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Austrian competition law: tough on big tech

Raoul Hoffer

This article considers some recent major developments in Austrian competition law regarding big tech companies. This covers a tighter scrutiny of tech mergers as well as an enforcement initiative as to the terms and conditions used by digital platforms.

Regarding merger control, Austria introduced a transaction-value based threshold in 2017.¹ The main objective of the new rules was to catch the acquisition of start-ups in the tech field. Target companies in such transactions might already have considerable growth potential and/or access to valuable data but were yet to generate substantial turnover. Such 'killer' acquisitions might be important in economic terms, in particular if the acquirer is a big tech company buying one of its future potential competitors. Due to the low turnover of the target, the purchasing of such companies might not reach the traditional turnover thresholds under Austrian law and, would therefore not have been subject to merger control scrutiny. By introducing an alternative threshold which is (also) transaction-value based, this was meant to be remedied. It is interesting to note that Germany also introduced such transaction-value based thresholds at around this time, based on the same rationale as in Austria.² Both sets of rules were drafted in parallel and guidelines for their interpretation were issued jointly by the German and Austrian competition authorities. This can be seen as a new coherent approach between these two countries and their enforcement agencies in big tech matters.

Considerable coherence was also shown by several European competition authorities, including Austria's Federal Cartel Authority (the FCA), joining forces to tackle much of Amazon's practices, which they considered to be anti-competitive. The result was a swift and quite astonishing settlement with Amazon by which it was

required to amend relevant provisions in its terms and conditions with its marketplace traders. These developments are discussed in more detail below.

Transaction-value based thresholds

By introducing transaction-value based thresholds in merger control, the Austrian and the German legislators took the lead in creating a new merger control tool. The aim was to scrutinise the acquisition of startup (and scale-up) companies by bigger market players. Focusing on digital companies,³ the provisions of the new laws were worded in such a way as to catch concentrations which would not reach traditional turnover thresholds, but would fulfil the following criteria:

- the undertakings involved had a worldwide aggregate turnover in the last business year before the concentration of more than €300m;
- the undertakings involved had an aggregate turnover in Austria in the last business year before the concentration of more than €15m;
- the value of the consideration for the concentration is more than €200m; and
- the target undertaking is active in Austria to a considerable extent.

To support undertakings in properly applying these new provisions, the FCA and Germany's Federal Cartel Office (the FCO) jointly issued guidelines on the interpretation of the new law. This involved an extensive consultation process on a draft version of the guidelines in 2018 in which major stakeholders in Germany and Austria participated.

In the two years following the transaction-value based thresholds, a couple of cases have been notified under the new rules.⁴ If that were not as many as expected, this might be due to the fact that a transaction value of €200m is high, compared with typical startup companies in Austria.⁵ In any event, the new thresholds can be viewed as a first step towards better control of such 'early-stage' transactions that could otherwise hinder competition. Furthermore, it is a strong sign of increasing cooperation between national competition authorities, not only within the European Competition Network (ECN) but also in regard to a joint approach to legislative measures. As will be outlined in more detail below, this cooperation on the enforcement level intensified in regard to the proceedings against Amazon.

³ It should be noted that, although tech startups and such startups in other sensitive areas as, eg, in the pharmaceutical field appeared to be the primary focus of the new rules, their ambit is wider and they apply to any concentration that meets the formal criteria.

⁴ In 2018, 17 filings were made based on the new thresholds in Austria.

⁵ The respective threshold in Germany is €400m. While this difference might be justified by the relative size of the German economy, it is also arguable that – particularly in a globalised world – startup companies do not necessarily differ much in size purely depending on their country of origin.

The FCA tackling digital platforms: the *Amazon* case

There has been considerable recent competition-law enforcement activity with respect to digital platforms. In 2017, the European Commission (EC) finally handed down its decisions in *Google Shopping* and *Google Android* the following year. Other digital platforms have also been the target of competition authorities around the world. Facebook and Amazon have been subject to particularly close regulatory scrutiny throughout Europe. There has already been one Facebook case decided in Germany following a thorough FCO investigation. The FCO found that a specific part of Facebook's practice of collecting and processing users' data – which can, for example be generated through 'like-buttons' on third-party websites – was contrary to German antitrust law. The FCO's basing of its case on data protection rules infringement, which it argued would also be relevant for competition law purposes, caused a great deal of discussion.

