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**The Interaction between Competition and Democracy – Note by Austria**

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## Austria

### 1. Introduction

1. In recent years, the intersection between democracy and economic regulation has gained critical importance. This contribution seeks to explore the relationship between democracy and competition law, highlighting the role of competition in safeguarding democratic principles.
2. The foundation of democracy rests on the principles of individual freedom, equal opportunity, and a balanced distribution of power. Enforcing competition law aims to prevent the concentration of economic power that could otherwise distort markets, limit consumer choice, and allow private corporations to wield undue influence over economic and political spheres.
3. In addition to these structural safeguards, competition law plays a vital role in fostering and sustaining public trust. Practices such as bid-rigging and collusion erode this trust by enabling to exploit public procurement, which should be conducted fairly and competitively to benefit the public interest. In essence, competition law supports public confidence by ensuring the accountability and integrity of government bodies and public institutions.
4. Case studies, including key rulings on market power abuse by digital platforms, illustrate how competition law serves as a safeguard not only for fair markets but also for democratic freedoms and informed public discourse.

### 2. Cartels

5. Bid-rigging is detrimental to the economy and to society as a whole and, moreover, it is illegal in most countries. Public tenders account for approximately 13% of GDP in OECD countries, which equates to roughly a third of government spending dedicated to procurement. In bid-rigging, public procurement, projects are completed at artificially higher prices due to collusion between bidders, resulting in higher costs for public contractors. Consequently, government spending increases at the expense of taxpayers' money, which could have been allocated elsewhere. Oligopolistic markets with few players, where competitors offer similar products and where there is little market change, whether due to minor fluctuations in supply and demand or limited new market entry, are particularly susceptible to bid rigging. In Austria, collusion between bidders in public is subject to both competition law enforcement and criminal prosecution.
6. §1 et seq. of the Austrian Cartel Act forbids agreements between undertakings "*which have as their object or effect the prevention, restriction or distortion of competition*". The prohibition covers, among other things, agreements on prices, market division, and coordination of participation behavior among undertakings. It also applies to bid-rigging.
7. Additionally, bid-rigging is also prohibited under Austrian criminal law. According to §168b of the Austrian Criminal Code, this offense can be punished with up to three years in prison. Furthermore, bid-rigging can also be classified as fraud in some cases. When the criminal behavior is deemed serious fraud and results in a loss exceeding EUR 300,000, this can result in a prison sentence of up to 10 years.

8. Criminal prosecutions against price-fixing agreements were relatively rare in the past but were systematically pursued by the authorities in recent years. The reason for this is that the burden of proof for criminal prosecution is quite high and the penalties are relatively low compared to those under competition law.

## 2.1. Recent cases

9. With the construction cartel, the AFCA uncovered the largest cartel in Austrian history. It had been investigating this cartel since 2017, in which more than 30 companies were involved over 15 years. The participants divided the market, coordinated their behavior in procurement procedures and entered into quid pro quo agreements. To date, fines totaling over EUR 192 million have been imposed.

10. Proceedings are still ongoing against one company, which had initially been sentenced to a reduced fine of EUR 45.37 million due to its cooperation as a leniency applicant. The case was re-opened to address concerns about the leniency applicant's cooperation.

11. In October 2024, the AFCA also concluded its investigation into a carpentry cartel. The companies had entered into restrictive agreements in connection with the award of public contracts in the healthcare sector (bid-rigging). Thanks to the AFCA's close cooperation with other public authorities, notably the Vienna Court of Auditors, this cartel was uncovered, leading the AFCA to conduct several dawn raids. The Supreme Cartel Court clarified that there was no double jeopardy, as the antitrust fine served as a complementary response to different aspects of the same "social problem".

12. Another large cartel in the waste management sector was uncovered by the AFCA in 2021. It operated throughout Austria from 2002 until 2021. In this context, the AFCA carried out several dawn raids. The focus of the collusive behavior was on agreements on the mutual distribution of public and private contracts, on price fixing and on collective market and customer allocation. The Cartel Court imposed initial fines at the request of the AFCA.

