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Information Sharing in Competition Policy – Note by Austria

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Austria

1. Introduction

1. The exchange of information between competitors is a delicate area of competition law, positioned at the boundary between legitimate business cooperation and unlawful market coordination. Under § 1 of the Austrian Cartel Act and Article 101 TFEU, such information exchanges may amount to unlawful agreements or concerted practices where they restrict competition by diminishing the independence of competitors' decision-making and thereby enable coordination of market conduct.

2. At the same time, not every information exchange between competitors is inherently anti-competitive. In practice, companies may in certain cases exchange information where this constitutes a legitimate interest. Austrian competition law, informed by EU jurisprudence and national case law, adopts a contextual approach, taking into account factors such as the type of information exchanged, market conditions, and the degree of coordination involved.

3. This paper is intended to give an overview of both the limits of the current legal framework on information exchange between competitors as well as possible exceptions that Austrian competition law provides. It gives examples of permitted forms of cooperation such as bidding consortia or sustainability cooperation, while pointing out the limitations of information exchanges in these contexts. Furthermore, it is emphasised that it depends primarily on the nature and characteristics of the data exchanged whether the exchange of information is anti-competitive. Several mentioned advocacy measures highlight the Austrian Federal Competition Authority's work in trying to sensitise market participants on this fine line of legitimate and illegitimate information exchange. Lastly, this paper tries to give an outlook on digital investigation tools that the AFCA will employ to detect infringements of competition law, including collusive tendering and algorithmic coordination.

2. General considerations of information sharing under Austrian competition law

4. An exchange of information between competitors infringes § 1 of the Austrian Cartel Act on the cartel prohibition if it is intended to influence how individual undertakings behave on the market. This provision essentially mirrors Article 101 TFEU.

5. Such an information exchange may be assessed under § 1 of the Cartel Act, if it amounts to or forms part of an agreement between companies, a decision by an association of undertakings, or a concerted practice that has as its object or effect the prevention, restriction, or distortion of competition.

6. An agreement exists where parties express a shared intention to act in a certain way on the market. The key element is a "meeting of minds" regarding their market conduct. This includes not only written contracts but also informal or purely verbal arrangements. An overall assessment of the circumstances is nevertheless always crucial (Judgment of the Austrian Supreme Court, 20 February 2020, OGH 6 Ob 166/19h).

7. A concerted practice serves as a catch-all category for coordination falling short of a formal agreement but involving deliberate cooperation that reduces competitive uncertainty and business risk. Information exchange can fall into this category (Judgment

of the Austrian Supreme Court, 20 February 2020, OGH 6 Ob 166/19h). This is because it is particularly capable of reducing uncertainty about competitors' future conduct. Under applicable EU law, as reflected in the same Austrian Supreme Court decision, the required reciprocity already exists if one competitor discloses its future intentions at another's request, or if the recipient simply accepts the information.

8. A restriction of competition may already arise where so-called "secret competition", i.e. uncertainty about competitors' strategies and plans on the market, is undermined. This can happen through the exchange of competitively sensitive information that would otherwise remain confidential, such as pricing, planned price changes, discounts, customer lists, investment plans, product innovations, or bidding strategies.

9. Importantly, the cartel prohibition does not require a fully developed agreement or coordinated conduct. Even the mere exchange of sensitive information between competitors can be problematic. From an enforcement perspective, it is generally assumed that such exchanges undermine the principle of independent market behaviour and create a basis for coordination. It is presumed that companies will use the information received to align their conduct.

10. The exchange of current business-related data is in any case prohibited under competition law. This includes, for example, prices, discounts, planned price increases or reductions, customer data, turnover or sales figures, production costs, capacities, planned shutdowns, investment plans, marketing strategies, and R&D programmes.

11. By contrast, the exchange of publicly available information is generally permissible, such as reports published by market research firms, trade associations, or statistical offices. Similarly, sharing historical or aggregated data is typically unproblematic.

