Privatization in the waste management industry

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Legal framework – merger control in Austria

- Structure of the Austrian enforcement system:
  - Phase I - Federal Competition Authority (BWB) – 4 weeks
  - Phase II - Cartel Court – Decision making body – 5 months

- Work in practice:
  - Most cases cleared in phase I by BWB
  - Some cases cleared during phase II by commitments / remedies
  - final decision in phase II: economic expert chosen by the court – decides on substance

Loacker / Häusle

- Time schedule
  - First notification: September 2007
  - FCA initiated phase II -> notification withdrawn
  - informal investigations & negotiations -> re-notified in September 2008 -> cleared in phase I by the FCA

- Background on the merger:
  - Häusle, a waste management finally owned by the state of Vorarlberg
  - Loacker was the main competitor in Vorarlberg
  - Conflict of interest was one of the main reasons to privatize: owner and regulator was identically – criticized by the local court of auditors
  - Room for discretion of state on approval of local business location and legislative power on e.g. obligation to sort residual waste at Häusle in Vorarlberg

Relevant product markets

- Not disputed
  - Collection of commercial and industrial residual waste
  - Collection of iron and steel scrap
  - Other affected markets, but of minor importance

- Disputed
  - Sorting of commercial and industrial residual waste:
    - Main reasoning FCA: “informal agreement” to sort waste at Häusle, data showed that no one else shipped commercial and residual waste across the border
    - Competitor complained about this sorting (and drying) facility, not replicable, kind of essential facility with problems regarding discrimination (pricing, confidential information)
    - -> strong indications for own market

Relevant geographic markets

- Disputed - FCA argued for state borders as market borders:
  - state borders are national borders
    - exception: border to Tirol: mountains, only one tunnel, road charge -> high transport costs
    - location of (Austrian competitors) far away
  - data showed there was no direct shipment cross the (national) border by customers
  - competitors: a location was necessary for being active on the market (for mixed waste)

Market shares and first assessment of the merger

- Market shares (based on assumption of geographic market of Vorarlberg)
  - Collection of commercial and industrial residual waste: [15-25%] + [55-65%] = [70-90%]
  - Iron and steel scrap: [50-60%] + [15-25%] = [75-95%], merger of main sorting facilities
  - Sorting of commercial and industrial residual waste : [100%] - buyer power of former competitor Loacker (bought at a 10% discount)

- Theories of harm:
  - Horizontally: Strengthening of dominant position
  - Vertically: Danger of foreclosure, discrimination of competitors in various collection markets

New arguments brought forward at the second notification

- Sorting facility
  - some competitors got the approval to directly ship mixed residual waste to waste incineration plants (especially Switzerland)
  - -> assuming a relevant market was not appropriate anymore; strong argument against vertical foreclosure story

- Commercial and industrial residual waste
  - market entry with location in Vorarlberg, former management staff of Häusle and strong financial backing – but on a smale scale
  - barriers to expansion on collection of waste are rather low

- Iron and steel scrap
  - Market entry & another market entry announced (due to high metal prices in summer 2008)

Clearance decision without any remedies

- Reasons to clear the merger in September 2008
  - market entry & announced market entry
  - outlook on "post privatization" regulatory issues was different -> different forward looking market definition
  - but: informal letter to relevant authorities and stakeholders on the importance of regulation and cross-border competition

- Ex post review