Facebook appealed the decision by the FCO. In the meantime the appellate court, the Düsseldorf Higher Regional Court (Oberlandesgericht), granted an injunction in favour of Facebook, stating that Facebook will not be obliged to implement the FCO's order until the court of appeal has handed down its decision on the substance of the case. The FCO, in turn has announced that it will appeal this decision of the Düsseldorf Court.

These proceedings are therefore being watched very carefully by national competition authorities in other European countries, among them the FCA, and the EC itself. Nevertheless, none of these other authorities has yet joined in by initiating comparable proceedings. There still appears to be a degree of reluctance to follow the substantive case pursued by the FCO.

However, in regard to another big internet player, Amazon, there seemed to be a much more coherent enforcement approach among European competition authorities. In parallel with the EC and other national competition authorities, such as the FCO, the Luxembourg and Italian competition authorities, in 2019 the FCA started proceedings against Amazon based on an alleged abuse of a dominant position. This case took a quite remarkable turn and by itself could serve as a role model for future dealings between national competition authorities and digital platforms.⁶

Impetus for the Amazon case in Austria

The FCA began receiving complaints about Amazon's terms and conditions from individual traders in 2017 and 2018. At the time the FCO had already started

⁶ The following is a brief overview of the Amazon case. For more details on the case see the case report on the FCA's homepage: www.bwb.gv.at

an investigation based on comparable complaints from German traders. In December 2018, the Austrian Retail Association (Österreichischer Handelsverband) submitted a complaint to the FCA. The FCA had also sent questionnaires to market participants and received substantial feedback, including a high number of additional complaints concerning Amazon's terms and conditions for traders on its marketplace. In particular, the complaints raised issues with the Amazon Services Europe Business Solutions Agreement (BSA). On the basis of this survey the FCA came to the conclusion that the amazon.de marketplace held a dominant position as an online retail intermediary for Austrian traders. The FCA's reasoning may be summarised as follows:

- Austrian traders do not have any alternative to selling on amazon.de;
- most total turnover of traders with a relevant alternative was earned on amazon.de;
- Austrian traders would not switch to another marketplace if Amazon increased the traders fee by a margin of five to ten per cent;
- many traders only distribute on amazon.de; and
- few traders mentioned their own 'webshop' or brick and mortar shops as alternatives to selling on amazon.de.

The FCA opened formal proceedings against Amazon based on an alleged abuse of dominance. The main grounds for the complaint laid out by the Austrian Retail Association were Amazon's role as both a trader in its own right and as a marketplace where other traders' products are sold. It was suspected that Amazon discriminates against other traders and thereby tries to unduly favour its own products on the Amazon Marketplace. The main complaints investigated by the FCA were:

- the possibility of immediate termination/suspension of traders' accounts by Amazon (even without justification);
- choice of Luxembourg law and jurisdiction solely in Luxembourg;
- problems/delays in communicating with Amazon in case of requests of traders;
- certain indemnification obligations of traders in circumstances where Amazon sends articles from its storage to customers;
- far-reaching limitation of liability in favour of Amazon;
- exclusion of products from the Amazon Marketplace without sufficient justification;
- display of (unjustified) long delivery periods if such delivery was performed by the traders and exertion of pressure to use Amazon delivery services;
- Amazon's obtaining the purchase prices of traders;
- Traders' obligation to repay the purchase price even in case of unjustified return of products by customers;
- non-transparent and arbitrary rankings of products and traders; and

- granting of a free, worldwide, perpetual, irrevocable right of use and licence to Amazon in regard to materials provided by the traders.