3. Exceptions

12. Competition law does not prohibit every form of contact or agreement with competitors. Certain collaborations such as R&D partnerships, technology transfer agreements, or joint production arrangements are recognised as potentially beneficial, for example by sharing risks, reducing costs, or accelerating innovation.

3.1. Under §2 Cartel Law

13. Although agreements that restrict competition are generally prohibited under § 1 of the Cartel Act, they may still be lawful if they meet the exemption criteria set out in § 2 of the Cartel Act.

14. In practice, companies can justify a competition-restricting cooperation if they demonstrate that the conditions for exemption under § 2(1) of the Cartel Act are cumulatively fulfilled:

- The agreement generates efficiency gains,
- Consumers receive a fair share of those efficiency gains,
- The restrictions on competition are indispensable, and
- Competition is not eliminated.

3.1.1. Sustainability Cooperations

15. Since the 2021 Cartel and Competition Law Amendment Act, a new sustainability exception has been introduced under § 2(1), last sentence of the Cartel Act. Accordingly, it modified the requirement for consumer benefit such that consumer benefit is deemed to exist if the efficiency gains resulting from a competition-restricting cooperation contribute significantly to an ecologically sustainable or climate-neutral economy.

16. Overall, however, it is essential that the cooperation be conducted in a manner that protects trade secrets and does not involve the exchange of competitively sensitive information. Furthermore, it is important that the cooperation is non-binding and that companies are not required, for example, to participate industry-wide.

17. The assessment framework for the sustainability exception involves five cumulative criteria:

- The cooperation produces efficiency gains,
- These gains contribute to an environmentally sustainable or climate-neutral economy,
- That contribution to an environmentally sustainable or climate-neutral economy is significant,
- The restrictions imposed are indispensable to achieving those efficiency gains, and
- The cooperation does not eliminate competition for a substantial part of the relevant products or services.

18. As can be read in AFCA's Guidelines[1], from a procedural standpoint, the indispensability criterion is typically assessed first, before assessing sustainability aspects. The reason is that if the cooperation imposes restrictions that go beyond what is necessary to achieve the efficiencies, it is automatically prohibited and does not require further analysis. Similarly, efficiency gains that do not require cooperation to be achieved cannot be justified under § 2 of the Cartel Act in any case.

3.2. Concept of Single Economic Unit

19. The cartel prohibition applies to conduct between companies, but not to conduct within a single company. This reflects the basic principle that competition can only be restricted where a competitive relationship exists. The decisive criterion is whether an entity can determine its market behaviour independently.

20. Under the "Single Economic Unit doctrine", agreements that would otherwise restrict competition may fall outside the cartel prohibition if they occur within a group of companies forming a single economic unit. The rationale is that companies belonging to such a unit do not act autonomously on the market, therefore, there is no relevant "inter-company" coordination to restrict competition and no scope of application for the cartel prohibition under §1 Cartel Act.

21. Whether companies qualify as a single economic unit depends on whether they retain real freedom of action and independent decision-making. Key factors include: (i)

[1] https://www.bwb.gv.at/fileadmin/user_upload/AFCA_Sustainability_Guidelines_English_final.pdf

ownership structure, (ii) control rights, and (iii) staff overlaps (e.g. overlapping management).

22. A central indicator of a single economic unit is the ownership relationship between the companies. In case of a nearly 100% owned subsidiary, an economic unit is generally presumed to exist, even though exceptions remain i.e. in the absence of unified management. Austrian case law however assumes full and lasting dependency based on corporate structure, at least where shareholding exceeds 75%.[2] Where ownership stakes are lower, there is no presumption of a single economic unit. In cases of mere majority shareholding, additional factors are possibly required to establish such unity.

23. Further indicators of decisive influence and thus of a group relationship include control rights and personnel links. All of these factors are to be assessed in light of the specific circumstances of the individual case.

