

Annual Report 2022



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Preface

In 2022, the FCA celebrated its 20th birthday. In these two decades, the Federal Competition Authority has achieved a great deal. Established on 1 July 2002, the institution was gradually developed into a modern competition authority. Austria had a lot of catching up to do; the German Federal Cartel Office (Bundeskartellamt), for example, had been founded as early as 1 January 1958. Successful investigations by the FCA have exposed cartels in the elevator industry, in the food trade, in freight forwarding services, but also in the market for robotic vacuum cleaners and in online trading, to name just a few sectors. In merger control, the risk of market power could be countered in a large number of markets.

The elucidation of the largest cartel of the Second Republic, in the construction industry, fills the working days of my colleagues, as do various market examinations, investigations into abuse of market power in the beverage sector, and many others.

2022 was marked by sharply rising prices, supply bottlenecks, and growth slumps. These circumstances call for a particularly active competition authority. In 2022, the FCA focused its market investigations on the energy markets (fuels and e-mobility) and food.

In addition, investigations carried out on the basis of specific suspicions in the areas of school bags, measurement, control and regulation technology for building technology systems, waste management, sub-metering and furniture joinery were successfully conducted and concluded.

I would like to take this opportunity to express my sincere gratitude for the feedback I received from citizens in 2022. Your letters about our set activities reach us all and are a great motivation for my team and me to ensure that "competition" remains a strong word with a lot of meaning.

I hope you enjoy reading the Progress Report 2022 of the Federal Competition Authority.

On behalf of the Team Competition

Dr. Natalie Harsdorf-Borsch, LL.M.

Interim Director General for Competition



Dr. Natalie Harsdorf-Borsch,
LL.M., Interim Director
General for Competition

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The Federal Competition Authority

1 That Was The Year 2022



13 Dawn Raids



3 Sector Enquiries



83 Whistleblowing-Reports



1 Cartel Law Moot Court



340 National Mergers examined



378 EU Mergers examined



M € 91,69

in Fines imposed by the Cartel Court



4 Leniency Applications



2 New Specialist Coordination Offices



2 New Units



20 Years of Federal Competition Authority – Happy Birthday

2 The Federal Competition Authority

The Federal Competition Authority (FCA) was established in 2002 as a monocratically organised apprehension and investigation authority. The Authority is run independently and not bound by directions by the General Director for Competition.

2.1 What are the Main Objectives?

- Elimination of distortions and restrictions of competition
- Preventing market concentration through efficient merger control
- Information and prevention measures

The legal bases for achieving these goals are the Cartel Act and the Competition Act, the Fair Competition Conditions Act, the prohibition of cartels under Art 101, the prohibition of abuse of market power under Art 102 of the TFEU, as well as the EU Merger Control Regulation (ECMR).

2.2 What Tasks does the Federal Competition Authority have, in particular to achieve the Objectives?

- Investigation of suspected or impending distortions or restrictions of competition
- Prosecution of violations through investigations (interrogations, requests for information, Dawn Raids)
- Applications to the Cartel Court
- Enforcement of the European rules of competition in Austria
- Investigation of economic sectors, insofar as it can be assumed that the competition in these areas is restricted or distorted
- Cooperation with regulators
- Provision of administrative assistance to courts and administrative authorities, and to the European Commission and the competition authorities of other EU Member States
- Issuing of opinions on general questions of competition policy, as well as, in particular, in the context of review procedures on legislative projects and in the enforcement of competition law on questions of competition law and competition policy,
- Investigations and applications to the Cartel Court under the Fair Competition Conditions Act (former Local Supply Act)
- Application under § 7 (2) of the Fair Competition Conditions Act (formerly Local Supply Act)
- Assertion of claims for injunctive relief pursuant to § 14 (1) of the Austrian Act against Unfair Competition (UWG)
- Performance of competition monitoring
- Participation in the preliminary contract review according to §§ 6 et seq of the Austrian Federal Broadcasting Act (ORF-G)
- Right to take action within the framework of the Platform-to-Business Regulation (P2B Regulation)



1 July 2002
Establishment
of the FCA



170 Dawn Raids



115 Leniency Requests

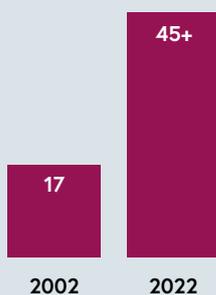


13 Sector Enquiries



7.500+ National Mergers examined

Number of Staffers



>M € 348

in Fines by the Cartel Court, imposed for Violations against the Cartel Act

3 20 Years: Happy Birthday FCA

Established in July 2002 on the basis of the Competition Act, the FCA, which is independent and not subject to directives, sees itself as the guardian of competition between companies, thus making a significant contribution to the overall economic welfare of Austria.

In order to be able to effectively carry out its duties as a guardian of competition, over the years the FCA has increasingly been given special investigative powers.

By December 2022, the FCA had carried out more than 170 Dawn Raids and 13 sector enquiries, received over 115 leniency applications and processed more than 180 whistleblower reports.

From the establishment of the FCA to December 2022, M€ 348.97 in fines have been imposed by the Cartel Court upon application of the FCA on companies that committed infringements of Austrian or European competition law. This corresponds to about six times the budget provided by the Federal Government to the FCA to date. Of these, the year 2022 alone accounts for more than M€ 90 in fines.

In the field of mergers, more than 7,500 national mergers were examined. The Federal Government thus received a total of approx. M€ 15 through registration fees.

The agency grew from an initial 17 to more than 45 staffers with three departments, four divisions and two specialist coordination offices. In 2022, two units and two specialist coordination offices were established.



Let us
collaborate.

4 European Cooperation

4.1 Cooperation with the European Commission

Enforcement of European rules of competition in Austria comprises two main aspects. On the one hand, the national competition authorities directly enforce the competition rules under Union law, and on the other hand, the national authorities assist the European Commission in its investigative actions in the course of the procedures carried out by the Commission (Directorate General for Competition) in application of Union law and are entitled to contribute their experience in these procedures.

In addition, there is ongoing and close cooperation, combined with a regular exchange of experience and information and the development of best practices within the framework of Regulation 1/2003 in order to ensure coherence in the decentralised application of Union Law in the context of the network of competition authorities, known as the European Competition Network (ECN).

4.2 Cooperation within the European Network of Competition Authorities – European Competition Network, ECN

Pursuant to § 3 (1) of the Competition Act, the FCA is the competent authority in Austria for implementation of the European rules of competition in Austria. Its more detailed tasks and powers originate in particular from its resulting position as a national (administrative) and independent competition authority within the meaning of Article 35 of Regulation 1/2003 and Article 2 (1) 2 of Directive 2019/1.

Directly to this end and in order to further support enforcement, the Commission and the competition authorities of the EU Member States jointly form a network of authorities that work together closely to protect competition (ECN). The ECN is a forum for discussion and cooperation on the application and enforcement of the EU rules of competition. It establishes a framework for cooperation between cooperation of European competition authorities in cases where Articles 101 and 102 of the TFEU are applied. Pursuant to Article 5 (2) of Directive 2019/1, this close cooperation within the framework of the European Competition Network in order to ensure the effective and uniform application of Articles 101 and 102 TFEU is one of the core tasks of the independent national competition authorities. Independence in the sense of freedom from instructions and from any political and other external influence, and adequate resources are among the minimum standards according to the Directive.

Within the European Network, the FCA 2022 has participated in the following working groups:

ECN Working Groups

| | |
|--|---|
| Directors General Meeting | ECN Chief Economist Group |
| ECN Plenary Meeting | ECN Digital Investigations and AI Working Group |
| ECN Cooperation Issues and Due Process Working Group | ECN Financial Services Working Group |
| ECN Merger Working Group | ECN Vertical Restraints Working Group |
| ECN Horizontal & Abuse Working Group | ECN Pharma & Health Working Group |
| ECN Cartel Working Group | ECN Subgroup Food |
| ECN Digital Markets Working Group | ECN Energy Working Group |
| ECN Telecom Subgroup | ECN Environmental Subgroup |
| ECN Advocacy Working Group | |

In addition to these regular meetings of the regular working groups of the European Competition Network, ad-hoc meetings were also held in 2022 on topics such as sustainability in anti-trust law or questions of the implementation of the Digital Markets Act.

In the context of its participation in the enactment of legal acts of the European Commission, the FCA, together with representatives of the BMAW, took part in advisory committees on the block exemption regulations for horizontal and vertical agreements as well as the notices on the delineation of the relevant market, on informal consultations and on the application of competition law to collective agreements on the working conditions of solo self-employed workers, as provided for in § 3 (2) of the Competition Act.

In the meantime, the format of virtual working meetings established due to the pandemic has become the norm and allows meetings to be held at short notice, flexibly and in a time-, cost- and resource-saving manner. The option of physical meetings, which was restored in 2022, has also been increasingly used to facilitate a personal exchange of ideas.



Joint declaration with Regard to the War in Ukraine

In the context of Russia's war of aggression against Ukraine, the ECN, in line with a comment of the European Council, has clearly condemned the aggression and, at the same time, in line with the principles developed on the Covid-19 crisis, issued guidelines for cooperation in areas such as on ensuring the purchase, supply and fair apportionment of scarce goods, as well as to mitigate serious economic consequences published.

In particular, it was made clear that, under certain conditions, no anti-trust action is intended against agreements that are strictly limited to mitigating the afore-mentioned effects. Conversely, determination to act against behaviour to unjustly enrich oneself from the consequences of war was expressed.

5 International Cooperation

International cooperation between competition authorities is an important instrument for detecting and eliminating violations of anti-trust law and abuses of market power. Be it in the case of transnational offences, when joint investigations are required, in the case of mergers involving several countries, or for the exchange of best practices.

International relations can contribute to successful conduct of investigations against increasingly global companies and corporations. At the same time, it leads to coherence in the enforcement and interpretation of competition law, which increases legal certainty globally.

The potential of international relations is particularly great for comparatively small agencies with many cross-border cases. In Europe, too, there is still a need to catch up here; for example, there is currently no legal basis for cooperation with Switzerland nor with the United Kingdom.

In November 2022, a specialist coordination office was established at the FCA to improve the performance and bundling of international cooperation. Dr. Lukas Cavada is the specialist coordinator for International Affairs.

5.1 United Nations Conference on Trade and Development (UNCTAD)



The UNCTAD Intergovernmental Group of Experts on Competition Law and Policy (IGE) met in Geneva from 20 to 22 July 2022. Topics discussed included current issues such as the role of competition law and competition policy in supporting micro-enterprises and SMEs during the economic recovery from the COVID-19 pandemic, and lessons learned from the COVID-19 pandemic in competition enforcement, particularly with regard to socially important markets. In addition, the progress made by the working group on cross-border cartels was reported in detail, and the group's mandate was extended. It was decided that at the IGE 2023 meeting, a background document from the secretariat for the discussion on issues of competition law enforcement with regard to monopsonies and the interaction between competition and industrial policy would be prepared.

Further information is available at <https://unctad.org/meeting/intergovernmental-group-experts-competition-law-and-policy-twentieth-session>.

For the year 2023, Dr. Natalie Harsdorf-Borsch LL.M. was unanimously re-elected as the OECD-UNCTAD Coordinator in the Competition Bureau of the OECD.

Dr. Harsdorf-Borsch has held this position since 2019. Since then, Austria has thus also been represented, for the first time, in the OECD's Competition Bureau.

In October 2022, the further course of action and dates of the working group on cross-border cartels was determined. The focus will continue to be on the presentation of cases and the exchange of experiences. The Working Group on Cross-Border Cartels will report its findings at the IGE 2023.

Further information is available at <https://unctad.org/meeting/ad-hoc-expert-meeting-competition-law-and-policy-cross-border-cartels>.

In addition, the UNCTAD organised an ad hoc expert meeting on competition, consumer protection and sustainability in September 2022. On the subject of sustainability in competition law, the FCA was able to contribute its expertise to the drafting of its guidelines for companies on sustainability cooperation.

5.2 Organisation for Economic Cooperation and Development (OECD)



An important forum for the discussion of competition policy issues is the Organisation for Economic Co-operation and Development (OECD) with its Competition Committee and the two working groups "Competition and Regulation" and "Cooperation and Enforcement". In the course of these forums, there is a regular exchange on relevant competition law issues. The FCA actively contributes to these discussions with written and oral contributions.

The Competition Committee and its working groups meet in Paris twice a year. Once a year, on the occasion of the meeting of the Competition Committee, the "Global Forum on Competition" is held with an expanded group of participants. In this context, OECD members exchange views and experiences with more than 110 delegates from around the world.

The FCA actively contributes to these discussions with written and oral contributions, most recently on the topics of competition and inflation, competition in energy markets and market power in the digital economy and competition policy.

Further information on these topics is available at <http://www.oecd.org/daf/competition/roundtables.htm> and <http://www.oecd.org/competition/globalforum/>.

Competition Bureau Dinner

In November 2022, Austria hosted the Competition Bureau Dinner for the first time, as the election of Dr. Natalie Harsdorf-Borsch LL.M. as coordinator means that for the first time Austria has a seat in the Bureau. Ambassador Dr. Gerhard Jandl, as Austria's Permanent Representative to the OECD, invited the members of the Competition Bureau of the OECD. High-ranking representatives of the competition authorities of OECD member countries and international organisations including from the USA, France, the EU and the United Nations were among the participants. In this context, Dr. Natalie Harsdorf-Borsch LL.M emphasised the importance of the OECD and international cooperation for Austria.





5.3 International Competition Network (ICN)

Founded in 2001 by 14 competition authorities and now expanded to over 130 member authorities, the International Competition Network (ICN) offers competition authorities around the world an informal, project-oriented network to intensify their cooperation in questions of the application of anti-trust law, with the involvement of civil society.

The 21st Annual Conference of the ICN took place in Berlin from 4–6 May 2022, at the same time as the 21st International Cartel Conference. Diverse discussions on topics such as priorities and new trends in the fight against cartels, killer acquisitions, regulatory and competition law instruments in digital markets, as well as sustainability, took place. Dr. Natalie Harsdorf-Borsch LL.M. was a presenter on a panel on successful international cooperation in cases of cross-border cartels.

Further information is available at <https://www.icn2022berlin.de/>.

6 Cooperation with other Austrian Authorities and Institutions

6.1 The Federal Cartel Prosecutor (BMJ)

In addition to the FCA, as a further official party for proceedings before the Cartel Court the Federal Cartel Prosecutor was established in July 2002, who is bound by instructions and reports to the Federal Minister of Justice. Since 1 September 2020, the position of Federal Cartel Prosecutor has been held by Heinz Ludwig Majer MBA. He has two deputies and one legal assistant.

The Federal Cartel Prosecutor is responsible for representing the public interests in matters of competition law, and has the right to file petitions before the Cartel Court. Unlike the FCA, however, he/she has no investigative powers. This arrangement takes into account the legislator's intention to avoid duplications. Both the Competition Act and the Cartel Act provide for close cooperation between the official parties not only but especially in the area of merger control. In 2022, once more this turned out very constructive. The role of the Federal Cartel Prosecutor in the interaction between cartel and criminal law pursuant to § 209b of the Austrian Code of Criminal Procedure should be emphasised.

In 2022, the FCA seconded one staffer to the Federal Cartel Prosecutor for two months in the course of the staffer's basic training (job rotation). At the invitation of the FCA, the Federal Cartel Prosecutor Mag. Majer also participated in the Cartel Law Moot Court in 2022 for the first time as a member of the jury and took the chair.

The annual report on the activities of the Federal Cartel Prosecutor can be downloaded from the BMJ website.

Further information:

<https://www.justiz.gv.at/justiz/justizbehoerden/bundeskartellanwalt.36c.de.html>

6.2 The Competition Commission

The Competition Commission (CoCo) is an advisory body to the Federal Competition Authority. It consists of eight members who have special knowledge and experience in economics, business administration, social policy, technology or economic law. The members of the CoCo are appointed every four years by the Federal Minister of Labour and Economic Affairs. The Austrian Federal Economic Chamber, the Federal Chamber of Labour, the Austrian Federation of Trade Unions and the Presidential Conference of the Austrian Chambers of Agriculture each have the right to nominate one member (substitute member). The members (substitute members) are not bound by any instructions in the performance of their duties and are subject to official secrecy. Reference is made to Chapter 23 for the CoCo's priority recommendations for the year 2022.

The current term of office is from 2022 to 2026.

| Member | Substitute member |
|---|---|
| RA Hon.-Prof. DDr. Jörg Zehetner (elected chairman) Lawyer at KWR; honorary professor at the University of Salzburg | Dr. Anna Hammerschmidt WU Wien |
| Mag. Maria Mercedes Ritschl IV | Mag. Ingrid Schöberl IV |
| Dr. Michael Sachs Vice-President of the BVwG | Mag. Dr. Agnes Kügler, MSc. WIFO |
| Prof. Dr. Markus Reisinger Frankfurt School of Finance & Management | Mag. Georg Konetzky SC BMAW |
| Ing. Mag. Andreas Graf LKÖ | Mag. Martin Längauer LKÖ |
| Mag. Helmut Gahleitner AK | Christian Berger, BA, MSc, LL.M. AK |
| Dr. Rosemarie Schön WKÖ | Dr. Winfried Pöcherstorfer, LL.M. (LSE) WKÖ |
| Miriam Baghdady, MSc. ÖGB | Dr. Helene Schuberth ÖGB |

6.3 FCA – RTR Cooperation Memorandum of Understanding (MoU)

The FCA and the Telecommunications and Post Division of RTR can look back on many years of cooperation. This goes back to early abuse and merger cases in the telecommunications sector and has most recently extended to the handling of complaints by MVNOs concerning access to wholesale conditions of mobile network operators or the joint monitoring of digital platforms. MVNOs are mobile network operators that do not own their own network infrastructure.

With the Telecommunications Act 2021, the FCA was involved in the procedure pursuant to § 85 for reviewing notified cooperations on active network components, as well as into the procedure for market definition and market analysis pursuant to § 87 of the TKG by way of a right to submit a comment. § 209b of the TKG 2021 now also explicitly authorises the competent authorities to conclude cooperation agreements with each other in order to promote cooperation in regulatory matters.

The FCA and the Telecommunications and Post Division of RTR signed such an agreement on 19 December 2022. The aim is to optimally utilise synergies in the area of overlapping competences in the parallel application of general competition law and sectoral regulatory law. The issues arising from the advancing digitalisation in the context of so-called gatekeepers, platforms or digital ecosystems can be meaningfully addressed only through broader approaches by the authorities that go beyond the respective immediate area of enforcement.

The cooperation should also be open for expansion to include other authorities with responsibilities in the digital field. The MoU is to be expanded in the near future to include the RTR Media Division and Komm Austria.

7 Outcome Orientation

The FCA had set itself the following targets for the year 2022:



Goal 1: Improving/Maintaining Competition

Primarily, investigations into competition violations, merger control, as well as European and international cooperation were the FCA's top priorities. These goals were indeed achieved through successful performance of investigative actions, effective merger control, and constructive continuation of cooperation with other EU authorities.



Goal 2: Building Awareness

This objective was characterised by continuation and improvement of the educational work. In order to fulfil its mission of informing the public about its activities, the FCA operates its own website (www.bwb.gv.at), on the one hand in order to comply with the legal publication obligations (§ 10b of the Austrian Competition Act) and on the other hand to ensure transparency. Furthermore, the FCA disseminates information via LinkedIn and YouTube. The account on Twitter was discontinued in 2022. Increasing transparency by maintaining an informative and clear homepage and continuing effective press work was implemented. The FCA also receives a large number of press enquiries (national and international) on procedures and general economic contexts on a daily basis.



Goal 3: Quality Management

FCA work is demanding, as the staff are in direct contact with the market (companies and consumers) and have to defend the public interest before the courts in merger and cartel proceedings. In order to perform these tasks successfully, it is necessary for the FCA staff to meet the same quality standards as the legal representation or economic consultation of the companies.

With a customised training programme (ongoing internal training, expert meetings, job rotation, study visits, etc.), the FCA ensures that the high quality standard is maintained and improved. In 2022, we were again able to implement and develop many measures for staff training and development.



Goal 4: Consolidation

Effective and modern anti-trust law enforcement requires constant development of the authority professionally and structurally. Evaluation of its own processes, assessment of the authority's inputs and outputs and implementation of the insights gained from this are striven for, making the FCA future-proof for its daily work and the resulting challenges.