How the Amazon case was settled

As mentioned above, Amazon was confronted with allegations of an abuse of dominance in regard to certain of its terms and conditions in a number of European jurisdictions.⁷ The respective European competition authorities had been in close contact with each other to coordinate their cases. The pressure exerted by the FCA and other European competition authorities seems to have worked remarkably well in this case. After some negotiations with the FCA and the other respective competition authorities, Amazon agreed to change its terms and conditions to address the concerns raised in the investigations. In particular, it agreed to amend the terms and conditions in the BSA to provide for the following:

- a notice period for traders' accounts of 30 days and an immediate termination only if that was for cause (as further specified in the terms and conditions);
- the jurisdiction of the Luxembourg courts to be non-exclusive;
- any change of the terms and conditions to be announced to the traders at least 15 days in advance, except in justified cases (as further listed in the terms and conditions) – it is worth mentioning in this context that Amazon explained to already have call centres for traders in place and pointed to the fact that it had started its Account Health Specialist Program (AHS) in 2018 to facilitate communication with traders in case of problems;⁸
- the indemnification obligations regarding products sent from the Amazon storage to be reduced in their ambit, inter alia, not to apply already in case of an alleged breach of the BSA but only in case of an (actual) infringement of the law or when there are concrete indications that the traders had infringed their contractual obligations;
- the broad limitation of liability in favour of Amazon to be abolished and, in principle, both parties only to be liable in case of fault (as further defined in the BSA);
- the time period for traders to object to any return of products to Amazon to be increased from three to 30 days;⁹ and
- the licence/right to use of Amazon of materials of the traders to be limited by an amendment of the BSA.¹⁰

⁷ Such as the national competition agencies in Germany, Italy and Luxembourg.

⁸ The FCA recommended that in addition Amazon should designate specific persons that traders could directly turn to in order to remedy communication problems.

⁹ The FCA found it essential that traders have sufficient opportunity to object to returns as opposed to being required to repay the purchase price even in the case of unjustified returns of products by customers and thought that an increase to 30 days was a substantial improvement.

¹⁰ It now only applies for the time period such rights are held by the trader and to the programmes, products or services of Amazon.

As to the other complaints raised during the course of the investigation. As a result of improving Amazon's communication policy, the FCA considered that the alleged exclusion of products from the Amazon Marketplace without sufficient justification would no longer be an issue. As far as concerns delivery periods for traders and use of Amazon delivery services, Amazon stated that it is handling issues in a non-discriminatory way. The FCA will be watching developments in this regard. In relation to obtaining traders' purchase price information, the FCA found that it did not have sufficient evidence of illegal conduct by Amazon. The FCA will not investigate this any further at the moment (also referring to the ongoing investigations of the EC into this issue). Regarding the alleged non-transparent and arbitrary rankings of products and traders the FCA did not find sufficient evidence that this is occurring and has not taken any action for the time being.

The changes have been effective as of 16 August 2019 and apply generally and not only in regard to the European countries in which they were investigated. Further complaints relating to matters such as Amazon's dual role as trader and platform and how Amazon uses data on its third-party traders are still being investigated by the EC.

The FCA achieved its aim of assisting traders operating on the Amazon platform. Furthermore, the FCA will continue its monitoring efforts, including in relation to communication and logistics. Nonetheless, it was interesting to see how the pressure of a focused investigation, coupled with parallel investigations by several enforcement agencies in Europe, made the internet giant Amazon settle the case. At the same time, in settling the case Amazon avoided lengthy proceedings and found appropriate solutions to accommodate the relevant complaints. The outcome could therefore also be regarded as a win-win situation for both sides.

Future dealings with digital platforms by the Austrian Competition Authority

The leverage wielded by enforcement agencies even in smaller countries can be considerable. Based on the above account, it can be seen that national competition authorities such as the FCA are becoming more engaged with and focused on the area of big tech platforms. Leverage can be further reinforced if, as happened here, several national competition authorities cooperate or at least exchange information in support of each other. Indeed, settling with Amazon to change its terms and conditions was a remarkable result. The traders previously affected by those terms and conditions can immediately profit from the improvements.

It remains to be seen whether this could serve as a model for national competition authorities when dealing more generally with big tech. Given that the EC is still investigating Amazon (for allegedly using sensitive sales data from independent

traders to its own advantage) and Google (regarding alleged abusive practices in job and local search services), it is clear that not all competition-law problems with digital platforms are solved. Therefore, the next big tech case for the FCA or other European national agencies might just be around the corner.

About the author

Raoul Hoffer is a partner of Binder Grösswang, head of its competition law team and an expert in digital law. He is recognised as one of the 'leading individuals' in the area of EU and competition law in Austria.