4. Assessment Framework for Information Exchanges

24. The exchange of information between competitors does not necessarily lead to a restriction of competition. It must rather be assessed on a case-by-case basis, with factors such as market structure, the degree of market concentration, and the nature, content, and timeliness of the data being of decisive importance. From an economic perspective, information exchanges are more likely to raise concerns in concentrated markets with few competitors, homogeneous products, and stable demand, where shared data can more readily serve as a focal point for coordination.

4.1. Bidding Consortia

25. Bidding consortia can expand the opportunities to participate in procurement procedures. They are defined as temporary collaborations between companies for the joint execution of a specific contract.

26. From the perspective of § 1 Cartel Act, such bidding consortia are generally unproblematic where the participating companies are not competitors. If they are actual or potential competitors, a restriction of competition may still be denied where an objective assessment shows that the project could not be carried out individually, or with less restrictive means. This may be the case due to limited technical or financial resources, insufficient know-how, or capacity constraints. It is not sufficient to engage in a consortium simply because it is more economically attractive than acting alone. In such cases, a joint bid may restrict competition and depending on the terms of the agreement, may constitute a restriction by object or by effect.

27. During the period in which a bidding consortium exists, it is possible that some degree of information exchange takes place between the undertakings regarding the nature and price of the goods delivered or services provided. However, if the exchanged information goes beyond what is necessary for the joint project, it must be assessed under § 1 of the Cartel Act and/or Article 101 TFEU.

28. The guiding principle is necessity. Competitively sensitive information may only be shared to the extent that it is indispensable for the project and objectively justifiable

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2 https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Standpunkt_zu_Fragen_der_Anwendbarkeit_des_kartellrechtlichen_Konzernprivilegs_Update_Mai_2020_Barrierefrei.pdf

(Judgment of the Cartel Court, 25 November 2024, 24 Kt 6/24y). Any exchange exceeding this threshold risks being classified as unlawful coordination. Moreover, an unlawful bidding consortium can also trigger criminal liability for the individuals involved under § 168b of the Austrian Criminal Code.

4.2. Age and relevance of exchanged information

29. Whether an information exchange is anti-competitive depends primarily on the nature and characteristics of the data shared. Exchanges via trade associations or suppliers for instance are generally unproblematic where the data is public, historical, or sufficiently aggregated, so that no conclusions can be drawn about competitively sensitive parameters. A key factor is timeliness: current data typically has far greater competitive relevance than historical data.

30. A restriction of competition by object exists in particular where competitors exchange information about future pricing or output strategies. Anti-competitive effects are also presumed to exist if the exchange of information has an appreciable negative impact on price, output, product quality, product variety, or innovation. Accordingly, under the case law of the Austrian Supreme Cartel Court, a restriction of competition exists, where timely information regarding circumstances that are not generally and readily available and that are relevant to competition between the participating undertakings is exchanged (Supreme Cartel Court, Judgment of 21 March 2007, 16 Ok 12/06). The decisive element is whether the exchange undermines independent decision-making and the principle of competitive uncertainty.

4.3. Market observations

31. Market observation, that is, observing competitors and reacting depending on their pricing behaviour without coordinating actions, is generally legitimate and not covered by competition law. This was analysed, among other things, in an AFCA report analysing the fuel station market in a region of Austria (2025).[3] *In the retail market for motor fuels in particular, a certain degree of price transparency is even legally mandated. Furthermore, intensive price monitoring is also an indication of intense competition.* When a competitor lowers prices, firms must react quickly in a highly competitive environment in order to retain price-sensitive customers. Such swift responses depend on thorough market monitoring, which is supported by publicly accessible pricing data via fuel price comparison tools.

5. Case law

32. In the facade construction cartel, telephone surveillance revealed that competitive sensitive information was frequently exchanged, such as price-fixing agreements and market-sharing arrangements.