Goal 5: Digital Challenges

Digitalisation affects all areas of economy, including competition. The FCA recognised the developments early on and has been using future-proof methods for several years. Both in the investigations – for example through computerised tools in the evaluation – and in the prevention campaigns, up to and including the training of employees of the authority. Since autumn 2021, the FCA has been using the elec-tronic file system (ELAK) for its file management, and this conversion process was successfully completed in the first quarter of 2022. In addition, digital competences were strengthened by the establishment of a separate IT Forensics unit. Hence, the FCA is well equipped for the digital challenges of the future.



Facts and Figures about the Federal Competition Authority

7 Outcome Orientation

8.1 The FCA's Budget Development

As explained in detail in the latest Progress Report (2021), for several years the standard budget provided for in the Federal Finance Act has failed to cover the most basic expenses such as those for staff, rent and general IT infrastructure. This was due in particular to the fact that the FCA was provided with more staff positions in 2016, but without an increase in the regular budget. Since then, it has only been possible to ensure the necessary minimum level of operation by submitting applications to the BMF for additional financing due to additional revenue from fines pursuant to § 32 (2) of the Austrian Cartel Act (so-called applications for budget overrun, "MVÜ application") and redeployments.

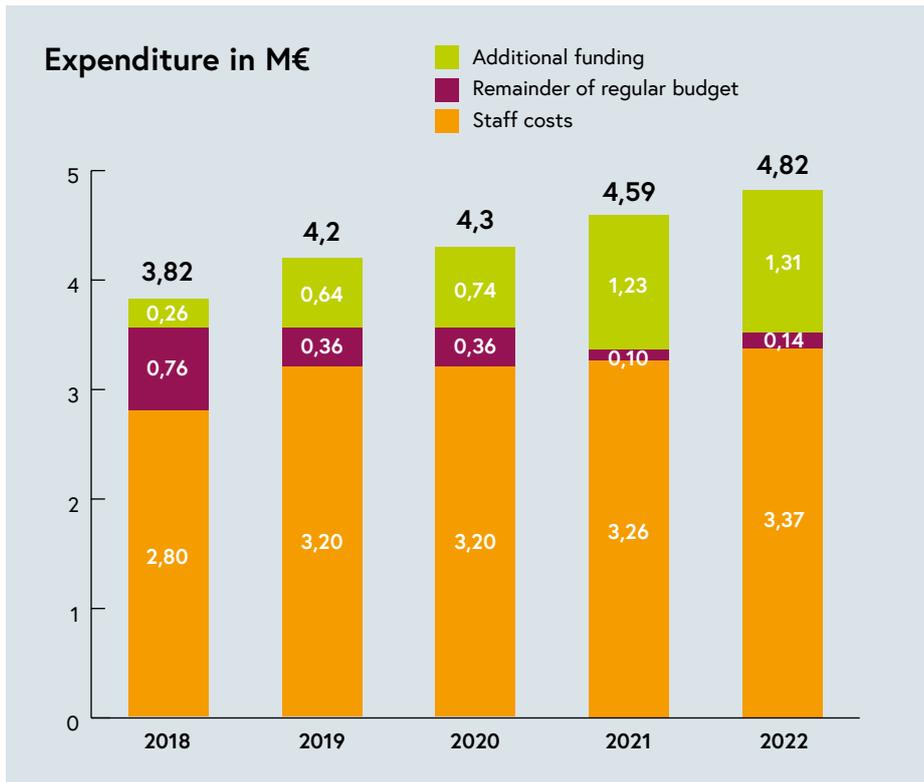
The underfunding in 2022 meant that from the beginning of April until the approval of the additional budget in late May, only fixed costs could be paid, but no invoices could from the budget freely available to the FCA. Only by fully utilising the maximum amount of M€ 1.5 provided for by law in § 32 (2) of the Austrian Cartel Act was it possible to ensure the funding of minimum operations again from the end of May on.

In autumn 2022, it was possible to achieve a substantial increase in the FCA's regular budget for 2023 by around M€ 2.4 to a total of M€ 5.901. The FCA would like to express its gratitude for the constructive process for this milestone. Further strengthening of resources is necessary due to the increasing demands.

This makes it easier for the FCA – subject to further budgetary challenges – to cover regular operations from 2023 onwards and be able to plan necessary investments in a rational and cost-covering manner already at the beginning of the year. The provision under § 32 (2) of the Austrian Cartel Act that – if fines of a corresponding amount have been paid – further funds of up to M€ 1.5 can be applied for from the Federal Ministry of Finance was maintained by the legislator in order to be able to make necessary extraordinary investments.

Overview of the Budget Situation

| | 2019 | 2020 | 2021 | 2022 |
|---|-----------|-----------|-----------|-----------|
| Federal Draft budget (standard budget) | 3.560.000 | 3.560.000 | 3.362.000 | 3.507.000 |
| Budget correction (requests for additional funds) | 740.550 | 773.000 | 1.417.000 | 1.511.300 |
| available budget | 4.300.550 | 4.333.000 | 4.779.000 | 5.018.300 |
| Success (actual payments) | 4.204.384 | 4.298.207 | 4.589.868 | 4.822.131 |



Expenditure in M€
Source: Progress reports of the FCA

8.2 Revenue from Fines and Fees

The revenue from fines and the fees for merger notifications generated on the basis of FCA applications is paid not into the budget of the Federal Competition Authority but, as a rule, into the general federal budget.

Pursuant to § 10a (1) of the Competition Act, a flat-rate fee amounting to € 6,000 is to be paid for a merger notification. With 340 merger notifications in 2022, this results in revenues amounting to € 2,040,000¹.

In total, fines totalling M€ 91.69 were imposed by the Cartel Court in 2022.

Fines in the amount of M€ 348.97 were imposed upon application of the FCA.

¹ One-ninth of the registration fees collected are to be remitted to the Federal Minister of Justice (§ 10a (1) of the Austrian Competition Act).

8.3 Staff in Figures

In 2022, a total of 47 people, including 39 case handlers, were working for the FCA at the reporting date of 31 December 2022. Nine staffers were employed part-time. In addition, the FCA employed one apprentice in vocational training as administrative assistant and three administrative trainees.

After a cut of four (lower-grade) staff positions in 2020 and 2021, the number of staff positions was increased by six (higher-grade) staff positions by the BMAW in the Federal Finance Act 2022. As a result, in 2022 the FCA has a total of two more staff positions on 1 January 2022 than it had on 1 January 2019.

Two staffers currently on leave are working in the Directorate General for Competition of the European Commission, and one staffer on leave is for Judge Elisabeth Tichy-Fisslberger at the General Court of the European Union.

Staff turnover was low in 2022. Only one staffer left the FCA in 2022 to join a private company. She is now working as a senior legal counsel in a digital-technology company.

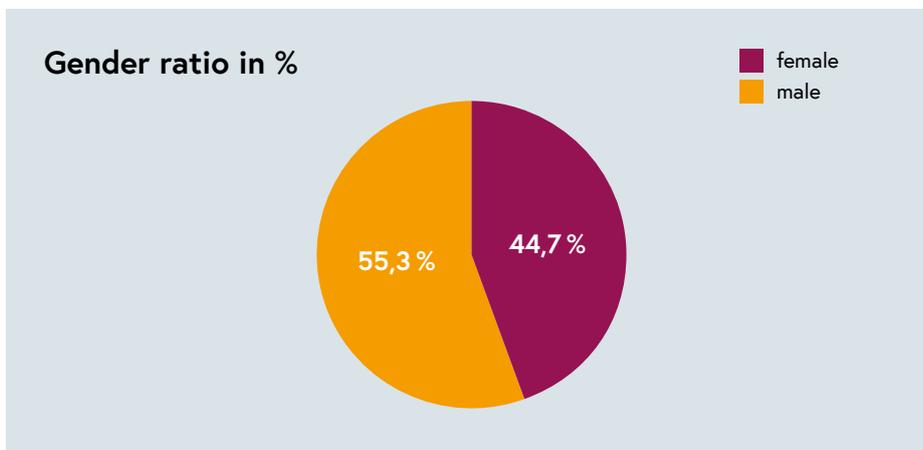
In 2022, for the first time the FCA also created and filled a disability position.

New hires were:

- A displaced employee of the Ukrainian Competition Authority was hired by the FCA as per 1 May 2022. This makes the FCA the first Federal agency to step into this pioneering role. Ms. Karpiuk has a PhD in Economics.
- Thomas Aldor (coming from the Federal Ministry of Education, Science and Culture)
- Raphaela Grünmann (coming from a law firm)
- Ferdinand Mikos (coming from the Federal Ministry of Education, Science and Research)
- Corinna Potocnik-Manzouri (coming from the University of Vienna)
- Kristina Pitterling (coming from the Federal Office of Metrology and Surveying)
- Nora Schindler (coming from the Vienna University of Economics and Business Administration)
- René Szeli (coming from a private-sector company)
- Rudolf Turetschek (coming from the Federal Office for Prevention and Combating of Corruption)

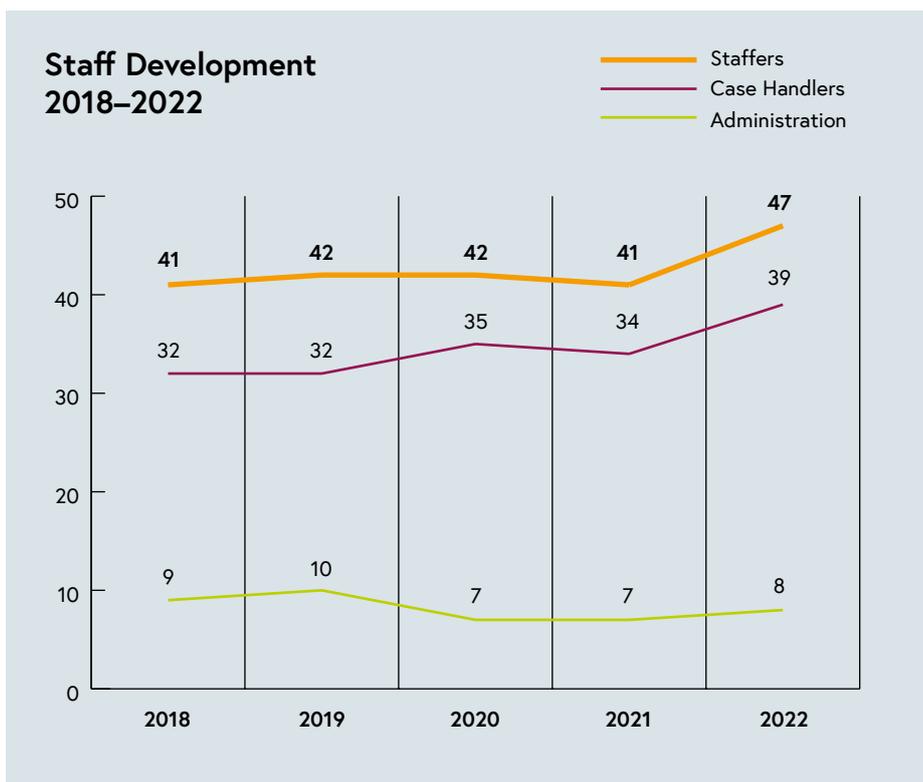
The FCA's employment status in 2022 (as per 6 December 2022)

| Distribution of active staffer | female | male | Total |
|--|-----------|-----------|-----------|
| v1 | 18 | 21 | 39 |
| v2-v4 | 3 | 5 | 8 |
| total active staff | 21 | 26 | 47 |
| Apprenticeships (3 administrative trainees and 1 apprentice) | 3 | 1 | 4 |



Gender ratio in %, As of 2022

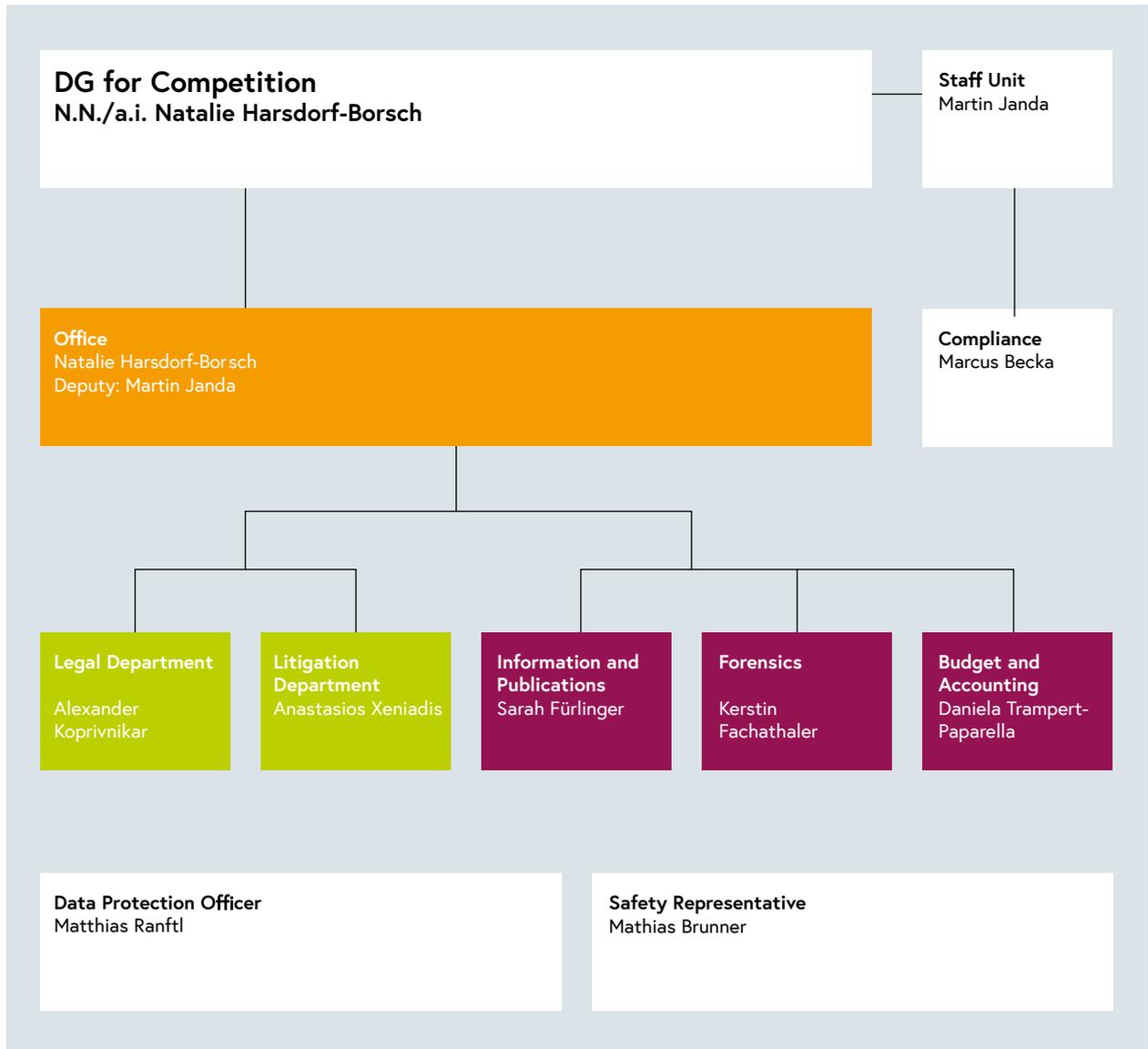
Source: FCA



Staff Development 2018-2022

Source: Progress reports of the FCA. Staffers incl. Director General and branch manager. Administration incl. one apprentice in vocational training as administrative assistant.

8.4 The FCA's Organisational Chart



Organisational chart of the FCA

Source: FCA

8.5 GCR Rating Enforcement: FCA once again among the World's best Competition Authorities

Every year, competition authorities worldwide are assessed by the trade magazine Global Competition Review (GCR). In the new report – a review from 2021 –, the FCA once more received high marks. Apart from the Austrian competition authority, the competition authorities in Chile, Canada, the Netherlands, New Zealand, Portugal, Singapore and Spain, among others, received a "good" rating. According to the rating, despite its comparatively low budget and staffing the FCA does "impressive work of consistently high quality". Lawyers praised the authority for its enforcement work but also for the way it uses its influence and advocacy skills to promote competition and its own institutional independence. Likewise, the authority received 4.5 out of 5 points in the market evaluation in the area of Independence and Ambition and the status "rising".

Global Competition Review (GCR) is an internationally recognised source for competition policy and anti-trust law enforcement. Indicators for the rating include the preliminary proceedings and decisions in cartel and market power abuse prosecution as well as merger control. Staffing and budget also play a role in the rating. Furthermore, technical specialists from the field are asked to assess the performance of the competition authorities.



Austria's Federal Competition Authority

Source: GCR

8.6 The Interim Head of the FCA – Lawyer of the Year



Dr. Natalie Harsdorf-Borsch,
LL.M.

Since 1 December 2021, Dr. Natalie Harsdorf-Borsch LL.M. has held the position of General Director ex lege on a provisional basis. She used to hold various positions at the FCA since 2009 (including Head of the Legal Department), most recently as Head of Office and Deputy Director General.

The Association of Austrian Corporate Lawyers (Vereinigung sterreichischer Unternehmensjuristen – VUJ), in cooperation with the organisation Women in Law Austria, awards the annual "Promoting the Best Awards". As per 11 October 2022, Dr. Natalie Harsdorf-Borsch LL.M. is the first woman in the public service to receive this award as "Lawyer of the Year".

8.7 Legal Department with new Head and Deputy

Mag. iur. Alexander Koprivnikar was appointed Head of the Fundamental Legal Affairs Department in July 2022. The focus of the department is on general competition law issues, e.g. in the context of investigations (leniency programme, Dawn Raids, interrogations), as well as in the area of legislation and cooperation in the European Competition Network (ECN).

Alexander Koprivnikar has been with the FCA since 2002 and has been deputy head of the Legal department since August 2019 and acting head since May 2021. Before joining the FCA, after graduation from the University of Vienna he had worked for three years at the Ministry of Economic Affairs in the Department for Competition Issues.

In addition to a new head of the legal department, a new deputy head of the function was also found. Mag. Mag. (FH) Stefan Ruech assumed this function in August 2022.

Stefan Ruech has been working at the Federal Competition Authority since November 2016. Previously he used to work as a lawyer in an international business law firm in Vienna in the areas of anti-trust and competition law as well as corporate law/M&A. Stefan Ruech is the author of numerous specialist publications and regularly lectures both nationally and internationally on the subject of Austrian and European anti-trust and competition law.

8.8 New Information and Publications Unit

In order to make public relations and communication even more efficient, the Information and Publications Unit was set up.

The unit deals with internal and external communication and the coordination and production of publications, such as the FCA's Progress Report, guides and manuals. The FCA is also subject to a large number of publicity obligations. The FCA's long-standing press officer, Sarah Furlinger LL.M., LL.M. has taken over as Head of Unit in August 2022 after return from parental leave. Sarah Furlinger has been working as a consultant and press spokesperson at the at the FCA since 2014.

She received her bachelor's and master's degrees in business law from the Vienna University of Economics and Business Administration. In addition, she completed a further Master of Laws in "European Competition Law and Economics" at the School of Competition in Brussels. Sarah Furlinger is the author of numerous specialist publications.

8.9 New Compliance, Risk Management and Whistleblowing Unit

In 2022, the new Compliance, Risk Management and Whistleblowing Unit was established at the FCA, and Dr. Marcus Becka LL.M. was appointed head of the new unit.

The FCA takes the issues of compliance, integrity and corruption prevention very seriously. Raising the awareness of FCA staff is at the heart of the prevention work. In recent years, numerous integrity-promoting measures have already been implemented in the authority. The newly created unit will continue these efforts and also oversee the internal compliance and risk management system, which will be regularly evaluated and further developed. Other tasks include the management and quality assurance of the in-house whistleblowing system.

Dr. Marcus Becka LL.M. has been with the FCA since the beginning of 2014. In addition to his activities in the legal core areas, he was press spokesperson for nine years. In addition he has been the FCA's Compliance Officer since 2016. After graduation in law (Mag., Dr., LL.M.), he completed further academic training in the fields of economics and psychology, as well as certificate courses as a compliance officer. He is the author of numerous specialist publications (including the KODEX Competition and Anti-Trust Law) and lecturer at several universities and colleges.

