

**Competition Issues in Online Sales
Austrian experiences**

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Why case handlers should read the newspaper

E-COMMERCE 47 Prozent der österreichischen Online-Händler werfen Industrie Einflussnahme auf die Preise vor Streit um Preise der Elektroindustrie



Die Industrie hat laut österreichischen Online-Händlern viele Möglichkeiten, Druck auszuüben, um die Preise hochzuhalten

Online-Händler fühlen sich von Herstellern bei der Preisgestaltung unter Druck gesetzt. Die Industrie bestreitet die Vorwürfe und macht den Markt für den Preisdruck verantwortlich.

Wien. Ganze 47,3 Prozent der heimischen Online-Händler fühlen sich laut einer aktuellen Studie der Wirtschaftsuniversität Wien (WU) von der Industrie in puncto Preisgestaltung unter Druck gesetzt. Ein österreichischer Online-Händler berichtet gegenüber dem WirtschaftsBlatt von Vertragskündigungen und „bösen E-Mails“. Freilich will sich keiner der Händler zittern lassen.

Die gängigsten Methoden der Einflussnahme sind mögliche Lieferverzögerungen oder Liefersperren bestimmter Artikel sowie die Verschlechterung der Einkaufskonditionen. Ein anderer Händler spricht über diese Praktiken: „Im Normalfall heißt es dann, es ist keine Ware mehr da. Das Druckmittel schlechthin ist, dass man selbst keine guten Einkaufspreise mehr bekommt.“ Einmal habe ein Hersteller ohne Rücksprache die Verträge gekündigt, mit der Begründung, „wir hätten zu viel preisliche Unruhe am Markt erzeugt“. Besonders häufig sollen kleine und mittlere Online-Händler betroffen sein, vor allem, wenn sie ihre Produkte auf Preisvergleichsplattformen anbieten. Beim Big Player Amazon war bis Redaktionsschluss niemand für eine Stellungnahme zu erreichen. Laut kleineren Online-Händlern sollen auch bekannte Marken wie LG, DeLonghi, Kenwood und Philips zu den Druckausübenden zählen. Selbst Rechtsexperten können sich durchaus vorstellen, dass solche Dinge passieren. Das wäre eine sogenannte Preisbindung der zweiten Hand und damit kartellrechtlich verboten. In jedem Fall müsste man aber immer auch die andere Seite hören.