## 3. Abuse of Dominance

13. Free competition and open markets are the cornerstones of dynamic markets and benefit both consumers and competitors. Competitive markets allow new players to enter a market and challenge incumbents' products, which spurs innovation, ensures product diversity and protects consumer choice. Yet it sometimes occurs that companies exploit their position of market power and restrict competition, which leads to inefficient economic outcomes. Preventing powerful companies from exercising monopoly power thus guarantees economic equality, citizen autonomy and assures desirable conditions for all market participants. Consequently, it is the task of the Austrian competition authority to protect and, if necessary, restore the competitive process on the Austrian market.

### 3.1. Legal framework

14. The prohibition of the abuse of market dominance is laid down in §4 and 5 of the Austrian Cartel Act and mirrors the provisions set by Article 102 TFEU. Dominance is typically assessed based on market share thresholds and other factors that indicate a company's ability to act independently of competitors, customers, or suppliers.

15. According to §4 of the Austrian Cartel Act, a company is assumed to have significant market power if it holds a market share of at least 30% as either a supplier or purchaser in the relevant market. Other factors to consider include financial strength, relationships with other companies, access to key markets, control over essential data, benefits from network effects, and other barriers that hinder new competition.

16. A specificity of Austrian competition law is the provision stipulating the concept of relative market power. According to §4a of the Austrian Cartel Act a company is also considered dominant if its purchasers or suppliers are dependent on maintaining a relationship with it to avoid serious economic harm. This applies especially to digital platforms acting as intermediaries. The latter are presumed as being dominant if users of their services rely on them to avoid significant economic disadvantages. This extends the concept of market dominance to encompass the power of dependency, both in traditional as well as digital markets.

17. §5 of the Austrian Cartel Act furthermore outlines specific categories of practices considered abusive if performed by dominant firms. This includes setting unfair prices and terms, which deviate from effective competition, but also restrictions on production, the discriminatory treatment of contractual parties, the imposition of unrelated contract obligations and below-cost sales.

18. Recent cases concern the Austrian postal services, car distributors and the beverage sector.

#### 4. Merger Control

19. Merger control is essential for preventing the excessive concentration of economic power when it is harmful to competition. When companies merge without oversight, there is a risk that a few large entities can dominate key markets, limiting competition, consumer choice, and fair access. Therefore, rigorous merger control helps to ensure that markets remain competitive, diverse, and transparent, which are all foundational elements of a democratic society.

20. Media mergers are particularly important in this context. They are considered to have a pivotal impact on the functioning of democracies due to the important societal role that media play. In addition to the general principles in merger control, media mergers introduce an additional layer of responsibility as media companies are tasked with informing citizens and acting as watchdogs over state actors. Accordingly, media mergers potentially also put other aspects such as media diversity and independence at stake. With this in mind, it could be argued that the merging of media companies and the resulting reduction in the number of media outlets, tend to mean that fewer opinions and interests are represented. Increasing media consolidation may in some cases even lead to so-called media deserts, which are geographic zones with little or no regional media coverage. All of these factors indicate that media mergers can impact democratic values and should therefore be carefully considered when assessing such mergers.

21. The discussion on the media's contribution to democracy is shaped by the fact that the sector is currently facing challenging times. Due to shifting consumer behavior away from print media and the restructuring of the market to adapt to the digital age, advertising and distribution patterns in the media industry have changed, resulting in a greater reliance on digital platforms.

22. As a result of these trends, media markets across Europe experienced a decline in the number of active media companies and an increase in media concentration over the last decade.<sup>1</sup>

#### 4.1. Legal Framework

23. Media mergers in Austria are reviewed with special scrutiny. The Austrian media market is characterized by a relatively high degree of concentration and a considerable proportion of non-media related shareholders in media companies. In fact, the AFCA was created in part due to a presumably failed attempt to protect media diversity after a merger in the media sector. Following a legislative amendment in 1993, the Austrian legislator introduced media mergers as a separate merger category, thereby recognizing their potential influence on pluralistic democracies. Building on this and following amendments, the AFCA has the legal obligation to pay special attention to the preservation of democratic values when assessing media mergers. Hence, the AFCA is required to additionally evaluate the potential impact media mergers can have on media plurality in the country (§§ 12 and 13 Austrian Cartel Act).