8.10 New Deputy in the FCA's Staff Unit

Dr. Martin Janda has been supported in the staff unit by Mathias Brunner M.Sc. as deputy since August 2022. The staff unit is responsible for strategic and coordinating matters; cross-organisational projects; stakeholder management; industry management; sector enquiries; risk management and compliance; and supervision of the whistleblowing system.

Mathias Brunner has been an economist at the FCA since 2018 and has practical experience in business and university teaching. He has also been an FCA safety officer for several years. Before joining the FCA, Mathias Brunner, a graduate of the Vienna University of Economics and Business Administration, worked for two years at the Ministry of Economic Affairs in the Export and Investment Policy Department.

8.11 Establishment of two new Specialist Coordination Offices

In November 2022, two new specialist coordination offices were created, and two experienced colleagues at the FCA were entrusted with these tasks.

8.11.1 Specialist Coordination for Matters relating to the Austrian Act against Unfair Competition (UWG)

Ms. Sigrid Tresnak was appointed specialist coordinator for matters relating to the Austrian Act against Unfair Competition (UWG) in November 2022. Pursuant to § 2 (2) 2 of the Competition Act, the FCA has the task of asserting claims for injunctive relief pursuant to § 14 (1) of the Federal Act against Unfair Competition before the civil courts. The responsibilities of the new position include the thematic coordination of matters and procedures relating to the Unfair Competition Act.

Sigrid Tresnak has been a case handler at FCA since 2002. She was part of the FCA already in its founding phase, and before that a consultant at the Ministry of Economic Affairs. Until 2019 (agendas were transferred to the Federal Office of Metrology and Surveying by the legislator), she was in charge of the agendas of consumer authority cooperation and enforcement of consumer protection regulations in cross-border cases. She is the author of numerous specialist publications.

8.11.2 Subject Coordination for International Affairs

Dr. Lukas Cavada was appointed subject coordinator for international affairs in November 2022. His areas of responsibility include coordination of the FCA's international cooperation, in particular with regard to bilateral cooperation, as well as ICN, OECD and UNCTAD.

Dr. Lukas Cavada has been with the FCA since the beginning of 2019; in the course of his training, he was also seconded to the OECD Competition Division for several months. He studied law in Vienna and London. He is the author of relevant specialist publications and regularly gives lectures at home and abroad.



Dr. Marcus Becka LL.M.

8.12 Career at the FCA: The Compliance, Risk Management and Whistleblowing Unit introduces itself – an Interview with Head of Unit Dr. Marcus Becka LL.M.

Compliance and Whistleblowing – added Value for Companies

Concerning the latest developments in the area of compliance and whistleblowing, the Information and Publications Unit has consulted Dr. Marcus Becka LL.M. (Head of Compliance, Risk Management and Whistleblowing at the FCA).

What does compliance mean, and why is it so important for organisations?

Compliance can be explained, with some simplification, as “adherence to the rules”. In other words, observance of laws and standards by companies and their employees. A process that should be a matter of course. But in practice this is not always easy: In recent years, the requirements for companies have considerably increased. Compliance is becoming an increasingly important issue in all fields, from criminal law through data protection to anti-trust law.

Targeted preventive measures can often prevent considerable damage in retro-spect. A good example here are the fines imposed by the anti-trust courts, as well as consequences that violations can entail, such as compensation for damages, exclusion from award procedures or even sanctions under criminal and labour law for the persons concerned.

It is therefore essential – also in the company’s own interest – to implement effective compliance programmes in the organisation, and to regularly monitor and adapt them to current changes.

How is compliance implemented at the FCA?

The FCA takes the issues of compliance, integrity and corruption prevention very seriously. Raising awareness among staff is at the heart of the FCA’s prevention work.

In recent years, numerous integrity-promoting measures have been implemented in the authority. For example, our own code of conduct, regular trainings and workshops and workshops as well as lectures by experts.

The newly created unit has consistently pursued these efforts and also oversees the internal compliance and risk management system, which is regularly evaluated and further developed.

How can companies become “compliant”?

Every company should first look at itself and the environment in which it operates and ask itself a few questions: Which market am I active in? Which business partners do I have to deal with? What are the special features of my industry? Which departments/individual employees are exposed to specific risks? On the basis of the knowledge gained from this, concepts tailored to the respective company can be developed and established in the company in a further step.

The FCA offers a service to companies – especially SMEs, which often do not have a Legal department of their own – by publishing publications such as guides, handbooks and viewpoints on its website publications such as guides, manuals and viewpoints on its website. Regular lectures and the publication of specialist articles by FCA staff also help to focus attention on current issues and achieve a multiplier effect.

The FCA sees the “Prevention & Information” pillar as an essential building block of the authority’s work, which, in addition to enforcement, contributes to fair competition in Austria. In addition to the guides already mentioned and in practice extremely relevant, such as on the topics of “Dawn Raids”, “leniency”, “vertical price maintenance”, “settlements” and the “Fairness Catalogue (Guideline for Corporate Conduct)”, in cooperation with the Austrian Federal Economic Chamber the FCA has issued the booklet “Anti-Trust Law and Compliance” as the first handbook for companies. This has been very well received; an update of the booklet is planned for 2023.

For 5 years, the FCA has had its own whistleblowing system. What is the outcome?

The FCA's whistleblowing system has been working extremely well. The number and quality of the tips reported to us show that this is very well received in practice. Since February 2018, over 320 whistleblowing reports have been submitted to the FCA. The instrument offers benefits on several levels: Whistleblowers are protected and at the same time help to ensure fair competition. A win-win situation.

The new Whistleblowing Directive on the protection of whistleblowers has now also been implemented in Austria as well. What role does the FCA play here?

In Austria, the Whistleblowing Directive was transposed into national law in the so-called Whistleblower Protection Act (Hinweisgeber:innenschutzgesetz, HSchG). The HSchG stipulates that the FCA is to play the role of an external authority within the meaning of the Directive in its area of responsibility. This means that information reported to the FCA will be received by the same, analysed, and forwarded to other competent authorities.

The FCA has taken timely preparations in this regard and already made adjustments to internal procedures and processes, and it has set up its own structural unit in which whistleblowing competence is concentrated. In addition, intensive talks with the other external authorities have already been held.

As a rule, there is no gradient between internal and external reporting offices. The whistleblower can therefore, as a rule, decide whether he/she wishes to use the reporting office of his/her own company, or turns to an external reporting office.

It is therefore in the interest of the company to seriously deal with the issue and establish an internal reporting office. Ideally, this should be as attractive as possible, so that whistleblowers primarily turn to the internal office and do not use external reporting channels.

A concluding statement?

Compliance should not be a mere matter of lip service; rather, it is important to implement a compliance culture in the company and also to live and exemplify it. The best role model is the boss or the respective superior. Only thus can a healthy system be sustained in the organisation, and illegal behaviour prevented from occurring in the first place.

8.13 Quality Management – Continuing Education – Basic Training

Staff have to meet high standards in terms of their qualifications. Ongoing education measures are therefore a key criterion for the FCA's quality management.

In 2022, training and further education measures took place in the following areas, among others:

- IT Forensics
- Compliance
- Media
- Data protection (data privacy)
- Competition economy

The FCA also operates an exchange programme with the European Commission, which allows FCA staff to be assigned to the Directorate General for Competition (DG Competition) in Brussels in order to gain experience. Due to the Corona pandemic, in 2022 no assignment was possible. The programme is scheduled to resume in 2023.

Each consultant must complete a basic training. In the course of the basic training, four staff members were assigned to external organisations such as the OECD Competition Division in Paris, the Data Protection Authority, the Public Prosecutor's Office of Vienna and the Federal Cartel Prosecutor. This promotes primarily professional competence as well as networking among the organisations. Furthermore, two staffers in departments of the BMAW could complete the basic training in 2022.

In addition to the specialisation measures within the authority, FCA staff attended a large number of language courses and seminars at the Federal Administration Academy (VAB).

8.13.1 Seminars on Competition Economics

The FCA regularly organises seminars on the economics of competition and invites researchers to present current findings related to competition economics and enforcement.

| Date | Speaker | Institution | Topic |
|-------------------|--|---|---|
| 15 February 2022 | Assistant Professor Dr. Shiva Shekhar | University (Netherlands) | Vertical control change and platform organization under network externalities |
| 1 March 2022 | Prof. Dr. Maarten Pieter Schinkel | University of Amsterdam (Netherlands) | Collaborative Corporate Social Responsibility |
| 03 May 2022 | Prof. Martin Schmalz | Saïd Business School of the University of Oxford (United Kingdom) | Common Ownership, Competition, and Top Management Incentive |
| 19 July 2022 | Christina Heldman | Düsseldorf Institute for Competition Economics (Germany) | Gender and Collusion |
| 07 September 2022 | Prof. Chiara Fumagalli | Università Bocconi (Italy) | Shelving or developing? Optimal Policy for Mergers with Potential Competitors |
| 15 November 2022 | Assistant Professor Felix Montag | Tuck School of Business (United States) | Mergers, Foreign Entry, and Jobs: Evidence from the U.S. Appliance |

8.13.2 Workshop Transparency International

On 21 December 2022, the Managing Director of Transparency International Austria, Luca Mak LL.M., visited the FCA to give a presentation in the course of an internal training event on the subject of "Transparency and Corruption Prevention".

In his presentation, he first introduced the Berlin-based organisation, which is active all over the world with about 100 national organisations. In his lucid and practice-oriented presentation, he introduced the most important tools used by Transparency International, namely the Corruption Perceptions Index (Corruption Perceptions Index – CPI), the Corruption Barometer, and the Austrian Index of Transparent Municipalities.

In addition to the definition, history and presentation of different forms of corruption, in his lecture he also addressed the current topics of lobbying, whistleblowing and the rule of law in Austria and Europe.

The FCA would like to thank TI Austria for the valuable exchange and the opportunity to gain exciting insights into their daily work.



Picture description f.l.t.r.:
Marcus Becka, Natalie
Harsdorf-Borsch and Luca
Mak

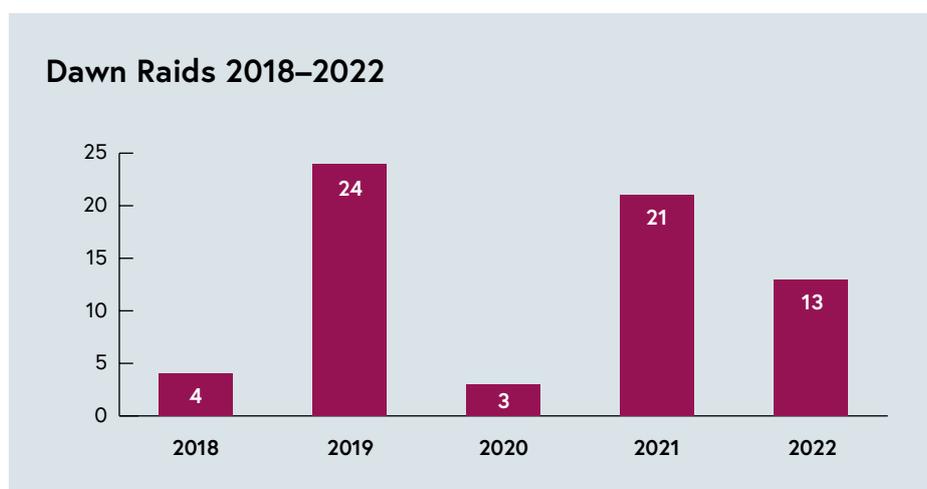


The Work of the Federal Competition Authority



9 Dawn Raids

In 2022, a total of 13 Dawn Raids took place. The investigative activities included, inter alia, suspicions of illegal agreements in waste management and in the pellets market. For the first time, a house search was carried out due to suspicions of abuse of market power in the market for beverages.



Dawn Raids
2018–2022

Source: FCA

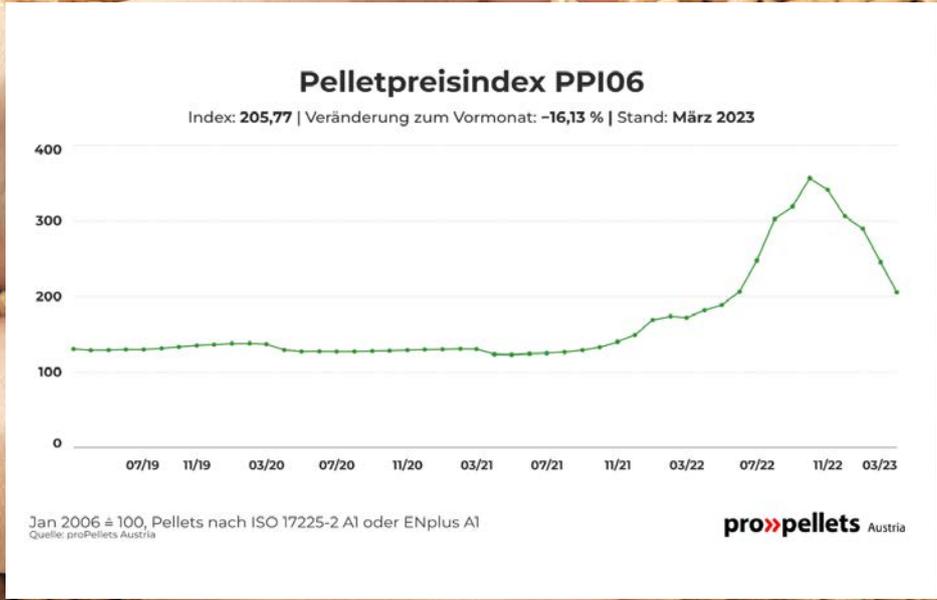
9.1 Investigations in Waste Management

Since 2021, the FCA has been investigating on suspicion of an Austria-wide violation of the ban on cartels in the waste management sector that had been going on for several years.

The suspicions include price fixing, market sharing, exchange of competition-sensitive information as well as collusion in tendering and the formation of joint ventures or bidding consortia in violation of cartel law. The focus of the investigations is on waste logistics, more precisely the collection and transport of waste.

In addition to the Dawn Raids already carried out in 2021 at over 20 locations, further Dawn Raids were performed in April 2022 at the locations of three companies in the waste management industry in Tyrol.

Several companies cooperate extensively and continuously with the FCA. In addition, a large number of employees of the companies under suspicion of having been involved in the competition law infringement were questioned in 2022. On the basis of these investigations, the FCA has already been able to address the allegations to a large extent. However, further necessary investigation steps will follow. The first applications to the Cartel Court can be expected in the course of 2023.



Pellet Price Index PPI06
7/19–3/23
Source: proPellets Austria

9.2 Investigations in the Wood Pellets Industry

The FCA is investigating the market for wood pellets, which are used as biogenic fuel, on suspicion of anti-trust law violations by producers and traders, as well as by proPellets Austria, the association representing the interests of the pellets industry.

The starting point for the investigations consisted in numerous complaints from all over Austria, submissions by the AK and information from whistleblowers received by the FCA.

In addition to the massive price increases (more than 150% within one year), which could not be explained, the complaints also stated that it was increasingly difficult to buy pellets because pellets traders sell wood pellets mainly to key accounts and only in exceptional cases to other customers. In addition, many traders are reported to offer only excessively long delivery times on grounds of delivery, capacity and storage bottlenecks, and this at the current daily price at the time of delivery.

The AK provided the FCA with data collected in the course of monitoring the sales prices of wood pellets in some States and forwarded anonymised consumer complaints for examination under competition law.

The specific suspicions concern, among others:

- Horizontal price fixing with the participation and coordination by the association proPellets and
- Artificial tightening of supply through excessive stockpiling (hoarding of goods)

The numerous submissions received from informants and complainants (including some whistleblower submissions) are being evaluated, and communication is taking place with the submitters in order to substantiate the suspicions expressed. One group of companies appealed against the search warrant to the Supreme Court of Austria as the highest cartel court. If a company appeals against a search warrant, the FCA does not include the seized data in the investigation until the appeal has been dismissed or rejected by the highest cartel court.

The price increase reached its peak in October 2022, i.e. at the time when the FCA's measures became known. From this point on, prices began to decline again. At the relevant time, the price per kilogramme was about € 0.63. A purely economic explanation for this sudden and rapid price reduction cannot be found.

9.3 Investigations in the Market for Beverages

The FCA received several anonymous complaints about the same issue via the whistleblower system. According to the complaints, a dominant company in the beer market wanted to introduce new conditions which would have had a restrictive effect on possible future partnerships for the distributors, as they would either have to act as exclusive distributors for the company or be confronted, when acting as mixed distributors for the company, with disadvantageous purchase prices or conditions for the company's products. It was also alleged in the anonymous complaints that the company was allocating customers and territories among the independent distributors, and that customers were forced to order their beverages from different distributors if they wanted to obtain favourable purchasing conditions.

On the basis of these complaints, a house search of the company in question was carried in April 2022, as there is the suspicion that market entries are being hampered and smaller breweries restricted in their opportunities for expansion, as well as independent beverage wholesalers driven out of the market by behaviour which constitutes an abuse of market power and infringement of cartel law. Accordingly, it is to be feared that there will be less product diversity on the beverage market and higher prices for consumers.



10 Whistleblowing System

As of February 2018, following a legal amendment the FCA's whistleblowing system was put into operation. This makes it possible to contact the FCA and report violations of anti-trust law anonymously. Due to the bidirectional communication with the whistleblower, questions can be asked and further information obtained.



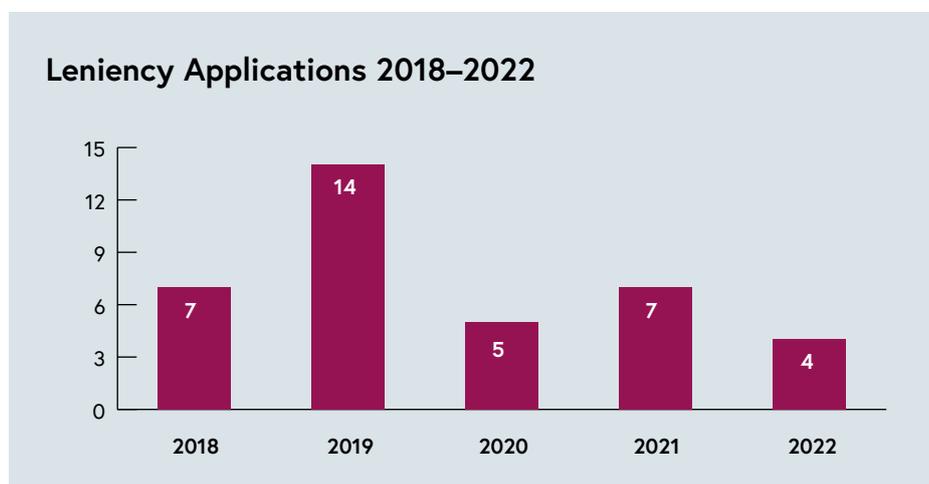
Whistleblowing Reports
Source: FCA



11 Leniency Programme

The FCA may refrain from requesting imposition of a fine or apply for a reduced fine for entrepreneurs or associations of entrepreneurs which, through their cooperation, contribute to disclosure of an infringement of § 1 of the Austrian Cartel Act or Article 101 of the TFEU. Thus, the leniency programme of § 11b of the Austrian Competition Act is an essential instrument for enforcement of the prohibition of cartels.

In 2022, four requests to proceed pursuant to this regulation were submitted to the FCA.



Leniency Applications
2018–2022

Source: FCA

11.1 Innovations in the Leniency Programme

Since the introduction of the leniency programme, the Austrian Competition Act has obliged the FCA to publish its practice in the implementation of the leniency programme in the form of a manual on its website, in the interest of transparency. While § 11b of the Competition Act in the version applicable prior to the entry into force of the KaWeRÄG 2021 contained only basic specifications for the application of the leniency programme, the details of its application were presented in this manual. However, the implementation of Directive 2019/1/EU (ECN+ Directive) made it necessary to provide an expanded normative basis for the leniency programme.