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Mesut Ales bei NOVOMATIC

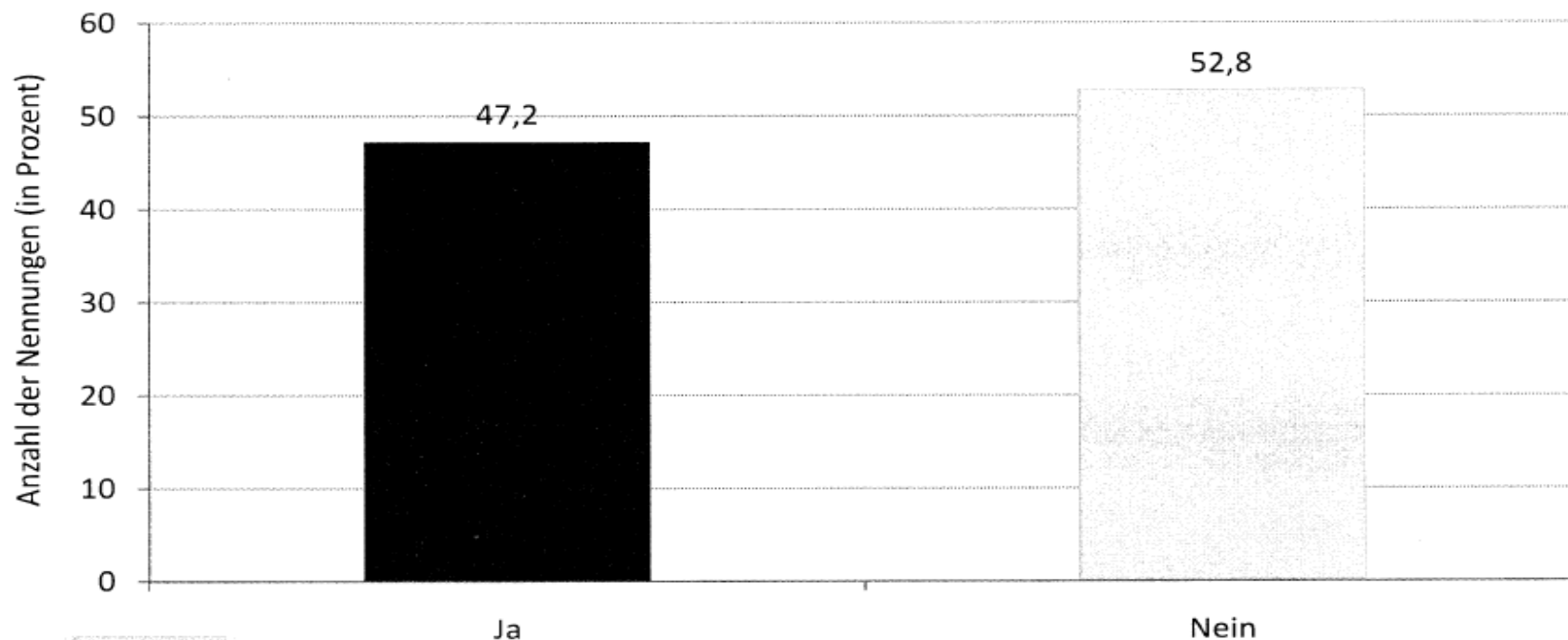
Marija Akalovic bei ADMIRAL Sportwetten

Investigations I

Situation 2011: 2. Druck der Industrie (1)

- **Frage:** Haben Sie in den letzten 6 Monaten das Gefühl, dass die Industrie versucht (hat), auf Ihre Preisgestaltung Einfluss zu nehmen?

47,2% der Händler sehen Einflussnahme auf ihre Preisgestaltung.

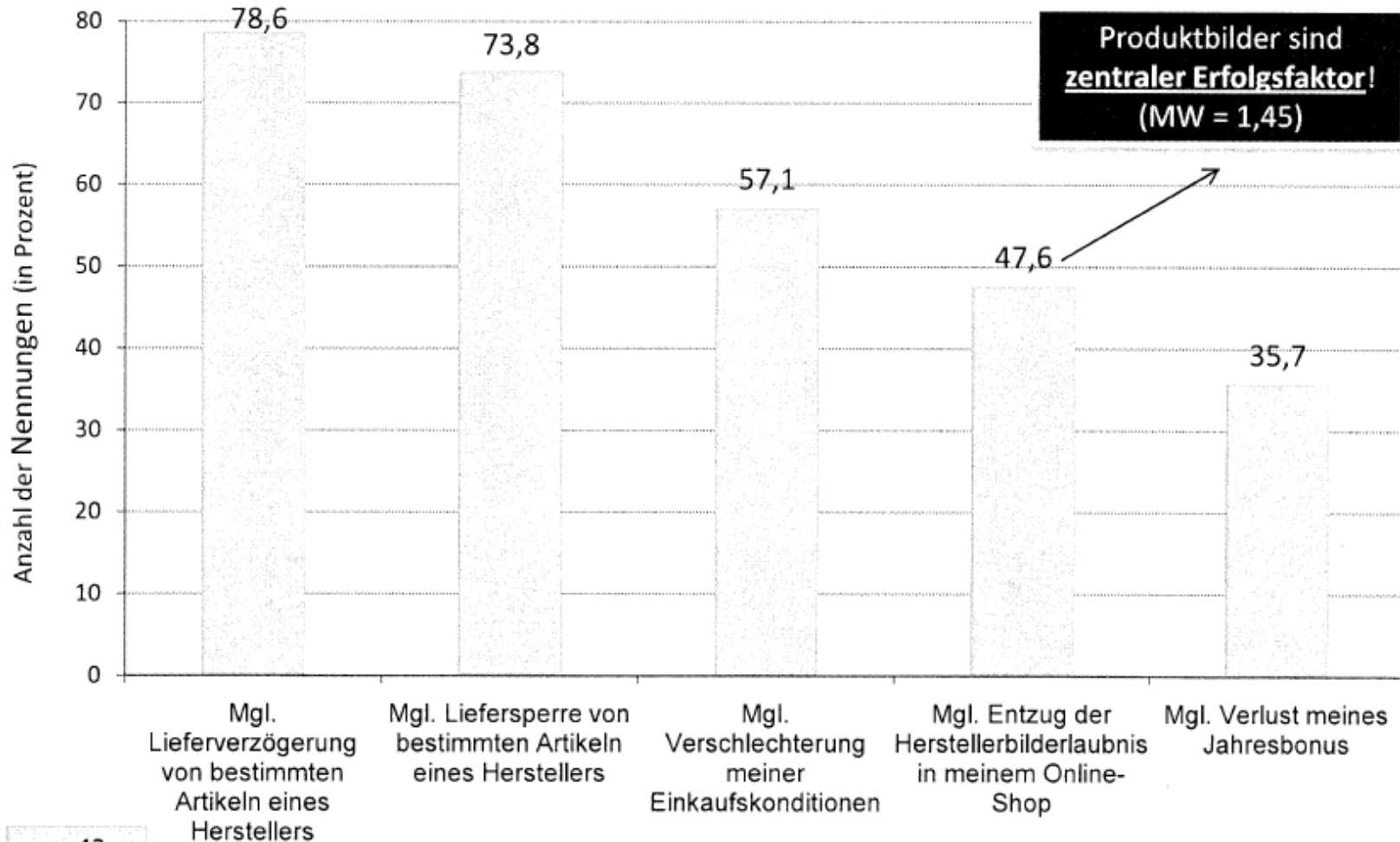


n=89



Investigations I

Wahrgenommene Art der Einflussnahme:



