an ecologically sustainable or climate-neutral economy is exempted from the ban on cartels, as appropriate consumer participation is now explicitly present if the “benefit derived from the improvement of the production or distribution of goods or the promotion of technical or economic progress contributes significantly to an environmentally sustainable or climate-neutral economy.” (Cartel Act s.2(1)).
2. Expansion of the demonstrative list of market power criteria in Cartel Act No. 2 s.4(1) to include some typical facts concerning the platform economy. Specifically, intermediation power (intermediary services for the access of other entrepreneurs to procurement and sales markets), access to competition-relevant data and benefiting from network effects are explicitly mentioned as parameters worthy of consideration.
3. Clarification that the concept of relative market power is independent of the concept of absolute market power and expansion of relative market power: uncertainties as to whether the relative market power previously regulated in Cartel Act s.4(3) constituted a separate offence are to be addressed by transferring this paragraph to a separate s.4a. For intermediaries on multi-sided digital markets, not only the maintenance but also the dependence on the establishment of business relationships in the case of otherwise threatening serious economic disadvantages will, in future, fulfil the elements of relative market dominance and thus, in the case of an infringement, may lead to a cessation.
4. For mergers notified after 31 December 2021, a second (internationally customary) domestic turnover threshold of one million euros will be introduced before an obligation to notify mergers arises (namely that the turnover of the companies involved in the last business year in Austria must now “in Austria total more than 30 million euros, of which at least two companies each have more than one million euros” (Cartel Act s.9). Fewer merger notifications to the antitrust authorities are therefore expected in the future.

5. Extension of Austrian merger control law to include the criterion of significant impediment of effective competition: While retaining the criterion for the creation or strengthening of a dominant position, the so-called “SIEC (Significant Impediment of Effective Competition) criterion” will be introduced as an additional element. Thus, in the future, a merger will also be prohibited if—apart from cases of market dominance—effective competition is significantly impeded (Cartel Act s.12(1)(2)(b)).
6. Extended possibilities for the exceptional approval of mergers. In the future, certain merger situations are to be approved by the Cartel Court despite the existence of grounds for refusal if the expected economic advantages substantially outweigh the disadvantages of the merger (Cartel Act No. 3 s.12(2)).
7. Creation of more efficient abuse control of entrepreneurs on multi-sided digital markets: Ex-post abuse proceedings against entrepreneurs operating on multi-sided digital markets are often judged to be too inefficient and cumbersome due to the specifics of the platform economy. The new Cartel Act s.28a is therefore intended to give the cartel authorities and regulators the opportunity to have the market-dominant position of such entrepreneurs determined by the courts if they have a justified interest. If such a determination is made, any subsequent abuse proceedings can be carried out quickly and efficiently.

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Denmark

ANTI-COMPETITIVE PRACTICES

Judgment—restrictive business practices—motor vehicle distribution—enforceability of warranty agreement—applicability of Regulation 461/2010—warranty conditions did not breach Block Exemption

Ⓒ Block exemptions; Denmark; EU law; Motor dealers; Motor vehicles; Repairs; Spare parts and accessories; Warranties

Court finds Kia’s warranty condition complies with EU Competition Law

On 23 August 2021, the Danish Maritime and Commercial High Court ruled that Kia’s warranty conditions did not infringe EU competition law and that the warranty agreement in question could be enforced if it applied to the facts. However, the court found that the claimant had not fulfilled the warranty conditions and had presented insufficient evidence of the service that his car had received from an unauthorised repairer, as required under the warranty agreement. Consequently, the car owner was unable to claim for repairs to the car engine under the warranty agreement.

The owner’s car engine broke down. Subsequently, the car owner invoked the warranty issued by the car manufacturer. The warranty covered repairs for seven years, but only if a number of conditions were met, including detailed presentation upfront of documentation relating to the car’s maintenance and service record, as well as the type of spare parts used if the car services had been performed by an unauthorised repairer. The warranty claim was rejected by the manufacturer on the ground that the car owner had provided insufficient documentation to meet the requirements set out in the warranty conditions. The owner sued the manufacturer, and the city court ruled in favour of the owner. The manufacturer appealed to the Danish Maritime and Commercial High Court.

In the Danish Maritime and Commercial High Court proceedings, the claimant primarily argued: (i) that the warranty agreement infringed EU competition law; and (ii) that he had provided sufficient proof of the service and maintenance of his car. The court ruled that the warranty agreement did not infringe EU Regulation 461/2010 of 27 May 2010 (the Motor Vehicle