Thus, an ordinance authorisation for the Federal Ministry of Labour and Economic Affairs to issue more detailed provisions on the application of the leniency programme, in particular on markers and summary applications, was added to § 11b (4) of the Austrian Competition Act. This ordinance on the application of the leniency programme (Federal Law Gazette II N° 487/2021) entered into force on 25 November 2021 and now regulates leniency applications, markers, summary applications, the form of the application, the obligation of the principal witness to cooperate, the reduction of fines, and the notification of leniency status.



Guideline: Leniency and principal witnesses

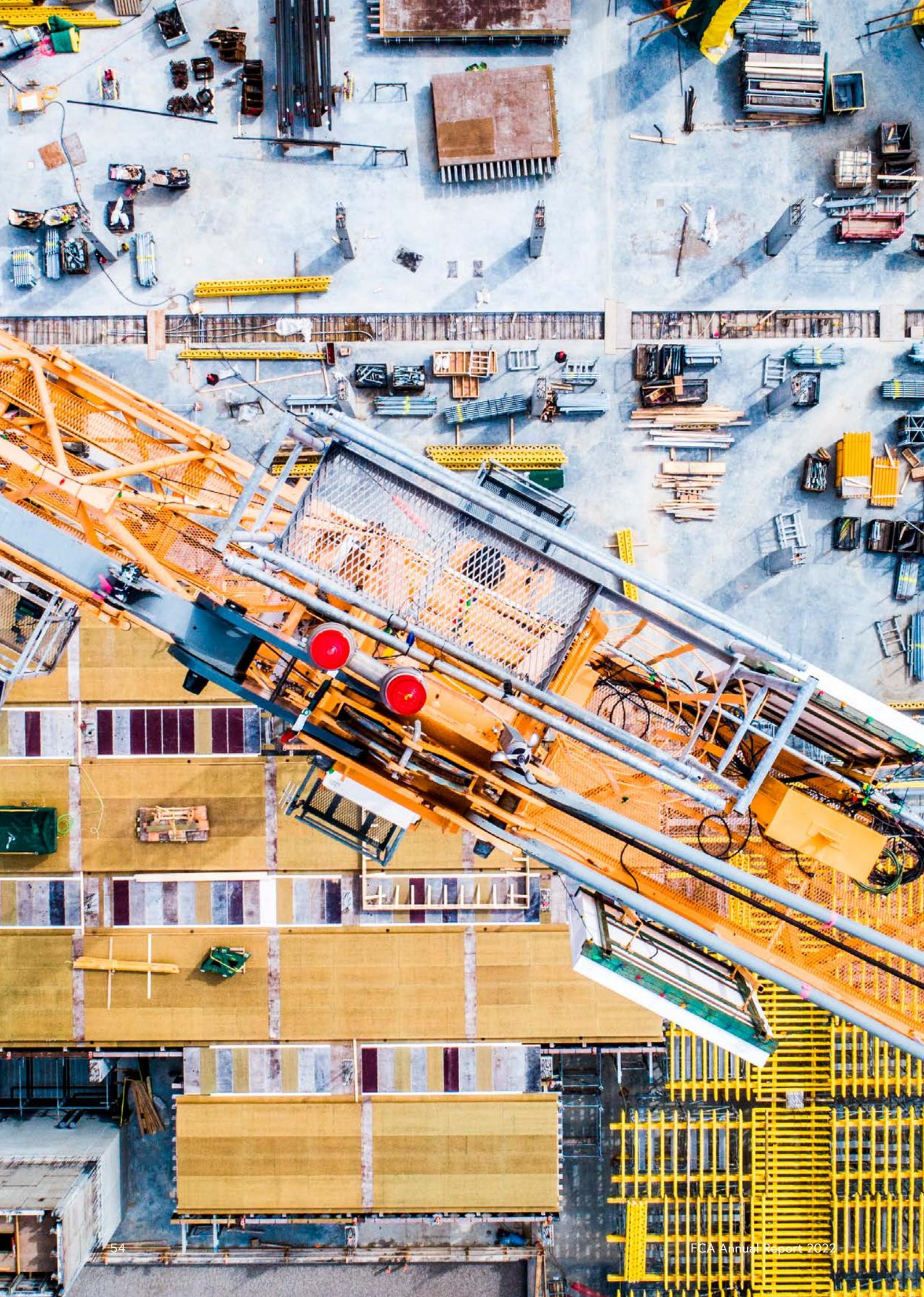
11.2 “Leniency Guidelines Programme”: The Guide to the Leniency Programme

Due to the importance of the leniency programme as an essential instrument for the enforcement of anti-trust law, the FCA has drawn up a comprehensive guideline and published it in August 2022 after conducting a consultation procedure and incorporating the comments received.

The aim of this guide is to outline the FCA’s practice in implementing the leniency programme in the interests of maximum transparency and summarise aspects relevant to (potential) principal witnesses in a clear and concise manner in one document.

The leniency guide provides information on:

- the general conditions for application of the leniency programme,
- the specific requirements both for waiver of the fine and for applying for a reduced fine,
- the procedure in the context of a request for leniency,
- the privileged treatment of employees of leniency companies in law enforcement and
- the privileging of principal witnesses or leniency applicants in compensation proceedings and the FCA’s handling of statements of principal witnesses.



12 Cartels

12.1 Getting a Grip on the “Construction Cartel”

Since mid-June 2017, in cooperation with the Public Prosecutor's Office for Economic Affairs and Corruption and the Federal Office for the Prevention of and Fight against Corruption the FCA has been investigating suspicions of violations of the ban on cartels in the construction sector throughout Austria that have been going on for several years.

The cartel comprises price fixing, market sharing and the exchange of competition-sensitive information in the context of tenders in the building and civil engineering sector. It primarily affects tenders by public contracting authorities such as the Federal Government, the States, municipalities and public companies. However, tenders in the private sector were also covered by the cartel. A total of more than 40 construction companies, albeit to varying degrees, are under suspicion of having been involved in the infringement. They are alleged to have allocated orders among themselves for several decades and coordinated their bid prices in order to secure market shares, among other things.

12.1.1 PORR Group

In September 2021, the PORR Group issued an acknowledgement in the course of settlement talks with the FCA and the Federal Cartel Prosecutor. In addition to the acknowledgement, the cooperation of the PORR Group (outside of the leniency programme) in the investigation and the far-reaching compliance measures, which included unbundling under company law in the field of asphalt mixing plants, were decisive for the assessment of the fine.

By decision of the Cartel Court of 17 February 2022 (26 Kt 5/21m), the fine requested by the FCA in the amount of M€ 62.35 for violations of Austrian and European anti-trust law was imposed on the PORR Group. The decision has been legally binding since 4 April 2022.

12.1.2 HABAU

On 6 September 2022, after protracted legal proceedings four companies of the HABAU Group of companies (“HABAU”) eventually admitted their participation in the construction cartel and issued a comprehensive acknowledgement. In the course of settlement talks with the FCA and the Federal Cartel Prosecutor, HABAU also recognised a fine amounting to M€ 26.33 as appropriate.

As early as October 2020, the FCA filed an application against HABAU to the Cartel Court for the imposition of a fine. In the light of the acknowledgement of September 2022, the FCA was able to substantiate its application and request imposition of a fine totalling M€ 26.33.

By decision of the Cartel Court of 23 November 2022 (28 Kt 6/20x), the fine in the amount requested by the FCA was imposed on HABAU for agreements contrary to anti-trust law in the form of price fixing, market sharing and exchange of information with competitors in relation to public and private tenders in the field of building construction and civil engineering in Austria in the period from at least July 2002 up to and including October 2017. The Decision has been legally binding since 13 December 2022.

12.1.3 Pending Proceedings before the Cartel Court

Swietelsky

On 21 July 2022, SWIETELSKY AG and two subsidiaries ("SWIETELSKY") issued a comprehensive acknowledgment in the context of the cooperation with the FCA, with the involvement of the Federal Cartel Prosecutor.

SWIETELSKY approached the FCA promptly after the first investigative actions in the summer of 2017 and thus became the second Austrian construction company to cooperate continuously and comprehensively within the framework of the leniency programme, which made it possible to significantly facilitate and accelerate the processing of the complex and extensive facts, also with regard to numerous other companies in the construction industry. In particular, SWIETELSKY conducted a large number of internal surveys of employees and introduced a certified compliance system.

In its application for a fine dated 27 October 2022, the FCA requested that SWIETELSKY be fined M€ 27.15.

Haider Brothers

On 25 October 2022, the FCA filed a further application for a fine against five companies of the Haider Brothers group of companies ("Haider Brothers").

The illegally coordinated construction projects concern both civil engineering and building construction. In civil engineering, primarily road construction and, to a much lesser extent, sewer construction is affected. In structural engineering, bridge construction as well as power plant construction and other master builder works are affected. The construction projects are concentrated in Lower Austria. However, there are also individual construction projects in Burgenland, Carinthia, Upper Austria, Styria, Tyrol and Vienna affected.

Review of the decision against STRABAG

In the summer of 2022, the FCA obtained knowledge of new facts by way of administrative assistance, necessitating a judicial review of the final decision against STRABAG necessary, whereby M € 45.37 had been imposed (27 Kt 12/21y). In particular, the question arose as to whether STRABAG had fulfilled its obligation to cooperate truthfully, fully and expeditiously as a principal witness pursuant to § 11b (1) 2 of the Austrian Competition Act. Against this background, the FCA filed an application for modification on 28 July 2022 and requested the Cartel Court to review the decision of 21 October 2021.

In its decision of 20 October 2022 (27 Kt 12/21y), the Cartel Court dismissed the FCA's motion for modification, in particular on the basis of procedural considerations rejected. In summary, the Cartel Court stated that in particular there was a lack of explicit statutory regulation, so that there was a legal gap and no formal gravamen on the part of the FCA. The FCA and the Federal Cartel Prosecutor lodged an appeal. A number of legal questions were submitted to the Supreme Cartel Court.

Statement of the Complaints

In autumn 2022, two further notices of objections were sent to companies concerned. Numerous further applications for fines to the Cartel Court are planned for 2023.



12.2 The Carpentry Cartel

In 2019, the FCA had carried out Dawn Raids in several carpentry companies. In 2022, the FCA was able to conclude its investigations, and subsequently it filed applications to the Cartel Court for imposition of fines against a total of four companies:

- Tischlerei Lechner GmbH,
- Krumböck GmbH,
- Josef Pirkl Gesellschaft m.b.H. u. Co. KG and Josef Pirkl Gesellschaft
- Norer Tischlereigesellschaft m.b.H.

The FCA filed an application against the company Fürst Möbel GmbH for declaration of an infringement of the Austrian Cartel Act. Fürst Möbel GmbH had cooperated extensively with the FCA within the framework of the leniency programme and was the first company to submit information and evidence that enabled the FCA to extend its investigations. For this reason, the application for a fine against Fürst Möbel GmbH was waived. Within the framework of the leniency programme, Norer Tischlereigesellschaft m.b.H. like-

wise cooperated, against which company a significantly reduced fine was applied for.

With the exception of the proceedings against Josef Pirkl Gesellschaft m.b.H. (still pending), final decisions have already been made in all proceedings and fines totalling € 297,000 been imposed on the companies mentioned. Based on the FCA's investigations, the prosecution authorities have initiated numerous investigations against individuals and associations, some of which are still ongoing.

Initiation of the Investigation: Tips through Complaints from Consumers

January 2019

House search in cooperation with the German Federal Cartel Office



Leniency application filed even during the house search.

2019 & 2020

Investigations because of suspicion of vertical price fixing

2021

Submission of an application for the imposition of a fine on Fond Of GmbH (already finally imposed)

2022

- Submission of applications for imposition of fines on Kastner & Öhler and Thalia
- Submission of an application for declaratory judgement against Georg Hausmann KG



Up to

€ 300

is the cost of a first-grader's starter pack.¹ Here the biggest price-driving factors are school bags.

¹ Handelsverband, Press release dated 26 August 2022

Timeline of the FCA's Investigation into the School Bag Cartel



510,000 €

in total fines were imposed in a legally binding manner.



Leniency status and further cooperation (e.g. in the form of acknowledgements) with the FCA generally reduce the amount of the fines. **So: Cooperation pays!**



In the school bag cartel case, Fond Of GmbH and Kastner & Öhler acted as principal witnesses.



12.3 Conclusion of the Proceedings concerning School Bag Sales

12.3.1 Fond Of GmbH

In 2022, the FCA was able to conclude the proceedings concerning vertical price fixing in the distribution of school bags. As early as at the beginning of 2019, investigations had been initiated against Fond Of GmbH, which manufactures school bags and backpacks, and against several retailers, on suspicion of anti-competitive agreements.

The anti-competitive practices involved agreements with manufacturers of school bags and backpacks regarding the fixing of sales prices. The dealers were prescribed only supposedly non-binding sales prices by the manufacturers, which they subsequently mostly observed. This restricted competition between traders. Furthermore, in some cases Fond Of GmbH also illegally restricted the possibility of online sales by traders on their own websites as well as on third-party platforms.

The first information came to the FCA through complaints from consumers to the FCA. In the course of the investigation initiated as a result, by way of administrative assistance in January 2019 the German Federal Cartel Office carried out a house search at the Fond Of GmbH location in Germany. In Austria, Dawn Raids at retailers were carried out. Fond Of GmbH filed a leniency application during the very house search and subsequently cooperated extensively with the FCA in order to fully clarify the facts of the case. In July 2021, upon application of the FCA, the Cartel Court imposed a reduced fine of € 340,000 (25 Kt 5/21d).

12.3.2 Kastner & Öhler Beteiligungs-Aktiengesellschaft, die Kastner & Öhler AG and die Kastner & Öhler Mode GmbH

The retailer Kastner & Öhler also cooperated with the FCA in the course of the investigations into the school bag cartel as a principal witness, which is why here, too, a reduced fine could be applied for (24 Kt 1/22k). With its decision of 12 May 2022, the Cartel Court imposed a fine of € 70,000 on Kastner & Öhler Beteiligungs-Aktiengesellschaft, Kastner & Öhler AG and Kastner & Öhler Mode GmbH for a uniform, complex and continuing infringement. The company has agreed on resale prices with the manufacturers of school bags and backpacks by determining the fixed

< Timeline of the investigations by the FCA into the school bag cartel
Source: FCA

and minimum price levels (and in some cases, also those of accessories). The infringement covered the period from February 2016 to March 2019.

12.3.3 Thalia Buch & Medien GmbH

A further legally binding decision was issued upon application of the FCA for the imposition of a fine against Thalia Buch & Medien GmbH on 14 July 2022 (25 Kt 4/22h), in which the fine amounted to a total of € 100,000. The company had issued an acknowledgement, so that due to the lower procedural costs, the fine to be applied for could be reduced. The anti-competitive practices and agreements concerning Thalia Buch & Medien GmbH and agreements with manufacturers of school bags and backpacks on the observance of sales prices took place in the period from February 2015 to February 2019.

12.3.4 Georg Hausmann KG

By decision (25 Kt 8/22x) of 5 December 2022, the Cartel Court finally declared an infringement by Georg Hausmann KG. The vertical agreements with manufacturers of school bags and backpacks on resale prices in the sense of setting a fixed and minimum price level, which were in breach of anti-trust law, concerned the period from January 2015 to October 2018. The company had cooperated with the FCA and issued an acknowledgement. Due to the company's difficult economic situation, the FCA refrained from filing an application for a fine.

tive information had taken place in several tenders for façade construction services. The Public Prosecutor's Office for Economic Affairs and Corruption then started criminal investigations in this context and cooperated with the FCA. On the basis of the telephone surveillance data sent to the FCA in 2019, in cooperation with the LKA Vienna the FCA conducted Dawn Raids at several companies in the façade construction sector.

Following a clarifying amendment on administrative assistance to the FCA in such cases, this is the first investigative investigation that the FCA has conducted on the basis of a suspicion resulting from tapped telephone conversations.

The investigations by the FCA confirmed the suspicion of conduct in violation of anti-trust law. The uniform and continuous infringement in the form of price anti-trust price fixing, market sharing and information exchange with competitors took place in 2017. With involvement of the Federal Cartel Prosecutor, NFS Bau GmbH issued an acknowledgement for the purpose of terminating the proceedings by mutual agreement. As a result of the application by the FCA, the Cartel Court imposed a fine totalling € 54,000 on NFS Bau GmbH by decision of 14 November 2022.

The FCA will file further applications against a number of companies in the sector in 2023.

12.4 Ongoing Investigations in the Field of Facade Construction

12.4.1 Imposition of a Fine on NFS Bau GmbH

Since 2019, the FCA has been investigating several companies in the area of façade construction on suspicion of collusion in violation of cartel law.

Telephone tapping carried out by the Vienna State Criminal Police Office (LKA Wien) in 2017 in the course of criminal investigation into certain offences against companies gave rise to the substantiated suspicion that systematic horizontal agreements in violation of anti-trust law and the exchange of competition-sensi-



12.5 Submetering – Market for Energy Billing

In July 2019, the FCA carried out Dawn Raids at several companies active in the submetering industry. There was a suspicion that, among other things, meetings of an industry association were used to exchange on or agree on market parameters. Submetering includes the individual logging and billing of heating, hot-water and cold-water costs in building units for private or commercial use (residential buildings, office buildings, etc.) and regularly also the provision of the measuring equipment required for this, known as heat cost allocators, hot and cold water meters and heat meters. The investigations by the FCA confirmed the suspicion of conduct in violation of anti-trust law.

12.5.1 ista Österreich GmbH

On 8 February 2022, the FCA filed the first application for imposition of a fine totalling M€ 2.2 on ista Österreich GmbH ("ista"). Due to ista's comprehensive cooperation as a principal witness and the issuance of an acknowledgement for the cartel court proceedings, imposition of a reduced fine was applied for.

By decision of 1 June 2022 (25 Kt 1/22t), the fine applied for by the FCA was imposed on ista

for an infringement in the form of agreements on prices and conditions and the exchange of information with competitors both within the framework of organised association meetings of competitors and outside the same between competitors in the submetering sector in Austria in the period from at least July 2004 to February 2019.

12.5.2 Techem Messtechnik GmbH

On 22 July 2022, the FCA led an application for declaratory judgement against the company Techem Messtechnik GmbH ("Techem"). Techem was the first company to file a leniency application with the FCA to fully clarify the facts of the case. In particular, Techem was the first company to submit information and evidence that enabled the FCA to make a sub-stantiated request to the Cartel Court to order Dawn Raids directly on suspicion of an infringement. For this reason, only the finding of participation in the cartel was requested.

In its decision of 3 October 2022 (25 Kt 6/22b), the Cartel Court found that Techem had violated the ban on cartels by exchanging information and agreeing on prices and conditions with competitors both in the context of organised association meetings of competitors and outside of these meetings in the submetering sector in Austria in the period from at least July 2004 to February 2019.

Further applications for the imposition of a fine are expected to be submitted to the Cartel Court in 2023.

12.6 R+S Group Regeltechnik und Schaltanlagenbau GmbH and Regel- und Steuersysteme AT GmbH

Upon application of the FCA dated 15 February 2022, the Cartel Court imposed a fine totalling € 50,000 on R+S Group Regeltechnik und Schaltanlagenbau GmbH on 10 May 2022. An application for declaration of an infringement was filed with the Cartel Court against Regel- und Steuersysteme AT GmbH.

In a contract with Regel- und Steuersysteme AT GmbH concluded on 11 March 2019 and valid from 1 January 2019 to 10 February 2020, the companies had agreed to share the Austrian market for measurement, control and regulation technology for buildings on the basis of the respective project address by province and on the basis of specific customers.

R+S Group Regeltechnik und Schaltanlagenbau GmbH made an acknowledgement to the FCA, so that a reduced fine could be applied for. Regel- und Steuer-systeme AT GmbH cooperated with the FCA within the framework of the leniency programme, so that it was not necessary to apply for a fine.

12.7 Price and Customer Allocation of the “Erste Salzburger Fiakervereinigung” (First Salzburg Carriage Association)

A complaint was lodged against the "Erste Salzburger Fiakervereinigung" according to which it had stipulated that all coachmen had to use the same prices. Attention was also drawn to other irregularities as well.

The FCA carried out investigations into the legal and factual background and sent a request for information to the "Erste Salzburger Fiakervereinigung" in order to check the allegations. The FCA was able to prove that agreements on prices and on the allocation of customers had been made, violating the ban on cartels.