24. Media mergers are considered to occur when at least two of the merging entities are media companies or media services, media support companies or undertakings that directly or indirectly hold a share of minimum 25% in a media company, media service or media support undertaking (§ 8 para. 1 Austrian Cartel Act). There are media merger-specific thresholds for falling within the scope of AFCA's merger assessment, which are more narrowly defined. For instance, the turnover of media companies and services must be multiplied by a factor of 200 and that of media support companies by 20. Another specificity when filing a media merger to the AFCA is that the concerned undertakings additionally need to submit "*exact and exhaustive information*" as to how the merger might affect media plurality (§ 10 para. 1 (2) Austrian Cartel Act). The Cartel Act hereby refers to "media plurality" as "*the diversity of independent media companies that are not affiliated to each other (...) and that ensure media coverage that takes into account a variety of opinions*" (§ 13 para. 2 Austrian Cartel Act).

#### 4.2. Recent case examples

25. A recent case involving the merger review of media companies concerned MEDIAFOREUROPE (MFE) and ProSiebenSat1 (P7S1). In this case, MFE planned to increase its stake in P7S1 in order to gain sole ownership of the company. The AFCA immediately requested an in-depth investigation by the Cartel Court due to serious concerns on media plurality as a result of this acquisition. Specific reasons for concern were possible increased pressure on costs which could lead the group to reduce local news coverage and a possible disadvantage in the marketing of national advertising inventory. If the case, this would significantly affect media plurality in an already small market like Austria and could have consequences on local demand for national media production as well as weaken the financial and editorial independence of the P7S1 Austria Group.

26. The Austrian communications regulator also issued a critical statement. The merger was ultimately approved, subject to specific commitments by MFE, which the group must report annually to the AFCA for an indefinite period. Commitments that remedied the

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<sup>1</sup> European Commission, Directorate-General for Communications Networks, Content and Technology, Bianchini, D., Dorenti, B., Gerardi, E., et al., Support for preparation of an impact assessment to accompany an EU initiative on the European Media Freedom Act – VIGIE 2021-644: final report, Publications Office of the European Union, 2022, p.26.

authority's concerns where among other things to ensure a strong focus on local news content and to maintain the independence of the P7S1 Austria Group's managers and editors-in-chief. Furthermore, MFE is to refrain from bundling P7S1 audiovisual content with other MFE content for content aggregators and P7S1 Austria's headquarters and administration shall remain in Austria.

27. Another recent case concerns the merger between Raiffeisen-Holding Niederösterreich-Wien Beteiligungs GmbH (RH-Bet) and Niederösterreichisches Pressehaus Druck- und Verlagsgesellschaft m.b.H. (NÖP). The objective was to raise the acquirer's stake in NÖP from 20% to 28.6%. The AFCA had reasons to assume an impairment on media plurality as RH-Bet and its ultimate parent company already had equity interests in other competing newspapers. As a result, there was a risk that the proposed merger could undermine the editorial independence of the media companies.

28. As part of AFCA's investigation, it initiated a market survey to assess competition concerns. The survey revealed *inter alia* that competitors raised concerns about future pricing and admitted facing more pressure to adapt, also with regard to their online presence.

29. To address AFCA's concerns regarding the potential reduction in media diversity and to preserve the media's unique selling point which is regional media coverage, AFCA approved the merger on the condition of commitments by the companies. RH-Bet committed itself to limit their equity increase in NÖP to the announced number and to appoint no more than one board member to NÖP's supervisory board. Secondly, the merging entities ensure that marketing activities for advertisement in print and online markets remain separate for both companies. Thirdly, the companies agree to maintain media plurality by retaining separate editorial teams and ensuring independent editorial values.

### 4.3. Additional legislation

30. At the European level, efforts are currently underway to enshrine media diversity and media freedom in the new Media Freedom Act. The aim is to curb undue influence in the media and the negative effects of further concentration within the media landscape. The AFCA welcomes the objectives of the European Media Freedom Act as it has already long placed a high value on considering media plurality in media mergers, recognizing it as an essential component of functioning democracies.

## 5. Conclusion

31. Competition law and its enforcement preserves consumer freedom, limits corporate overreach, and ensures that the marketplace remains a domain of individual choice and diversity, thereby supporting the broader democratic ideals of equality, autonomy, and fairness.