Vertical price fixing: legal & economic assessment

Article 4 EC Regulation:

*Restrictions that remove the benefit of the block exemption:
— hardcore restrictions*

(a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

EU Guidelines on Verticals:

RPM can also be achieved through indirect means:

- fixing the maximum level of discount the distributor can grant from a prescribed price level*
- making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level*
- linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level*
- Price monitoring system*

On the theory of harm (EU guidelines):

–RPM may facilitate collusion (enhancing price transparency on the market)

–RPM also undermines the incentive for the supplier to cut its price to its distributors, as the fixed resale price will prevent it from benefiting from expanded sales

–by eliminating intra-brand price competition, RPM may also facilitate collusion between the buyers, that is, at the distribution level.

–RPM may more generally soften competition between manufacturers and/or between retailers, in particular when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them.

On the theory of harm:

- *the immediate effect of RPM will be that all or certain distributors are prevented from lowering their sales price for that particular brand*
- *RPM may reduce dynamism and innovation at the distribution level. By preventing price competition between different distributors, RPM may prevent more efficient retailers from entering the market or acquiring sufficient scale with low prices.*
- *It also may prevent or hinder the entry and expansion of distribution formats based on low prices, such as price discounters.*

Vertical online cases:

- November 2011: Vienna University of Economics published a **study** entailing the information that **47,2% of online traders in the electronic industry felt pressure** from the industry considering their price setting
- Study had used information given in an anonymous way
- BWB managed to investigate and contact selected retailers
- Very little information came back in written form; many were not ready to give any information, but some oral information disclosed
- Autumn 2012: two **search warrants** granted regarding producers,
- Dawn raids led to **follow-on inspections**



Affected lines of products:

– Electronical devices, i.a.

- Plasma TVs
- TV receivers
- Navigation systems
- Laptops
- Printers
- Cleaning robots for pools and ponds
- Electric shavers
- Coffee machines
- Electric toothbrushes

Anticompetitive conduct:

- RPM (setting of minimum prices / fixed prices for resale)
- Penalties / bonuses for non-compliance / compliance with RPM
- Fixing of maximum discounts from a prescribed price level
- Delays in supply
- Refusal to supply
- Partly outright ban on online sales for certain goods
- Partly ban to sell certain goods on specific online platforms
- MAP (minimum advertising price arrangements)
- Producers informed all retailers about the prices their competitors are going to charge (hub and spoke)

Consequently: infringements of Art 101 (1) TFEU and § 1 of the Austrian Cartel Act

Track Record Online vertical cases:

a) Settlements

- Philipps (producer): 2,9 Mio €
- Grundig (producer): 372.000 €
- Media Saturn (big retailer): 1,23 Mio €
- Lurf (producer): 100.000 €
- SSA Fluidra (producer): 50.000 €

b) further cases

- many pending; settlements talks ongoing

Settlements

- More than 70% of cartel cases are closed via settlements
- BWB brings case to Court, but undertakings have in advance admitted to facts presented by the authority, height and calculation of the fine and confirmed legal assessment of the authority (settlement declaration); Court is bound to the height of the fine determined by BWB
- Court can render a decision swiftly and with no further steps
- Undertakings get up to 20% reduction (**BWB settlement guidelines**)

Why?

- EU Guidelines/regulation not much understood or known
- Knowledge of and understanding of these very little among SMEs
- Additional guidance needed
- Advocacy

Process:

- Draft guidelines published
- Led to huge public debate (received many contributions, also from abroad)
- Meetings with main stakeholders; talks
- Final draft published with short 2nd consultation

Notice published in **August 2014** after almost a year of consultations with stakeholders, European Commission and other NCAs

Structure:

1. Legal introduction
2. Which cases the BWB would probably investigate
3. Which cases the BWB would generally consider non problematic
4. Practical examples

English version will be published soon!

Austrian hotel platforms cases

- Similar to British and German hotel platforms cases
- Competition concerns about **price parity agreements (MFN-clauses)**
 - MFN may deter the entry of new platforms
 - MFN restrict hotels in their pricing; pressure from platforms to comply with MFN-clauses (warnings, contract terminations)
- Information requests sent out to the major operators of hotel platforms
- Talks with the tourism-section of the Austrian chamber of commerce and the ÖHV (Austrian hotel industry association)
- Talks with legal representatives of the major operators
- Latest developments: British solution quashed by British Court
- Waiting for the German judgement in the HRS-case, hearing end of November 2014

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*More Information
coming soon!*

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