Although the duration of the offence was comparatively long, more than ten years, the impact of the industry's conduct on other economic sectors and consumers was negligible. In addition, the companies concerned are small and micro-enterprises and were cooperative after discussing the infringements. Within the margin of discretion allowed for prosecution, it was therefore decided not to apply for a fine and choose a gentler instrument to bring the situation into conformity with the law.

The association was ordered to cease the price fixing and market and customer allocation, and to amend the relevant passages in the statutes of the association. In addition, the members of the association were made to sign a code of conduct for fair competition.

After the association had acknowledged the violation and implemented the measures taken to prevent future violations of anti-trust law, a prosecution was waived, subject to future competition-compliant conduct of the association.

12.8 The Industrial-Sugar Cartel: Following a Preliminary Ruling by the ECJ, the highest Cartel Court upheld the FCA's Appeal against the Application of the Double Jeopardy Prohibition.

The FCA's application for imposition of a fine and declaration of participation in an infringement in the form of territorial agreements in the distribution of industrial sugar had been dismissed in 2019 by the Cartel Court at first instance. A fundamental reason of the dismissive decision was the assumption of the Court that the fine imposed by the German Federal Cartel Office (Bundeskartellamt, BKA) imposed by the German Federal Cartel Office (BKA) against Südzucker AG would constitute double jeopardy. With regard to the principal witness Nordzucker AG, interest in a declaratory judgement was denied. The FCA lodged a partial appeal and argued, in particular with the support of the BKA and the US Department of Justice, that in the specific case the principle of "ne bis in idem" does not preclude a fine. The Supreme Court as the highest cartel court (HCC) referred these questions to the European Court of Justice (ECJ) with a request for a preliminary ruling.

In its decision of 22 March 2022, the ECJ expounded the prerequisites for application of the prohibition of double jeopardy. Moreover, it clarified in summary that the latter does not preclude a company from being prosecuted and possibly fined by the competition authority of a Member State for infringement of Article 101 TFEU and the relevant national competition rules for conduct which had an anti-competitive object or effect in the territory of that Member State, even though that conduct has already been mentioned in a final decision by a competition authority of another Member State, provided that said decision is not based on a declaration of an anti-competitive object or effect in the territory of the first-mentioned Member State.

The HCC applied the interpretation of the ECJ to the individual case and ruled in its decision of 21 October 2022 that the prohibition of double jeopardy did not apply to the facts to be assessed in

the appeal proceedings. The court appreciated the German fining decision, the hearing letter of the BKA and the comments submitted, and concluded that there was no identity of the offence established by the BKA on the one hand and submitted by the FCA on the other. The decision of the BKA was aimed at punishing anti-competitive conduct that extended to or had an impact on the German market. Furthermore, continued interest in a declaratory judgement against the principal witness was affirmed by applying the current case law of the ECJ.

The HCC therefore upheld the FCA's appeal and, on the one hand, made the requested declaration on the illegal cartel agreement between Nordzucker AG and Südzucker AG pursuant to § 1 of the Austrian Cartel Act and Art 101 of the TFEU. The agreement concluded was qualified as a core infringement. With this declaration, the proceedings against Nordzucker AG ended with legal effect.

On the other hand, the HCC saw a need for supplementary information with regard to Südzucker AG in order to determine the amount of the fine. The proceedings were therefore referred back for a new decision. The Cartel Court has already reopened the proceedings. In the continued proceedings, the FCA submitted written submissions on the appropriate assessment of the fine. The proceedings have not yet been concluded.



13 General Market Investigations

The Federal Competition Authority conducts market investigations in markets, if there exists a suspicion that competition is restricted or distorted. In 2022, the FCA published the result of its investigations on the fuel market as well as on the public e-charging infrastructure in Austria.

13.1 Market Investigation: Fuel Market

Against the backdrop of sharply rising POS prices as a result of the Russian invasion of Ukraine on 24 February 2022, the FCA launched an investigation of the Austrian fuel market in response to an increasing number of complaints in March 2022.

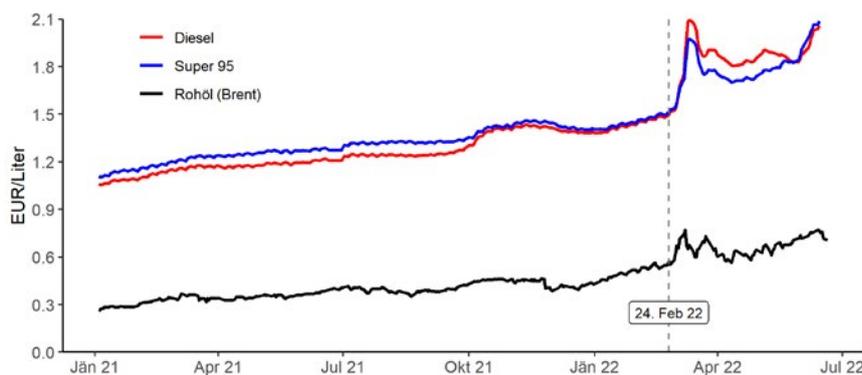


Figure 1: Price Development for Diesel, Super 95 and Crude Oil (Brent)

Source: E-Control and EIA.

The petrol and diesel price developments since January 2021 as shown in *Figure 1* (incl. mineral oil tax and VAT) are juxtaposed with the development of the crude oil price (Brent). After 24 February 2022, sharp price jumps and increased volatility are evident, with the gap between POS prices and crude oil prices widening.

These price data for diesel, Petrol¹ and Brent² crude oil prices were the starting point from which the FCA, in the course of the competitive investigation answered the following questions:

1 E-Control

2 EIA, U.S. Energy Information Administration



1. What are the reasons for the drastic price increases at the POS since the beginning of the Russian attack on Ukraine?
2. How have the margins on the various levels of the supply chain changed?
3. Has there been a decoupling of fuel prices from crude oil prices?
4. Can information be extracted from the price data that points to a decline in competition at both petrol station and refinery level?

In addition to price data from E-Control and the EIA, price quotations for diesel and petrol for the period under review (January 2019 to June 2022) were also acquired from Argus Media, an important price information service on the international petroleum markets alongside S&P Platts. International price quotations regularly serve as reference prices in supply contracts between refineries and petrol stations as well as wholesalers.

Immediately after the start of the sector enquiry, requests for information were also prepared and sent to the five major players (OMV, BP, Shell, ENI, JET). Among other things, the operating costs in the ten refineries relevant for Austria were queried. In addition, the FCA held talks with three larger fuel wholesalers and petrol station operators that do not hold any shares in refineries.

Since there is at least one OMV refinery in Schwechat in Austria, but crude oil production in Austria does not play a role, the FCA limited itself to two stages of the value chain: Refining of crude oil and distribution of vehicle fuels

(diesel and petrol) for small customers.

Figure 2 shows the most important events and deadlines in the context of the sector enquiry. After analysing the responses to the requests for information, the data submitted and the above-mentioned price data, the FCA published a provisional version of the sector inquiry on 7 July 2022. Due to the high economic and social importance of the topic and the dynamic geopolitical and economic conditions, it was important for the FCA to give the market participants concerned the opportunity to comment. Only two market participants submitted constructive comments, which, however, had no impact on the results of the preliminary report. Finally, two chapters were included into the final report in which on the one hand the development of the operating costs and on the other the comments in the opinions submitted were addressed. On 22 August 2022, the FCA submitted the final report.



Figure 2: Timeline of the sector enquiry

Source: FCA

Results of the Market Survey

The FCA used a market survey to analyse whether the POS price increases can be explained by the development of crude oil prices. The calculations showed that in the first half of June, compared with the period before the start of the war in Ukraine, the price quotations, which rose by around 36 ¢ per litre of diesel and 41 ¢ per litre of petrol, were decoupled from crude oil prices, as crude oil prices only rose by around 22 ¢ per litre.

The stronger increase in prices (decoupling) of diesel and petrol at the POS, which cannot be explained by the increase in crude oil prices, led to a tripling of gross refining margins from about 7 ¢ to about 23 ¢ per litre of processed crude oil over this period. The operating costs reported by the petroleum companies in the course of the market survey, against the background of increased natural gas and electricity costs since the year 2021, suggest that the refineries' actual profit margins (i.e. gross margins minus operating costs) have increased considerably since the start of the war in Ukraine and are likely to have developed in a manner comparable to the gross margins. Quarterly reports of oil refineries submitted after the publication of the final report of the sector enquiry confirm this finding.

At the petrol station level, only for March 2022 are there indications of substantially increased gross margins of the petrol stations. In the months that followed, the gross margins were only slightly above their pre-war level. The investigation at the level of the petrol stations suggests that the cause of the increased petrol station prices is not a lack of competition between them, but in particular the increased international price quotations are. Functioning competition will continue to be important for the rapid passing on of cost reductions to consumers in the future.

With the final report, the FCA was able to provide the government, the parliament and the general public with facts supported by data to enable an evidence-based discussion. The most important findings and results of the sector enquiry are summarised below.

No direct indications of cartel formation or abuse of market power emerged from the investigation. However, it should be noted that the final report suggests that refiners' profit margins (= gross margins minus operating costs) increased sharply in the months following the start of the war in Ukraine. This finding was subsequently confirmed in the quarterly reports published by the oil refineries.



13.2 Market Investigation: E-Charging Infrastructure

The Federal Competition Authority, with the involvement of the expertise of E-Control, conducted a market investigation in the area of electromobility (e-mobility), which was started in November 2021 and concluded in November 2022. The objective was to gain an overview of the currently prevailing market and the players therein at an early stage of the upcoming transformation in order to be able to address potential future competitive issues. Furthermore, the results and recommendations of the FCA should also provide the opportunity to conduct the political-regulatory discourse on the further development on the basis of corresponding surveys. With the final results of the study, the FCA would like to point out possible competitive challenges in the area of e-charging infrastructure in order to make a contribution to a successful further expansion in Austria.

The climate protection and energy strategy of the Federal government provides for a significant reduction in CO₂. This goes back to initiatives of the European Union that are to be implemented by 2030 and 2050, respectively. Since road traffic accounts for a considerable share of total greenhouse gas emissions, such a goal can be achieved only if there is a corresponding reduction in passenger cars with combustion engines. Currently, a transformation towards e-mobility is taking place. One of the greatest challenges in the changeover from combustion engines to electric motors lies in the development of an efficient, comprehensive and safe charging infrastructure and in the upgrading of the electricity grids.



Sector enquiry E-charging structure

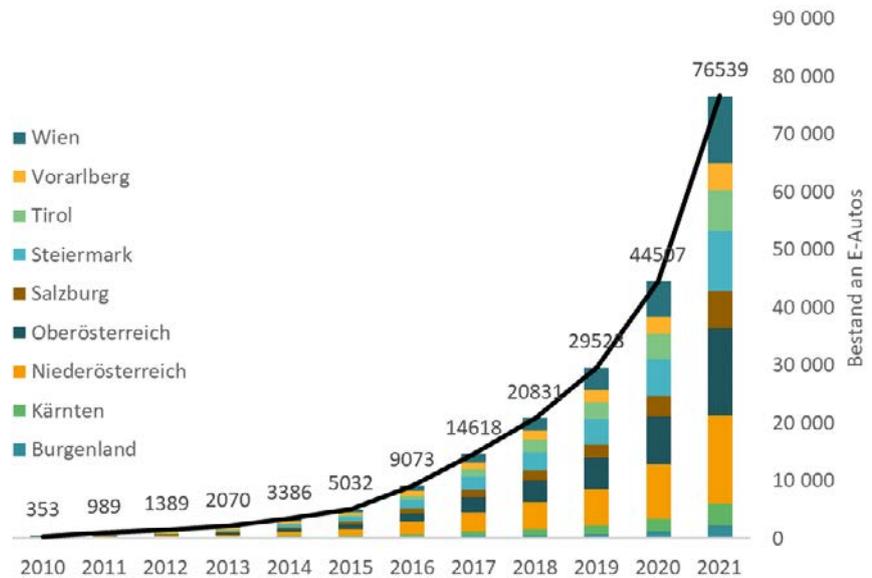
Focus of the Sector Enquiry

The sector enquiry included only an analysis of publicly accessible charging accessible charging stations. Exclusively privately used charging stations were not part of the study.

Comprehensive Market Analysis

The results of the sector enquiry are based on interviews with market participants, scientific literature, relevant publications and intensive discussions with stakeholders such as companies, interest groups, institutions and authorities. In addition, the ÖAMTC, with involvement of the FCA, surveyed its members on the topic of e-mobility and made the results available to the FCA. One of the core statements was that the vast majority of e-car drivers use privately accessible charging stations. About $\frac{1}{3}$ of e-car users in the city depend on public charging points. The increase in e-vehicles is expected to further increase this dependency.

Figure 1: E-Car Fleet from 2010 to 2021 in Austria



The sector enquiry report addresses the competitive conclusions of the analyses carried out in more depth and includes several competitive recommendations for the market.

These include, for example:

- Increasing transparency regarding price, energy purchased and charging time
- Improved and simpler payment modalities
- Taking account of concentration tendencies in the market when awarding subsidies; and Observing non-discrimination
- Developing a strategy to promote small companies as micro-charging point operators as local competitors
- Ensuring diversity of providers at municipal level
- Strengthening compliance with antitrust law
- Avoiding regional concentrations
- Expansion of fast-charging options
- Standardisation of billing
- Tariff and price monitoring

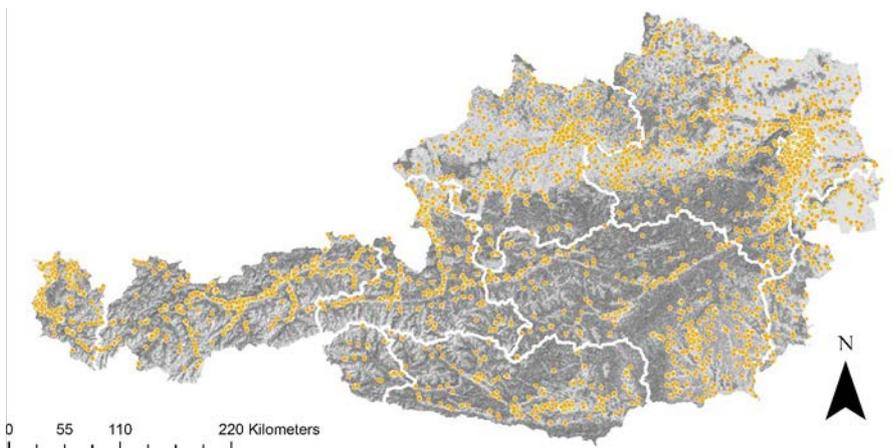


Figure 2: Map with distribution of the charging points in Austria



13.3 FCA launched Market Investigation in the Food Sector

Since the end of 2021 and especially since the start of the Russian invasion of Ukraine, food prices have risen conspicuously and now place a heavy burden in particular on low-income households. Against the backdrop of these and other macroeconomic developments, which in turn have an impact on competition, as well as the increasing importance of online food sales since the FCA's latest investigation into the food sector, the Federal Competition Authority started the food sector enquiry on October 25, 2022. The motivation for this was also fed in particular by complaints received by the FCA in the context of the rising food prices since the end of 2021. These developments since the most recent sector enquiry made a competition analysis appear appropriate.

Here, the sector enquiry should focus on the last two stages of the food value chain: Processing and retail. While processing and retailing are linked via the market for processed agricultural products, purchasing by consumers takes place predominantly in the food retailing companies. The FCA plans to survey an extensive selection of companies in these two widely defined markets to obtain information and solicit comments. This is to enable an informed competitive assessment.

In particular, the survey will focus on the following four main questions:

- Where in the value chain (especially processing or retail) did food price increases primarily go to in 2022?
- How have competitive factors developed in the food industry in recent years?
- Buyer power and practices in the relationship between supplier level and the food retail sector: How have concentration within a wide range of product categories and the share of private labels on the shelves of the grocery trade developed?
- What influence does the increasing role of online retailing have on competition in the food sector?

The starting point for the FCA's analysis was the micro goods basket of Statistik Austria, on the basis of which the price development of goods and services for daily needs is calculated. This basket includes, among other things, dairy products, pastries, ham, tomatoes, mineral water, orange juice and apples.

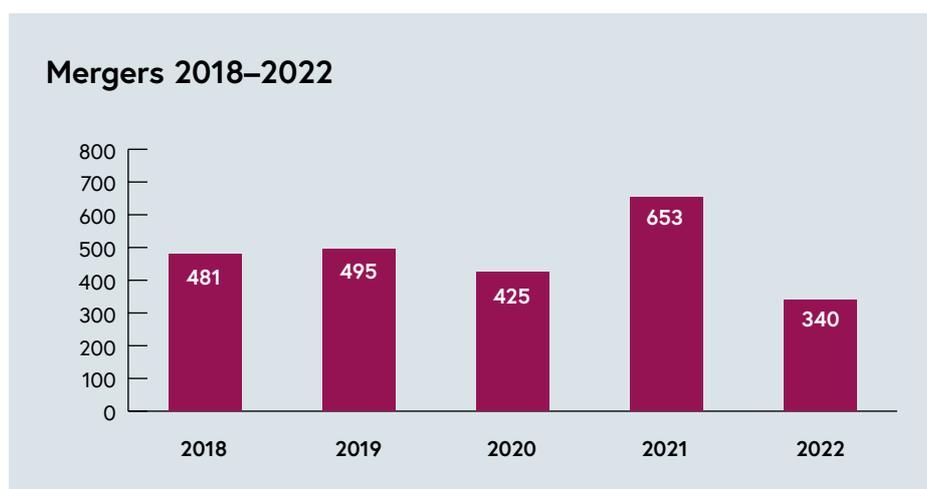
Initial analyses, internal discussions and talks with stakeholders suggested that an expansion of the product groups would be appropriate. The FCA based the expansion on the bundle of goods of the consumer price index (CPI) of Statistics Austria. The FCA will redesign and analyse a basket of food and non-alcoholic beverages suitable for the analysis, based on the CPI, with purchased or requested price data.



14 Mergers

14.1 National Mergers

In 2022, a total of 340 mergers were reported. Each FCA case handler thus dealt with an average of around eight mergers in 2022.



Mergers 2018–2022
Source: FCA

335 cases (equivalent to 99.1% of the notified mergers) could be concluded in the four weeks of procedural phase I. Usually, mergers are approved by the expiry of a deadline or by an audit waiver.

Two mergers were approved in Phase I with conditions.

In 10 cases, the review period in Phase I was extended by two weeks to ensure a sound legal and economic analysis.

Three cases (0.31%) were dealt with in the second procedural phase. The FCA lodged two applications with the Cartel Court for an in-depth examination of the mergers.

26 cases were notified to the FCA under the transaction value threshold pursuant to § 9 (4) of the Austrian Cartel Act.

14.2 EU Mergers

In 2022, a total of 378 mergers notified to the European Commission due to their EU-wide significance and then brought to the attention of the Member States in accordance with the relevant EU law were also examined for possible negative effects on Austria.

14.3 Impact of the new 2nd Domestic Sales Threshold

With the latest amendment to the Cartel Act, a new 2nd domestic turnover threshold for the merger notification requirement was introduced on the initiative of the FCA. Since 1 January 2022, mergers must be notified to the FCA if the companies have the following turnover:

1. Globally more than M€ 300,
2. domestically more than M€ 30, of which at least two companies more than one million € each and
3. at least two companies worldwide more than five million € each.

The introduction of the “1-million threshold” is intended to prevent over-bureaucratisation. The second domestic turnover threshold has led to a 32% decrease in merger filings on average over the last 5 years.

14.4 Pre-notification Talks

If there are any doubts about the need for registration, or if a merger is very complex or the market shares after the merger are going to be very high, a pre-registration meeting can be advised in many cases. It is in the interest of both the notifying parties and the FCA to conduct merger control proceedings as expeditiously and smoothly as possible. With the help of a discussion on the basis of a submitted draft application, important information can often be obtained to assess the competitive impact.

If it is possible at this early stage to delineate the competition issues and reach an agreement between the FCA and the notifying parties on effective remedies (restrictions or conditions), complex and costly proceedings before the Cartel Court can be avoided. In 2022, 16 pre-notification procedures were conducted. Ten of these mergers were notified to the FCA, one of which was cleared in Phase I subject to conditions and another of which was the subject of a request for review by the Cartel Court (Phase II).