33. The Austrian Cartel Court held that such exchanges are by their very nature, capable of restricting competition and are consequently qualified as anticompetitive by object (Judgment of the Cartel Court, 23 September 2024, 24 Kt 9/23p). The reasoning was that the exchanged information did not merely allow participants to infer competitors'

3 https://www.bwb.gv.at/fileadmin/user_upload/Ermittlungsbericht_Tankstellenmarkt_Lungau_2025.03.12_NEU_Barrierefrei.pdf

strategies but it involved active discussions of future market behaviour in tenders, disclosure of strategic considerations, and alignment of conduct.

6. Advocacy Measures

34. The AFCA engages in several forms of advocacy initiatives, be it in written documents or the provision of competition law trainings, where the subject of information exchange between competitors is raised and warns about the consequences of exchanging competitively sensitive data.

35. In its brochure Competition Law & Compliance (2023), published jointly with the Austrian Federal Economic Chamber, the AFCA highlights that information exchange between competitors can raise serious competition law concerns.[4] Additional practical guidance is provided in the AFCA's Fairness Catalogue for Companies on Responsible Business Conduct (2022), which outlines standards for compliant market behaviour.[5] Further orientation is available in AFCA's Checklist for Contracting Authorities for the Prevention and Detection of Bid Rigging (2024), which is particularly relevant in public procurement contexts.[6] Beyond published materials, the AFCA may be consulted at any time for an informal assessment on the interpretation and application of cartel law.[7] The AFCA also regularly conducts compliance trainings for public authorities and procurement bodies, providing extensive training resources to support adherence to competition law requirements.[8]

6.1. Cartel Screening and algorithmic monitoring

36. The use of algorithms in business conduct is now well established. The existing Austrian competition law framework is generally adequately fit to address harms arising from advanced algorithmic systems given its technology-neutral provisions. However, practical enforcement gaps remain. Detecting algorithmic coordination remains highly challenging for competition authorities, as they must prove not just parallel outcomes but the underlying collusive mechanism. While international cases show that algorithmic tools can function as coordination devices, establishing an agreement or concerted practice requires the finding of additional evidence.

37. This makes rigorous market assessments indispensable. In its new institutional structure, the AFCA has prioritised expanding the use of AI in core forensic work to ensure stronger enforcement. In 2025, the AFCA established a Cartel Screening Unit which focuses on robust empirical methods to conduct market screenings. The aim is to detect potentially anti-competitive behaviour of firms. The detection of collusive practices in tendering processes is one possible application. This requires a framework for strategic and systematic data collection. One possible mechanism for data collection is expanding the

[4] Broschüre Kartellrecht und Compliance (2023)\Compliance-Word\1WKOE_ABT_RP_Compliance-Broschuere_A4-trebuchet_250813.pdf

[5] https://www.bwb.gv.at/fileadmin/user_upload/_BWB_Fairnesskatalog_Barrierefrei.pdf

[6] https://www.bwb.gv.at/fileadmin/user_upload/Leitfaden_Vergabeabsprachen_Praevention.pdf

[7] https://www.bwb.gv.at/en/informal-assessment

[8] https://www.bwb.gv.at/events/compliance-kompass

use of AI for data scraping to systematically gather publicly available information for analytical purposes.

7. Conclusion

38. In conclusion, the assessment of information exchange under Austrian competition law is defined by fine but decisive boundaries. A central guiding principle is the protection of so-called "secret competition". Exchanges must not impair or eliminate the uncertainty that exists between competitors regarding each other's market behaviour. Increased market transparency is not problematic per se, but it becomes unlawful where it allows companies to align individual competitive actions.

39. Against this background, a clear distinction must be drawn. The exchange of public, historical, or sufficiently aggregated data is generally permissible. In contrast, the sharing of current or forward-looking competitively sensitive information, relating to prices, quantities, or strategic conduct is prohibited since it undermines independent decision-making.

40. In practice, companies may consult AFCA's compliance materials which clarify the risks associated with information exchange and outline best practices. Ultimately, companies must ensure that any interaction with competitors preserves independent market conduct and does not impair competitive processes.