14.5 Notification Requirement for Mergers

In 2022, too, entrepreneurs and legal representatives were again supported by the FCA's legal department with questions concerning the notification requirement, with the relevant mailbox (POST-Anmeldepflicht@bwb.gv.at) continuing to prove its worth as a single point of contact.

In total, the FCA provided informal legal assessments of more than 40 enquiries. The focus was on the realisation of a concentration, the calculation/attribution of turnover, the domestic effect, and the element of significant domestic activity (§ 9 (4) 4 of the Austrian Cartel Act) in the context of the so-called transaction value threshold.

14.6 Merger Statistics

Merger Statistics 2018 – 2022

| Registrations | 2018 | 2019 | 2020 | 2021 | 2022 |
|--|-------------|-------------|-------------|-------------|-------------|
| Total applications for registration | 481 | 495 | 425 | 653 | 340 |
| Release due to expiry of deadline | 451 | 467 | 382 | 628 | 326 |
| Waiver of examination | 27 | 21 | 27 | 15 | 10 |
| Withdrawal of the application | 2 | 6 | 15 | 8 | 1 |
| Case closure in Phase I | 480 | 494 | 424 | 651 | 337 |
| these are in % of the applications | 99,8 | 99,8 | 99,8 | 99,7 | 99,1 |
| Withdrawal of the application | 0 | 0 | 0 | 0 | 1 |
| Withdrawal of application for examination | 1 | 1 | 1 | 0 | 2 |
| Prohibition by Cartel Court | 0 | 0 | 0 | 0 | 0 |
| Non-prohibition without requirements | 0 | 0 | 0 | 0 | 0 |
| Non-prohibition with requirements | 1 | 0 | 0 | 0 | 2 |
| Case closure with Cartel Court decision | 0 | 0 | 0 | 0 | 0 |
| Total Phase II cases | 1 | 1 | 1 | 2 | 3 |
| these are in % of the applications | 0,2 | 0,2 | 0,2 | 0,3 | 0,9 |
| Examination requests FCA | 0 | 0 | 1 | 2 | 3 |
| Examination requests Federal Cartel Prosecutor | 1 | 1 | 1 | 2 | 3 |



15 Judicially Examined Mergers and Mergers Approved Subject to Conditions

15.1 Merger Metro/AGM

On 2 September 2021, the FCA received a notification of a merger (Z-5650) pursuant to which METRO Cash & Carry Österreich GmbH ("Metro"), in agreement with REWE Group, intended to acquire sole control over C & C Abholgroßmärkte Gesellschaft m.b.H. ("AGM"). The merger affected nine AGM wholesale markets throughout Austria.

The starting point for examination of the merger was the FCA's position on Food Wholesalers published in 2011 and based on decision Z-1387 (Pfeiffer/Nuss-baumer): Substantively, the market is divided into the segments of "pick-up wholesale" (small customers) and "delivery wholesale (large customers)". Spatially, trading areas are delineated around the respective location, covering 30 km (road kilometres) for collection wholesalers and 100 km (road kilometres) for delivery wholesalers. The notifying parties submitted a product and geographic market definition that was fundamentally different in every respect.

In order to better represent the market, the FCA conducted an extensive market investigation. An innovative online market survey and evaluation tool was used, which enabled a large number of customers and competitors to be surveyed at the same time.

Ten full-range competitors of Metro and AGM as well as around of Metro and AGM, as well as around 1,200 customers, were queried.

In the market investigation and analysis, the FCA found no convincing reasons to depart from its position concerning the food retail trade.

According to this, at all AGM locations, the presumption of market dominance was fulfilled with significant increases were fulfilled. Due to the high concentration in the Austrian food markets, there were also supra-regional concerns due to future gradual external market share increases ("salami tactics") and the possible loss of regional diversity in the product range and local value creation through global sourcing strategies.

The critical feedback and competition concerns were sent to the notifying parties for their comments. As they have not offered any measures to address the concerns of the FCA or the Federal Cartel Prosecutor, the two official parties each filed an application for review with Cartel Court (Phase II) on 30 September 2021. Phase II was completed with structural conditions imposed for the AGM Bludenz and AGM Klagenfurt sites (25 Kt 8/21w). These two locations were sold to competitors. The primary and secondary obligations of the conditions were thus fulfilled. The FCA will continue to monitor the follow-up obligations (10-year ban on the reacquisition or operation of a separate operating business at the two locations) until expiry. A trustee has been appointed to monitor compliance with the conditions.



15.2 Merger Salzburger Alpenmilch Genossenschaft eGen and Gmundner Molkerei eGen

The planned merger of Salzburger Alpenmilch Genossenschaft eGen (as the acquiring company) with Gmundner Molkerei eGen (as the transferring company) and the transfer of the operations of Gmundner Molkerei to SalzburgMilch GmbH was notified to the FCA on 14 March 2022. The merger was approved after an extension of the deadline by 14 days with commitments (conditions). In the end, however, the merger between Salzburger Alpenmilch Genossenschaft eGen and Gmundner Molkerei eGen was not implemented. The commitments associated with the approval at the time therefore did not come into effect either.

The merger project concerned the markets for the collection of raw milk (collection market) and for the distribution of dairy products (sales market), whereby, according to an initial competition assessment based on the information provided, the focus of the investigation was on the market for the collection of raw milk. The market definition could ultimately be left unresolved. The results were published in a case report on the FCA's homepage.

In view of the merger, there were concerns about a deterioration in the conditions for agricultural milk suppliers as members of the cooperative due to a reduction in mutual competitive pressure. In several extensive requests for information, the FCA obtained information on the merger project from the notifying party in order to be able to better assess the market conditions. The other official party, the Federal Cartel Prosecutor, also addressed several requests for information to the notifying party. Any competition concerns ultimately remained at the wholesale level in the collection of raw milk. However, the pending issues were resolved by the notifying party submitting commitments. Thus, the merger investigation revealed that the modified merger notification would neither have created or strengthened a dominant position, nor would effective competition have otherwise been significantly impeded.

In order to overcome the competition concerns, the parties committed themselves to measures aimed at counteracting the possible negative consequences of the merger by issuing commitments in the form of a minimum guarantee package to safeguard the situation of dairy farmers.

This minimum guarantee package is binding for six years and includes the following aspects:

- Priority delivery right or a purchase guarantee;
- Freedom also in direct sales and with regard to farm-gate sale;
- Milk supply contracts with appropriate right of termination;
- Possibility of limiting the duration of milk supply contracts with an option to extend;
- Right of termination with regard to the membership in the cooperative;
- Rights of delegation to the supervisory bodies;
- Separate collection, if and insofar as possible, of conventional milk, organic milk and hay milk; and
- Passing on of synergy effects from the merger to the dairy farmers.

15.3 Merger of Gmundner Molkerei eGen and Milchwerk Jäger GmbH

On 9 September 2022, the intended establishment of a joint dairy between Gmundner Molkerei eGen with Milchwerk Jäger GmbH was notified to the FCA. The share held by the applicant, Gmundner Molkerei eGen, in a subsidiary is to be contributed to Milchwerk Jäger GmbH. This will be done in return for an increase in this company's capital in kind, so that after the implementation of this project the existing shareholders of Milchwerk Jäger GmbH on the one hand and the applicant on the other hand will hold an interest of 50% of the share capital of Milchwerk Jäger GmbH.

The proposed merger concerned the production and the distribution of fresh and long-life dairy products, white-range products such as drinking milk, natural yoghurt, sour milk, cream, curd cheese, coloured-range products, yoghurt products with fruit, mixed milk drinks and fresh desserts, cheese and yellow fat products such as butter, margarine, mixed fats and clarified butter.

In the course of the merger examination, Gmundner Molkerei eGen and Milchwerk Jäger GmbH offered similar conditions to those envisaged in the Salzburger Alpenmilch Genossenschaft eGen/Gmundner Molkerei eGen project described above, which was ultimately not implemented, according to which a minimum guarantee package safeguards the situation of dairy farmers.

The following conditions were included:

- The conditions give priority delivery rights to the farmers' milk suppliers, so that the two companies are obligated to purchase the entire milk delivery quantities.
- The companies will not make any deductions from the milk price for the delivery of shortages or surpluses.
- The joint dairy reserves the right to pay surcharges for quality standards such as animal welfare or milk quality to farmer milk suppliers.
- Farm milk suppliers may continue to sell their milk freely in "farm-gate sales" and direct sales (e.g. to hotels, tourism enterprises, catering businesses, restaurants, etc.).
- Farm milk suppliers will continue to be offered fixed-term milk supply contracts for a period of 1, 3 or 5 years, each with an option to extend.



16 Prohibited Implementations or Incorrect/Misleading Information in Merger Proceedings

If mergers of companies are not notified to the Federal Competition Authority despite the notification requirement, or if incorrect or misleading information is provided in the notification, the Cartel Court can impose a fine upon application of the FCA. In a total of 47 cases of prohibited mergers, the Cartel Court imposed fines amounting to € 14,661,410.00. In 2022, fines amounting to € 238,000 were imposed for prohibited transactions.

16.1 SFS Group

Upon application of the Federal Competition Authority, by order of 14 July 2022 (24 Kt 3/22d) the Cartel Court imposed a fine of € 220,000 on the SFS Group.

First, in the course of the proceedings on BWB/Z-2777, SFS Group had made incorrect or misleading statements in that, contrary to the statements in the notification at that time, a provision "deviating from the statutory model" was made in the partnership agreement. Specifically, the German Commercial Code (HGB), which is relevant for the target company, provides for unanimity for limited partnerships. In contrast, however, the partnership agreement at the time generally provided for simple majorities, and in some cases increased majorities of 60% or 75%.

In addition, the acquisition of a further 21% of the shares in Ludwig Hettich Holding GmbH & Co. KG, Germany, was carried out by SFS Group in a prohibited manner.

The SFS group had not disputed the facts relevant to the decision and had issued an acknowledgement. In addition, in the calculation of the fine the concurrence of two infringements, the duration, the degree of fault, the voluntary and speedy cooperation as well as the absence of any detectable enrichment were considered.

16.2 Heise Medien GmbH & Co KG; yeebase media GmbH

Upon application of the Federal Competition Authority, on 5 December 2022 the Cartel Court imposed a fine in the amount of € 18,000 on the company Heise Medien GmbH & Co. KG for the prohibited acquisition of 100% of the shares and thus sole control over yeebase media GmbH.

The merger was notified to the FCA late and after a voluntary disclosure on 14 January 2022. As there were no concerns under competition law against the merger, it was finally approved on 12 February 2022. The merger was thus implemented in Austria in the period from 14 December 2021 to 11 February 2022 without approval.

The facts relevant to the decision were not disputed by Heise Medien GmbH & Co. KG.

Heise Medien GmbH & Co. KG publishes, in particular, computer and technology magazines, electronic media, non-fiction, fiction and regional editions of telecommunications, industry and address directories. Furthermore, the company operates several online platforms and offers various online advertising services. yeebase media GmbH operates the platform for the digital economy [yeebase.de](https://www.yeebase.de).



Further Activities of the Federal Competition Authority

17 Further Competences of the FCA

17.1 UTP Activities in the Context of unfair Trade Practices in the agricultural and Food Supply Chain

With an amendment to the Federal Act on the Improvement of Local Supply and Competition Conditions, which has now received the abbreviated designation of Fair Competition Conditions Act (Fairness Catalogue and Roundtable on the Food Sector) (Faire-Wettbewerbsbedingungen-Gesetz, FWBG), Directive (EU) N° 2019/633 on unfair trading practices in business relations between companies in the agricultural and food supply chain (UTP Directive) was implemented in Austria (see also "New edition of the Fairness Catalogue and Roundtable on the Food Sector"). The FCA was designated as the competent enforcement authority. The new provisions came into force on 1 January 2022, whereby already existing supply agreements had to be adjusted to the new legal situation on 1 May 2022. Since that date, the FCA has also been able to apply to the Cartel Court for the imposition of fines.

In 2022, the FCA received only one complaint based on conduct that concerned a possible case of application of the new provisions of the FWBG. One of the reasons for this may be the so-called "fear factor". This refers to the fear of affected suppliers that a complaint that would ultimately reveal their identity could lead to the termination of business relations. In this context, it must also be taken into account that as of March 2022 the independent first point of contact (Fairness Office) has started its activities, to which suppliers can also anonymously and confidentially turn with complaints about unfair trade practices. Its tasks include, among other things, analysing complaints and advising the suppliers concerned, whereby the objective of these activities can be seen in an unbureaucratic conflict resolution.

In 2022, the FCA carried out investigations based on a complaint from an anonymous whistleblower regarding a letter from a company to its suppliers

concerning the guarantee of availability of goods at the end of the year. It was investigated whether there had been a unilateral change in the terms of the supply agreement.

However, these investigations did not reveal existence of any violation.

Apart from prosecution of specific infringements, in 2022 the FCA – in line with its advocacy activities – endeavoured to raise awareness of the issue of unfair trading practices, for example by revising its Fairness Catalogue or through relevant expert presentations.

With regard to new legal framework conditions, such as those created with the implementation of the UTP Directive, the exchange with other authorities, especially those that have had experience with this area of law for a long time, is also of particular importance. In this context, the networking with other enforcement authorities – among others within the framework of the UTP Enforcement Network initiated by the European Commission – is to be mentioned. The FCA intends to intensify this exchange with other authorities in the future.

Finally, the FCA has also included the topic of unfair trading relationships in the agricultural and food supply chain into its sector enquiry of the food sector, which started in October 2022, which on the one hand aims to create an overview of the prevalence of unfair trading practices in Austria and on the other hand to determine the extent to which the new legal provisions are known and what expectations suppliers have of them. This information should also contribute to their efficient enforcement by the FCA.

17.2 Proceedings under the Unfair Competition Act

Pursuant to §2 (2) 2 of the Austrian Competition Act, the FCA is authorised to seek injunctive relief under § 14 (1) of the Unfair Competition Act (UWG) in order to achieve its objectives of ensuring functioning competition and countering distortions or restrictions of competition within the meaning of the Austrian Cartel Act 2005. The FCA can therefore investigate complaints about unfair, aggressive or misleading business practices and bring them before the civil courts.

Unlike in cartel court proceedings, §§ 11 to 14 of the Competition Act, which describe the FCA's investigative powers, do not apply in unfair competition proceedings. In civil proceedings, the FCA has the same status as a private party and bears the full cost risk of the proceedings.

The FCA primarily examines matters that are subject to the Unfair Competition Act if they are in a public interest and in a context with the FCA's core competences under antitrust law.

17.2.1 Proceedings in 2022

In 2022, the FCA received 25 complaints under unfair competition law, four of which were submitted via the whistleblowing system.

Compared to previous years, there is a trend towards an increasing number of cases. Here enquiries and complaints were submitted to the FCA in the B2B and B2C areas.

Due to this trend, the management of the FCA has established the specialist coordination in the field of the Unfair Competition Act. All complaints are accompanied by intensive investigations by the FCA. For a comprehensive assessment of a complaint, it is often necessary – in addition to the mere descriptions by the complainant – to obtain supplementary information and evidence in the form of documents, invoices, emails or advertising brochures.

The good cooperation with the professional associations of the Economic Chamber should be mentioned here. In connection with complaints directed against companies of a certain industry, these associations are requested by the FCA to ask their members to comply with the relevant legal provisions. This procedure is extremely effective, raises awareness of the companies and, moreover, is a gentler instrument than filing a complaint under § 14 (1) of the Unfair Competition Act is.

The complaints filled with the FCA mainly concern violations of § 1 or § 2 (4) and § 2 (6) 2 of the Unfair Competition Act in the form of a missing legal notice on a website or non-compliance with opening hours. Further complaints were received, among others, about "bait-and-switch offers", unfair price undercutting, insufficient price information on websites, or misleading by not indicating the origin of a product.

If there is a lack of public interest so that the FCA does not take action, complaints from companies can be sent to the Protection Association against Unfair Competition. Consumers can turn to the Association for Consumer Information or the Chamber of Labour. These institutions are also entitled to assert claims for injunctive relief pursuant to § 14 (1) of the Unfair Competition Act.

17.3 Preliminary Contract Reviews pursuant to §§ 6 et seq. of the Austrian Federal Broadcasting Act (ORF-G)

Since 2010, new ORF offerings have had to undergo a preliminary contract review pursuant to §§ 6 et seq of the Austrian Federal Broadcasting Act (ORF-G), in which KommAustria examines not only the contribution of these offerings to the fulfilment of the public service mission, but also their impact on competition and the diversity of offerings, and may attach conditions to the approval.

In these proceedings, the Federal Competition Authority represents the interests of competition as an official party. In this function, the FCA comments on the likely impact of the new offering on the competitive situation of other media companies operating in Austria.

17.3.1 ORF Preliminary Contract Review Procedure Ö3 Live Visual

In September 2014, ORF applied for approval of the new service concept for "Ö3 Live Visual" – a moving image service for its radio programme Ö3 which can be accessed via the internet – for the first time. KommAustria rejected the application on 18 February 2015 (KOA 11.266/15-001). The Federal Administrative Court has confirmed this decision (decision of 1 October 2018, W2492104463-1/10E). On 5 October 2021 (decision Ro 2020/03/0005), the Supreme Administrative Court upheld the ORF's appeal against this decision and overturned the decision of the Federal Administrative Court on grounds of illegality. As a result – due to the referral of the case back to KommAustria by the Federal Administrative Court – a new decision must now be taken on the ORF's application pursuant to § 6a (3) of the Austrian Federal Broadcasting Act (ORF-G). In particular, the ORF had stated that it would maintain its application and updated its information on the costs and the effects of the new offering on the competitive situation.

In its opinion pursuant to § 6a (4) 2 ORF-G, the FCA conceded that the design of Ö3 Live Visual, which is the subject of the proceedings, as a moving-image offering with music videos, recordings from the broadcast studio and certain information accompanying the programme (title info, weather, headlines, etc.), which can only be accessed synchronously with the live radio programme, no longer raises any concerns with regard to its lawfulness under the Austrian Federal Broadcasting Act (ORF-G). However, KommAustria was requested to examine in detail what specific impact the new offering could have on private radio broadcasters and their online services. Primarily, it was to be evaluated whether and to what extent the ORF can increase the reach of Ö3 with the help of the new offering and thus – even without independent marketing of the new service – attract more advertising revenues on the radio market and thus adversely affect the competitive situation of private radio broadcasters. In its decision of 15 February 2023 (KOA 11.266/23-001), KommAustria approved the requested provision of the new online service "Ö3-Live/Visual". An examination of the effects of the new offer on market participants in the field of radio and online offerings was rejected with the indication that only those effects are to be examined which are attributable to the new offer. The novelty value of the offering in question was derived from music videos and only affected the market for television programmes with similar content. Since there was no marketing on the television advertising market, there was no new offering and no effects there.

18 Competition Advocacy

Advocacy refers to the totality of projects, events and initiatives that serve to bring about a change in awareness of a specific issue in society.

The FCA specifically uses competition advocacy programmes to arouse and deepen interest in anti-trust and competition law. This is achieved in particular through preventive and informative measures.

Despite its limited capacities, the FCA tries to offer services in the field of prevention and information.

18.1 Presentations by Staffers

In the context of the prevention measures, the FCA's consultants regularly give lectures at conferences, universities and other academic institutions. In 2022, staffers gave more than 40 lectures.

18.2 Cartel Law Moot Court 2022

In 2022, the Cartel Law Moot Court took place already for the eighth time. This was organised by the FCA together with the ELSA (European Law Students Law Students Association) and the law firm DORDA. Fortunately, the Cartel Law Moot Court could be held in presence again.

The Vice Chancellor and Federal Minister for the Civil Service, Mag. Werner Kogler, gave the opening speech at the Cartel Law Moot Court 2022.

Nine teams, each consisting of two to three people from a total of five universities, took part. They were supported by partner law firms in the preparation of the pleadings and the oral proceedings.

The winner was the University of Vienna 1 team (Marko Jakšić, Sabeth Rivero Mendez and Elias Ring), who beat the Graz/Vienna team (Franziska Waltersdorfer and Alexander Sommergruber) in the final.

The Best Speaker final was won by Maxim Soukhatski (Team WU 1), who beat Yvonne Wohlmuth (Team WU 1), Jana Pachner (Team Uni Salzburg 1) and David Fitzka (Team Uni Salzburg 1).



The following teams competed:

- Team University of Vienna 1, supported by Schima Mayer Starlinger (first-time participation)
- Team University of Vienna 2, supported by Schönherr (first-time participation)
- Team University of Vienna 3, supported by Cerha Hempel
- Team Vienna University of Economics and Business Administration 1, supported by Reidlinger Schatzmann
- Team Vienna University of Economics and Business 2, supervised by EY Law (first-time participation)
- Team Vienna University of Economics and Business Administration, supported by Haslinger Nagele
- Team University of Vienna 1, supported by Peter Thyri

— Team University of Salzburg 2, supported by Taylor Wessing

— Team University of Linz, supported by Burgstaller & Partner

In the oral proceedings, besides the substantive argumentation, the presentation and spontaneous presentation and spontaneously taking up the arguments of the opposing side, as well as and answering the jury's questions were of central importance.

In terms of content, this year's participants had to deal with current issues, based on the innovations of the KaWeRÄG 2021. The case was about two producers of organic drinks who do not want to accept questionable distribution conditions of a large food retail chain and decide to organise the distribution of their products independently through a joint venture. With reference to exceptions to the ban on cartels in relation to sustainability, certain agreements are made, which the moot court participants had to examine for admissibility. In addition, a search engine that compiles company rankings on the basis of sustainability criteria and a call for a boycott had to be examined.

The jury consisted of:

— Mag. Heinz-Ludwig Majer MBA (Federal Cartel Prosecutor), who chaired the meeting,

— Dr. Natalie Harsdorf LL.M. (FCA),

— Dr. Heinrich Kühnert M.Jur. (DORDA), and

— Mag. Corinna Potocnik-Manzouri (BWB).

The assessment of the pleadings and the oral proceedings was carried out according to previously defined criteria. Among other things, factual and legal analysis, argumentation, rhetoric, teamwork and time management of the participants played an important role.

Due to its great success, the Cartel Law Moot Court will take place again in 2023. In the meantime, it has also become a model for other competition authorities. For example, an Cartel Law Moot Court has also been established at the Canadian competition authority for several years, which is based on an exchange of experience between the FCA and the Canadian Competition Bureau.

18.3 Participation in the Expert Group on Inflation Monitoring and Analysis (EBAI)

Due to the strong price increases in Austria, at the request of the social partners the Austrian federal government established the "Expert Group on Inflation Monitoring and Analysis" (EBAI), to which, in addition to the social partners, government institutions, economic researchers and representatives of important social groups were invited. The participation of the FCA, which according to its legal mandate has to ensure functioning competition by counter-

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acting distortions or restrictions of competition, guarantees that the principle of competition is considered in the discussion.

The expert group was established under the joint chairmanship of the Federal Ministry of Finance and the Federal Ministry of Social Affairs, Health, Care and Consumer Protection in April 2022 and monitors price developments, identifies causes and assesses possible countermeasures. The goal of this group is to present regular reports with analyses and possible measures. The reports are submitted to the Council of Ministers and the National Council. This is intended to provide an even better decision-making basis for possible measures.

In the regular meetings of the expert group, the FCA provides its expertise and participated in commenting on the measures to reflect the competition principle. The first report was published in June 2022¹. The FCA is also mentioned among the measures. To strengthen the effective enforcement of competition law, its resources are to be increased and the number of sector enquiries expanded. The FCA welcomes the more-than-necessary increase in its regular budget by M€ 2.4 to M€ 5.9.

¹ Report of the Expert Group on Inflation Monitoring and Analysis (EBAI) of 13 June 2022

In 2022, the FCA completed two market investigations in the market for fuels and in the market for e-charging stations. In addition, the market investigation on food was launched. The FCA has made the findings of this study available to the expert group. For example, there is a contribution from the FCA on the Fuel market in the second report of the expert group of 30 November 2022.

18.4 Presentation of the new Edition of the Fairness Catalogue and Roundtable on the Food Sector

In October 2018, in response to complaints about problematic business practices that are the result of imbalances in the supply chain, the FCA published the Position on Corporate Conduct (Fairness Catalogue). This cross-sectoral guideline was intended to serve in particular as an aid for shaping supplier-customer relationships – for example in the context of compliance programmes. The core of the document is a catalogue of business practices that – regardless of their legal assessment in the individual case by the courts – are in any case considered to be incompatible with good conduct. Already in 2018, six leading companies in the food trade had committed to this catalogue by signing a voluntary declaration.

Due to the positive reactions to the Fairness Catalogue, the FCA decided to update it if necessary.

The implementation of the Unfair Commercial Practices Directive in business relationships between companies in the food supply chain (UTP Directive) in the Federal Law on the Improvement of Local Supply and Competition Conditions, which is now abbreviated to the Fair Competition Conditions Act (FWBG), has led to a significant change in the legal situation in the area of unfair commercial practices. This necessitated an update to the Fairness Catalogue.



The aim of the UTP Directive is to counter the imbalance in the bargaining power of suppliers and buyers of agricultural and food products, and to protect the supplier as the weaker trading partner. Central components of the UTP Directive as well as of the FWBG are two lists of prohibited trade practices. The so-called black list lists those practices that are prohibited under all circumstances. The “grey list” lists those practices that are permissible only if clearly and unambiguously agreed upon beforehand between suppliers and buyers.

The FCA, as the Austrian enforcement authority, has been entrusted with the enforcement of these provisions. Competences and procedures are essentially modelled on those of cartel law enforcement. In addition, an independent first point of contact, the Fairness Office, was established with effect from 1 March 2022.

These innovations are considered by the revised Fairness Catalogue as well. It comprises an overview of the central UTP provisions of the FWBG, including some case studies and additions to practical guidelines, and also considers, among other things, the relevant innovations of the KaWeRÄG 2021 and recent case law. Thus, the Fairness Catalogue can continue to fulfil its purpose as a practical guide for the daily work in companies.

For the presentation and discussion of the new edition of the Fairness Catalogue, the FCA invited representatives of commerce and of the branded goods industry as well as the Fairness Office to a roundtable on 25 October 2022. On this occasion, the start of a sector enquiry in the food sector was also announced, which includes the area of unfair trade practices as well.

18.5 Guidelines on the Application of § 2 (1) of the Austrian Cartel Act to Sustainability Cooperations

With the amendment of § 2 (1) of the Austrian Cartel Act and the explicit provision that from 10 September 2021 on "out-of-market efficiencies" are to be considered in the assessment of sustainability cooperations, the Austrian legislator has dared to take a hitherto unique legislative step and has placed Austria and the FCA at the centre of the ongoing discussions on exemptions for sustainability cooperations. Specifically, the following paragraph was added to § 2 (1) of the Austrian Cartel Act:

„Consumers are likewise entitled to a fair share if the profit resulting from the improvement of the production or distribution of goods or the promotion of technical or economic progress contributes significantly to an ecologically sustainable or climate-neutral economy.“

In addition, the legislator considered a specification of the sustainability exemption, for example through guidelines of the FCA in consultation with the Federal Ministry for Climate Protection (BMK) as helpful for the more detailed elaboration. For this reason, a working group of the FCA dealt intensively with this topic from autumn 2021 onwards in order to develop guidelines on the application of § 2 (1) of the Austrian Cartel Act to sustainability cooperations (sustainability guidelines). These were published in the spring of 2022 after the involvement of the Federal Ministry for Climate Protection and a subsequent public consultation incorporating the results in September 2022.

The Sustainability Guidelines were drawn up with the intention of providing competitors potentially interested in cooperation with a tool for self-assessment. They provide information for practical use, taking into account the principles of anti-trust law, as to which forms of cooperation are as a rule not expected to restrict competition and are therefore permissible.

The Sustainability Guidelines start by pointing out that the sustainability exception cannot be used to justify anti-trust law if it exclusively concerns aspects beyond ecological sustainability or if the cooperation fulfils the intergovernmental criterion. In addition, reference is made to the other – unchanged – possibilities of justification, especially for cooperations outside of ecological sustainability or with only minor sustainability-related effects.

The guidelines are intended to support companies in better assessing the application of anti-trust law in planned sustainability cooperations. If doubts remain in the course of the self-assessment, it is recommended to contact the FCA in good time beforehand. The FCA has the possibility to provide an assessment. With the sustainability guidelines, the FCA took an important step towards creating transparency and legal certainty regarding the official interpretation of the new provision.

18.6 Update to the Guide to Dawn Raids

In July 2022, the FCA published updated guidance on Dawn Raids published. Due to the implementation of RL 2019/1 (ECN+ Directive) with the Cartel and Competition Law Amendment Act 2021 (KaWeRÄG 2021), adjustments had to be made to the Guidelines for Dawn Raids.

The updates primarily concern the following items:

— Tightening of the Sanction Options in Case of Breach of Seal or Lack of Cooperation.

In addition to selective clarifications on the procedure of a house search, in particular regarding the specific modalities of securing IT data, the extended sanction options by way of penalty payments or fines in case of breach of seal or lack of acquiescence and cooperation are presented.

— Protection of Correspondence between Companies and independent Legal Counsel in Accordance with European Case Law

In implementation of the ECN+ Directive, the legislator has now explicitly enshrined in the Austrian Competition Act (§ 13 (1) of the Competition Act) the safeguarding of the standard of fundamental rights under EU law by the FCA when exercising its powers. This means that the FCA's established practice in dealing with documents containing legal correspondence (in accordance with European case law) is explicitly explained in the guidelines.

Accordingly, the FCA recognises, in accordance with the case law of the European courts, the protection of correspondence between the company and an independent lawyer which is conducted in the course of defence and in the interest of the client's right of defence (attorney-client privilege under anti-trust law). This is in line with the practice of the European Commission and the fundamental rights standard established by the ECJ. The narrow criteria developed by the ECJ for the application of the attorney-client privilege will be closely examined by the FCA on a case-by-case basis.

— Sealing of Documents

In contrast to this, the possibility of sealing certain categories of documents with reference to statutory rights to refuse to give evidence or obligations to maintain secrecy (§ 12 (5) and (6) of the Austrian Competition Act), which however only directly benefits the respective holder of the rights and obligations, is explained in more detail.

The updated version of the guide is available on the FCA's website under the sub-heading Viewpoints in the Legal & Publications section.

18.7 Comments on Legislative Projects

The FCA has commented on draft legislation for the Whistleblower Protection Act related to its area of responsibility in the context of (pre-)parliamentary review procedures.

18.7.1 Whistleblower Protection Act – HinweisgeberInnenschutzgesetz, HSchG

The draft was intended to transpose Directive (EU) 2019/1937 on the protection of persons reporting infringements of Union law.

In its comment, the FCA particularly addressed the overlaps with the anonymous whistleblower system it has set up since 2018. This system is well established and has become an essential tool in the investigation and detection of infringements. The instruments necessary for implementation of the directive would therefore have to be well coordinated with the existing system in order not to impair its functionality.

In terms of content, the FCA also pointed out the following items in the draft:

- Misleadingly narrow wording of the scope of application; infringements can be reported even if they are committed by a legal entity that is not itself obligated to set up an internal reporting office.
- Factual impossibility of limiting the scope of application to infringements of Union anti-trust law; the criterion for distinguishing between national and Union law is the suitability of a conduct to affect trade between the Member States. In the early stages of an investigation, this often cannot be assessed beyond doubt even by the authority. Whistleblowers or even internal offices will all the less be able to make such an assessment. The envisaged differentiation is therefore virtually unmanageable and will in any case be meaningless due to the protection of good faith.
- Equality of internal and external reports. The wording of the draft is not clearly defined in this respect. However, especially in the area of anti-trust law, early involvement of the competition authorities is essential in order to ensure the integrity of investigations and to prevent deterioration of evidence, which is why whistleblowers should be encouraged to contact the FCA directly.

19 International Projects

19.1 Twinning Project “Competition Authority Georgia”

The FCA supports the competition authority in Georgia with its long-standing know-how and expertise. Also involved in the project are the Federal Cartel Prosecutor and his team as experts.

The specific objective of the project entitled “Strengthening Capacity of the Competition Agency of Georgia” is to prepare the Georgian National Competition the Georgian National Competition Agency (GNCA) to effectively enforce competition and consumer protection laws and policies in Georgia, in line with EU procedures and best practice, by strengthening the institutional and human and standing capacity of the agency.

The Federal Competition Authority applied for this project as a junior partner together with the Competition Council of the Republic of Lithuania (CCRL) and the State Consumer Rights Protection Authority of the Republic of Lithuania (SCRPA).

On 12 February 2020, the FCA, also supported by the Austrian ambassador in Georgia, Arad Benkő, was able to present its project plan together with the Lithuanian colleagues in Tbilisi. From this selection process with a total of three submitted projects, the FCA and its Lithuanian partners emerged victorious.

Due to the coronavirus pandemic, the start of the 24-month project was delayed to June 2022. The following activities were carried out by one expert and three experts of the FCA in 2022:

- Preparation of printed and video material as part of awareness raising on competition policy – An expert from the FCA presented by way of video conference
- Training of the relevant GNCA staff in the relevant competition policy issues
 - Two experts from the FCA were present for five working days each at the GNCA premises in Tbilisi.
- Training of the relevant GNCA staff in the relevant competition policy
- One expert from the FCA was present for five working days at the GNCA premises in Tbilisi.

The experts carry out their activities exclusively in their free time.

In addition, a high-ranking five-member delegation from the GNCA, led by the Chairman of the GNCA, Irakli Lekvinadze, paid a working visit to Vienna in November 2022. In addition to topics related to competition and anti-trust law, e.g. legal options for uncovering and sanctioning price fixing, and activities with an economic focus such as conducting industry investigations, the delegation was also introduced to areas such as public relations, compliance and the whistleblowing system used at the FCA. In the course of a visit to the Cartel Court, Senate President Mag. Köller-Thier and Federal Cartel Prosecutor Mag. Majer explained the function and working methods of these two institutions to the delegation.

19.2 Study Visit of the Kosovo Competition Authority to the FCA

In the period from 20 to 22 June 2022, the FCA was able to welcome colleagues from the Kosovo Competition Authority in Vienna. The three-day programme included several presentations at the Federal Competition Authority and a visit to the Palace of Justice.

The colleagues from the Kosovo Competition Authority received in-depth training on the topic of "Market Survey Design" using practical case studies. Due to the Corona pandemic, a previous training in February 2021 had taken place in virtual form. The knowledge gained from this could be deepened during the three-day stay at the FCA. In addition, the colleagues gained an insight into the activities of the Federal Cartel Prosecutor and the Cartel Court during a visit to these institutions.

20 Other Proceedings and Reports

20.1 Mobile Communications and Competition: The FCA supports the Analysis of the Mobile Telephony Market by the Regulatory Authority TCC

Against the background of the expiry of the so-called MVNO¹ conditions on 2 December 2022, to which Hutchison Drei Austria (H3A) committed itself for ten years in the course of the merger of H3A and Orange in 2012, there was a lively exchange of ideas and numerous meetings between RTR and the FCA in 2022.

In its practical implementation, this MVNO commitment acted like a regulation of access to mobile networks, because it guaranteed network access for up to 15 MVNOs to H3A's mobile network at fixed wholesale rates. As the abolition of the commitment drew nearer, there was an accumulation of complaints from MVNOs as early as 2021, which were filed at the time active in the Austrian mobile telephony market.²

Against this background, on 14 February 2022 the Telekom-Control Commission (TCC) issued an expert opinion mandate to RTR's official experts in order to examine in detail the area of wholesale "mobile access and origination" with regard to possible regulatory relevance.

This market analysis in the area of mobile communications is still in progress and is expected to be completed in the first half of 2023. Aspects that will be considered in this analysis include the abuse of joint market power by the three MNOs operating in Austria³ The concept of relative market power (between MNOs and MVNOs) will also be examined in the course of the analysis.

In the meantime, a new study has shown that Austria is relatively cheap in mobile telephony in an EU comparison for 4G, but is one of the most expensive countries for 5G⁴ The transition to the new 5G standard has turned out to be one of the sticking points in the renegotiation of wholesale contracts between MVNOs and MNOs. In this context, there were numerous rounds of negotiations with and without the assistance of RTR and the FCA. By the end of the reporting period, the FCA had not become aware of any final contracts concluded in this market segment between the relevant MVNOs and MNOs.

1 MVNO: Mobile Virtual Network Operator = Mobile radio operator without its own core network

2 see also the FCA's Activity Report 2021, p. 37 et seq.

3 MNO: Mobile Network Operator = Mobile operator with own core network

4 see: https://www.bitkom.org/sites/main/_les/2022-09/220825_Studie_Mobilfunkpreise_Industrienationen.pdf p. 18

20.2 FCA Practice in mutual Assistance Investigations in the ECN

As a side issue of proceedings on vertical price fixing and restrictions on passive sales, which were legally concluded already in 2019 with the imposition of a fine, in its decision of 18 March 2022 (Ro 2018/04/0001) the Supreme Administrative Court has now dismissed as unsubstantiated the extraordinary appeal of the company concerned in proceedings on the basis of a complaint of measures against the FCA (Art 130 (1) Z 2 B-VG). The company had considered the execution of a house search by the Dutch competition authority in 2016 at the request of the FCA by way of European administrative assistance to be an exercise of unlawful direct administrative command and coercive power by the FCA.

In its decision, the Supreme Administrative Court confirmed correctness of the procedure of the FCA within the framework of the established administrative assistance practice within the ECN and thus followed the case law of the Supreme Court on the legal nature of investigative acts upon request pursuant to Art. 22 of Regulation 1/2003.

The BVwG had already previously rejected the company's view that the house search "in the name and on behalf" of the FCA could only have been carried out on the basis of a house search warrant issued by the (Austrian) Cartel Court.

The Constitutional Court of Austria (VfGH), to which recourse against this decision was sought, then also refused to deal with the complaint due to the lack of constitutional law issues raised (in particular the alleged violation of the right to the lawful judge) and referred the complaint to the Supreme Administrative Court.

The latter clarified, with reference to a case already settled by the Supreme Court in 2009 (16 Ok 7/09), that the wording "on behalf of" the requesting authority chosen in Art 22 of Regulation 1/2003 was not to be understood as referring to an official act of this authority (in this case the FCA). Rather, the official act had been carried out in the name of the requested authority, but in the interest of the requesting authority. It was therefore merely a matter of making it clear that an investigative act was being carried out for another authority.

It is true that investigation files abroad should not be subject to lower (content-related) requirements than in Austria – the requesting competition authority must therefore also provide information on all circumstances, such as, in particular, the initial suspicion and the subject matter and purpose of the investigation, which are necessary under the national law of the requested authority in order to be able to examine the existence of the intervention requirements required thereafter. However, the order for a house search was given in accordance with the applicable national law of the authority whose assistance was sought.

There is no legal basis for a prior judicial examination of a house search by a competition authority in another Member State under Austrian law, and the Austrian Cartel Court has no competence or authority to issue instructions to the competition authority in the foreign territory.

For the case at hand, this therefore means that the house search was in this respect attributable to the Dutch authority, which had acted independently. The lawfulness of the execution of the house search was therefore governed by the law of the state of the authority asked for assistance, and was accordingly to be reviewed by the legal protection instruments provided for in Dutch law.

The Supreme Administrative Court also rejected the appellant's view that the request for administrative assistance to carry out a house search itself had an independent legal quality, which was why the submission of a request for administrative assistance was to be qualified as an act of direct command and coercive power of the administrative authorities.

According to the case law of the Supreme Administrative Court, an act of direct administrative command and coercive power existed only if no further intervening action was required in order to bring about the state of affairs desired by the authorities. By issuing the request for administrative assistance, the FCA had not directly interfered with subjective rights of the appealing party, because the actual provision of administrative assistance and thus the implementation of the measure was under the responsibility of the authority asked for assistance.

Therefore, the submission of a request for administrative assistance did not constitute an act of direct command and coercive power of the administrative authorities due to its lack of immediacy. There was no legal basis in Austrian law for lodging an appeal against the request itself. Nor was there an unintended loophole, because the possibility of an appeal existed under the law of the requested authority.

With the decision of the Supreme Administrative Court, all three Austrian supreme courts have now confirmed both the legal unobjectionability of the administrative assistance provisions of Regulation 1/2003 and their correct application in the current enforcement practice by the FCA.

20.3 Dealing with Lawyer Correspondence as an Competition Authority

In the spring of 2022, the FCA carried out a search of Brau Union AG's premises on suspicion of abuse of a dominant market position. The investigation is still ongoing. After the conclusion of the house search, the company requested – based on § 12 (5) of the Austrian Competition Act (right of objection) – a review of certain individually designated electronic documents, which in the opinion of the company were subject to the so-called “attorney–client privilege”, to the Cartel Court. According to this provision, the addressee of a house search may object to the inspection of documents “by invoking a legally recognised confidentiality obligation or a right to refuse to testify pursuant to § 157 (1) 2 to 5 of the Austrian Code of Criminal Procedure”.

The Cartel Court then stated again in 24 Kt 4/22a (legally binding) – in accordance with the previous case law of the Supreme Court in 16 Ok 2/14 – that pursuant to § 12 (5) of the Austrian Competition Act the opposition procedure deliberately intended to restrict the circle of persons entitled to object. Investigation proceedings should be able to be conducted quickly and efficiently. Generously assigning documents

to secrecy protection would require a time-consuming separate review by a court. This would significantly delay investigations.

Therefore only to the person who has a duty of secrecy himself/herself or a right to refuse the statement himself/herself is entitled to the objection according to § 12 (5) of the Austrian Competition Act. For example, members of the legal professions or doctors should be considered here. Since the addressee of the house search is not considered entitled to object, the documents had to be returned to the FCA.

In July 2022, the FCA published an updated version of the guide to Dawn Raids. The practice already applied by the FCA in dealing with documents containing lawyer correspondence was now explicitly presented in the guideline. In accordance with European case law, the FCA therefore respects the protection of correspondence between companies and independent legal advisers, which is conducted within the framework of and in the interest of the company for defence (attorney–client privilege under anti-trust law).

In practice, the companies are also informed after evaluation of the seized electronic documents, which documents the FCA intends to take for the investigation. Affected companies are also given the opportunity to comment.

In addition, the FCA is obligated to comply with the fundamental rights applicable in Austria, including the Charter of Fundamental Rights of the European Union and the general principles of Union law, in the further use of the documents and in the exercise of its powers in general.

20.4 Supreme Court confirmed Conditions imposed by the Cartel Court in the Merger Meta (formerly Facebook), Inc.; GIPHY, Inc.

On the basis of an examination request by the FCA and the Federal Cartel Prosecutor in 2021, the Cartel Court had examined the acquisition of Giphy by Meta. Giphy is a searchable GIF library, whose GIFs and stickers are embedded in numerous social media. It was found that the merger could strengthen Meta's dominant position on social media. The merger was carried out without notifying the FCA despite the legal obligation in Austria. For this reason, a fine totalling M€ 9.6 was imposed on Meta in 2021.

After the official notification of the merger, the FCA and the Federal Cartel Prosecutor submitted an examination request to the Cartel Court, which finally released the merger subject to conditions. On 03 March 2022, the FCA appealed against this decision to the Supreme Court as the highest cartel court. A number of legal issues relating to the merger review were submitted to the highest cartel court for review:

- procedural deficiencies,
- review of the full effectiveness of the conditions, both with regard to the exclusion of possibilities for Meta to circumvent the conditions and with regard to significant concerns about the facts found by the Cartel Court in this context,
- review of the decision of the Cartel Court with regard to the sufficient consideration of the development without the concentration and thus the question of which settlement scenario is to be assumed in the examination,
- review of the decision of the Cartel Court with regard to the sufficient consideration of the change in the market structure of GIF libraries.

In its decision of 23 June 2022, the Supreme Court of Austria, as the highest cartel court, confirmed the approval subject to conditions by the Cartel Court and did not uphold the appeals of the FCA and the Federal Cartel Prosecutor.

21 Individual Proceedings

Companies have the option, with certain restrictions, of filing applications with the Cartel Court for violations of the Cartel Act if they have a legal or beneficial interest in the decision. For example, companies may not file an application for a fine. This is reserved for the FCA and the Federal Cartel Prosecutor.

21.1 Individual Application due to Abuse of a dominant Position in the Gambling Market

The core allegation of the applicant AMATIC Entertainment AG was the poaching of customers in the slot machine gambling market and the foreclosure of competitors in this market through mutual advertising of the services offered by Österreichische Lotterien GmbH and Casinos Austria AG, excessive advertising and an excessively broad interpretation of the licence pursuant to § 12a of the Austrian Gambling Act. The applicant invoked the general clause of Art. 102 of the TFEU and referred in particular to the case law on “leveraging”, the exploitation of a dominant position on an adjacent market.

The FCA observes the individual proceedings before the Cartel Court and participated in the hearing on 21 June 2022. At this hearing, the applicant’s request was rejected. In order to await the decision and the appeal before further steps were evaluated, no opinion was given.

The applicant appealed against the decision of the Cartel Court with regard to the items “reciprocal advertising of the offering” and “excessive advertising”. The decision therefore became legally binding with regard to the remaining items. The applicant argued that the abuse test was too narrow. They alleged that the crucial thing was not the mere expansion of market power in the related market that was relevant, but also the displacement to another market. The appeal objected especially to the “declaration” that customers of one market were not necessarily customers of the other market. In addition, the omission of the requested taking of evidence and secondary deficiencies in the declaration were complained about.

After evaluating the appeal and the submissions of the respondents, the FCA saw no need to comment.

21.2 Individual Application due to Abuse of a Dominant Position in the Market for “Delivery Letter and Info. Mail”

In June 2019, Portoservice et al filed an application against Österreichische Post AG to stop the abuse of market power.

The reason for the application was the request to stop abusive discount practices and discrimination by Österreichische Post AG in the markets "Delivery Letter and Info. Mail" markets. The Cartel Court granted the request to stop abusive practices in June 2021 by partial order, in addition to the rejection of interim injunctions against Post AG. Post AG appealed against this decision, which was dismissed by the highest cartel court in November 2021.

The FCA submitted several comments in the proceedings as well as a response to the appeal, clearly denying the compatibility of ÖPAG's rebate practice with European competition law.

Those allegations of abusive behaviour that were not covered by the partial decision were still pending in 2022.



Annexes

22 Annex

22.1 File Accrual in 2022

| File Accrual 1 January 2022 until 31 December 2022 | 1st Q | 2nd Q | 3rd Q | 4th Q | TOTAL |
|---|------------|------------|------------|------------|------------|
| National cases | | | | | |
| Merger registrations | 87 | 84 | 95 | 74 | 340 |
| Other merger files | 2 | 2 | 0 | 1 | 5 |
| Prohibited implementation of mergers | 5 | 0 | 0 | 0 | 5 |
| Cartel cases | 10 | 4 | 11 | 20 | 45 |
| Market power abuse proceedings | 8 | 2 | 8 | 8 | 26 |
| UWG/ORF Act | 4 | 3 | 3 | 4 | 14 |
| Cases Miscellaneous | 29 | 13 | 20 | 65 | 127 |
| TOTAL National cases | 145 | 108 | 137 | 172 | 562 |
| Cartel and market power abuse (EU) – EC | 1 | 3 | 0 | 3 | 7 |
| Mergers (EU) - EM | 89 | 76 | 129 | 84 | 378 |
| TOTAL Cases in Europe | 90 | 79 | 129 | 87 | 385 |
| TOTAL National cases and Cases in Europe | 235 | 187 | 266 | 259 | 947 |
| Dawn Raids* | 4 | 3 | 6 | 0 | 13 |
| Forensic IT | 11 | 6 | 1 | 4 | 22 |
| Administration | 9 | 10 | 8 | 4 | 31 |

| File Accrual 1 January 2022 until 31 December 2022 | 1st Q | 2nd Q | 3rd Q | 4th Q | TOTAL |
|---|--------------|--------------|--------------|--------------|--------------|
| National cases | | | | | |
| International Affairs | 10 | 17 | 11 | 22 | 60 |
| Lawmaking | 27 | 36 | 23 | 41 | 128 |
| European legal proceedings | 1 | 4 | 4 | 2 | 11 |
| Competition Commission (omnibus act) | 1 | 0 | 0 | 0 | 1 |
| Eur. Comp. Network | 31 | 21 | 34 | 38 | 124 |
| Miscellaneous | 12 | 13 | 14 | 5 | 44 |
| TOTAL Others | 106 | 110 | 101 | 116 | 434 |
| SUM TOTAL 2022 | 341 | 297 | 367 | 375 | 1.381 |

* Dawn Raids without requests for assistance

22.2 Fining Decisions in Austria in the last 10 Years

| Field | Company | Fines in € | Year |
|------------------------------------|--|------------|------|
| Cartel agreements | | | |
| Joinery and cabinetmaking services | Tischlerei Lechner GmbH | 100.000 | 2022 |
| Civil engineering | HABAU Group (HABAU Hoch- und Tiefbaugesellschaft m.b.H./Held & Francke Baugesellschaft m.b.H./ÖSTU-STETTIN Hoch- und Tiefbau GmbH/STRAKA Bau GmbH) | 26.330.000 | 2022 |
| Joinery and cabinetmaking services | Thalia Buch & Medien GmbH | 100.000 | 2022 |
| Joinery and cabinetmaking services | Tischlerei Krumböck GmbH | 128.000 | 2022 |
| Facade construction | NFS Bau GmbH | 54.000 | 2022 |
| School bags | Kastner & Öhler BeteiligungsAktiengesellschaft Kastner & Öhler AG Kastner & Öhler Mode GmbH | 70.000 | 2022 |
| Submetering services | ista Österreich GmbH | 2.200.000 | 2022 |
| Submetering services | R+S Group Regeltechnik und Schaltanlagenbau GmbH | 50.000 | 2022 |
| Joinery and cabinetmaking services | Norer Tischlereigesellschaft m.b.H. | 69.000 | 2022 |
| Civil engineering | PORR Group | 62.350.000 | 2022 |
| Civil engineering | STRABAG AG; F. Lang u. K. Menhofer Baugesellschaft m.b.H. & Co. KG | 45.370.000 | 2021 |
| School bags | Fond Of GmbH | 340.000 | 2021 |
| Pool cleaning equipment | Zodiac Marine & Pool (Zodiac Pool Systems, Inc.) | 294.000 | 2020 |
| Bikes | Specialized Europe B.V. | 378.000 | 2020 |
| Electronics | Bose Ges.m.b.H. | 665.000 | 2019 |
| Waste material collection | Banner GmbH | 60.000 | 2019 |

| Field | Company | Fines in € | Year |
|----------------------------|--|------------|------|
| Cartel agreements | | | |
| Bakery products | Anker Snack & Coffee Gastronomiebetriebs GmbH | 210.000 | 2019 |
| Mobile devices | Ingram Micro GmbH | 288.888 | 2018 |
| Gas Station | A1 Tankstellenbetriebs GmbH | 70.000 | 2018 |
| Electronics | Devol Austria GmbH | 223.000 | 2018 |
| Rubber (disposable gloves) | Semperit Technische Produkte GesmbH | 1.600.000 | 2018 |
| Electronics | Pioneer & Onkyo Europe GmbH | 120.000 | 2017 |
| Drywall construction | 3P Trockenbau GmbH | 185.000 | 2017 |
| Drywall construction | Kaefer Isoliertechnik Ges.m.b.H | 190.000 | 2017 |
| Electronics | Robopolis GmbH | 208.200 | 2017 |
| Drywall construction | Perchtold Trockenbau Wien GmbH | 48.000 | 2017 |
| Drywall construction | E+H Trockenbau GmbH | 110.000 | 2017 |
| Drywall construction | Tüchler Ausbau GmbH | 130.500 | 2017 |
| Drywall construction | Wagner & Jüptner GmbH | 22.500 | 2017 |
| Electronics | Makita Werkzeug Gesellschaft m.b.H. | 1.560.000 | 2016 |
| Electronics | De'Longhi-Kenwood GmbH | 650.000 | 2016 |
| Foodretailers | Spar Österreich-Gruppe II | 10.210.000 | 2016 |
| Foodretailers | RAUCH Fruchtsäfte GmbH & Co OG | 1.700.000 | 2016 |
| Freight transport | ETRANSA Speditions AG | 3.500.000 | 2015 |
| Freight transport | Schenker & Co AG | 317.000 | 2015 |
| Freight transport | PANALPINA Welttransport Holding GmbH | 2.000.000 | 2015 |
| Freight transport | Rail Cargo Logistics Austria GmbH | 184.000 | 2015 |

| Field | Company | Fines in € | Year |
|--------------------------|--|------------|------|
| Cartel agreements | | | |
| Electronics | Hewlett-Packard Gesellschaft mbH | 640.000 | 2015 |
| Electronics | KTM Fahrrad GmbH | 112.000 | 2015 |
| Electronics | United Navigation GmbH | 100.000 | 2015 |
| Electronics | Samsung Electronics Austria GmbH | 1.050.000 | 2015 |
| Food trade | Spar Österreich-Gruppe | 30.000.000 | 2015 |
| Electronics | Nikon GmbH (Zweigniederlassung Wien) | 170.000 | 2015 |
| Steeltrade | Frankstahl Rohr- und Stahlhandelsgesellschaft m.b.H | 147.000 | 2015 |
| Foodretailers | Pago International GmbH | 152.460 | 2015 |
| Foodretailers | Pfeiffer HandelsgmbH und die Zielpunkt GmbH | 562.500 | 2015 |
| Steeltrade | Großschädl Stahlgroßhandel Gesellschaft m.b.H. | 47.500 | 2015 |
| Steeltrade | Eisen Wagner Gesellschaft mbH | 150.000 | 2015 |
| Steeltrade | Filli Stahlgroßhandelsgesellschaft m.b.H | 32.500 | 2015 |
| Steeltrade | Mechel Service Stahlhandel Austria GmbH | 200.000 | 2015 |
| Sports equipment | Sport Pangratz & Ess GmbH Alber Sport GmbH Sport Jennewein Martin e.U. Sport Fauner GmbH & Co KG | 419.000 | 2015 |
| Foodretailers | Vöslauer Mineralwasser AG | 653.775 | 2015 |
| Foodretailers | Brauerei Joseph Baumgartner GmbH | 56.250 | 2014 |
| Foodretailers | NÖM AG | 583.200 | 2014 |

| Field | Company | Fines in € | Year |
|--------------------------|--|------------|------|
| Cartel agreements | | | |
| Transport companies | <p>Speditionssammelladungskonferenz ABX Logistics (Austria) GmbH*, Alpentrans Spedition and Transport GmbH*, Logwin Solutions Austria GmbH (vormals Logwin Invest Austria GmbH), DHL Express (Austria) GmbH, G. Englmaier Spedition GmbH, Rail Cargo Logistics-Austria GmbH (vormals Express-Interfracht Internationale Spedition GmbH), A. Ferstl Speditionsgesellschaft mbH*, Spedition, Lagerei und Beförderung von Gütern mit Kraftfahrzeugen Alois Herbst GmbH & Co KG *, Johann Huber Spedition und Transportgesellschaft mbH, Kapeller Internationale Spedition GmbH, Keimelmayr Speditions- u. Transport GmbH*, Koch Spedition KG (vormals Koch Speditions GmbH), Kühne + Nagel GmbH, Lagermax Internationale Spedition Gesellschaft mbH, Morawa Transport GmbH in Liquidation, Johann Ogris Internationale Transport- und Speditions GmbH, Logwin Road + Rail Austria GmbH, Internationale Spedition Schneckenreither Gesellschaft mbH, Leopold Schöffl GmbH & Co KG*, “Spedpack”-Speditions- und Verpackungsgesellschaft mbH*, Johann Strauss GmbH, Thomas Spedition GmbH*, Traussnig Spedition GmbH, Treu SpeditionsgesmbH, Spedition Anton Wagner GmbH*, Gebrüder Weiss GmbH, Wildenhofer Spedition und Transport GmbH, Marehard u. Wuger Internat. Speditions- u. Logistik GmbH* und Rail Cargo Austria AG * Minor fines were imposed on these companies, as they had not generated any sales with national groupage transport despite being a member of the SSK. Moreover, they have played a very subordinate role within the framework of the SSK and have partly cooperated with the BWB.</p> | 17.500.000 | 2014 |
| Foodretailers | MPREIS Warenvertriebs GmbH | 225.000 | 2014 |
| Foodretailers | Sutterlüty Handels GmbH | 78.750 | 2014 |
| Insulating materials | Austrotherm GmbH | 187.500 | 2014 |

| Field | Company | Fines in € | Year |
|--------------------------|--|------------|------|
| Cartel agreements | | | |
| Foodretailers | Stieglbrauerei zu Salzburg GmbH; Stiegl Betriebsholding GmbH/Stiegl Getränke & Service GmbH & Co. KG | 196.875 | 2014 |
| Electronics | Grundig Intermedia GmbH | 372.000 | 2014 |
| Foodretailers | Brauerei Hirt Gesellschaft mbH | 58.500 | 2014 |
| Electronics | SSA Fluidra Österreich GmbH | 50.000 | 2014 |
| Foodretailers | AFS Franchise-Systeme GmbH | 225.000 | 2014 |
| Insulating materials | swisspor Österreich GmbH & Co KG | 290.000 | 2014 |
| Foodretailers | Braucommune in Freistadt | 52.500 | 2014 |
| Electronics | Hans Lurf GmbH | 100.000 | 2014 |
| Foodretailers | Mohrenbrauerei August Huber KG | 82.500 | 2014 |
| Electronics | Media-Saturn BeteiligungsgmbH | 1.230.000 | 2014 |
| Electronics | Pioneer Electronics Deutschland GmbH | 350.000 | 2014 |
| Foodretailers | Privatbrauerei Zwettl Karl Schwarz Gesellschaft m.b.H. | 82.500 | 2014 |
| Foodretailers | Brauerei Schloss Eggenberg Stöhr GmbH & Co KG | 57.000 | 2014 |
| Foodretailers | Vereinigte Kärntner Brauereien AG | 195.000 | 2014 |
| Foodretailers | Kärntner Milch reg.GenmbH | 375.000 | 2013 |
| Foodretailers | Vorarlberger Mühlen- und Mischfutterwerke GmbH | 58.500 | 2013 |
| Foodretailers | Brauerei Ried e.Gen. | 52.500 | 2013 |
| Foodretailers | Emmi Österreich GmbH | 210.000 | 2013 |
| Insulating materials | bauMax AG | 90.000 | 2013 |
| Foodretailers | REWE International Lager und Transport GmbH/Merkur Warenhandels-AG/Billa AG | 20.800.000 | 2013 |

| Field | Company | Fines in € | Year |
|--------------------------|---|------------|------|
| Cartel agreements | | | |
| Electronics | Philips Austria GmbH (Consumer Lifestyle) | 2.900.000 | 2013 |
| Foodretailers | Berglandmilch eGen | 1.125.000 | 2013 |
| Insulating materials | Steinbacher Dämmstoff GmbH | 610.000 | 2013 |
| Insulating materials | Bauhaus Depot GmbH | 100.000 | 2012 |
| Insulating materials | Hornbach Baumarkt GmbH | 100.000 | 2012 |
| Insulating materials | OBI Bau- und Heimwerkermärkte Systemzentrale GmbH | 235.000 | 2012 |
| Beer | BRAU UNION Österreich Aktiengesellschaft | 750.000 | 2012 |
| Beer | Ottakringer Brauerei AG | 190.000 | 2012 |
| Beer | Stieglbrauerei zu Salzburg GmbH/Stiegl Betriebsholding GmbH | 170.000 | 2012 |

| Field | Company | Fines in € | Year |
|---|-------------------------------|------------|------|
| Illegal Mergers | | | |
| Forbidden implementation of a concentration | Heise Medien GmbH & Co. KG | 18.000 | 2022 |
| Forbidden implementation of a concentration | SFS Gruppe | 220.000 | 2022 |
| Forbidden implementation of a concentration | Ondufin SAS | 64.000 | 2021 |
| Forbidden implementation of a concentration | Naxicap Partners SA | 83.000 | 2021 |
| Forbidden implementation of a concentration | SMS group GmbH | 30.000 | 2021 |
| Forbidden implementation of a concentration | Facebook, Inc.; GIPHY, Inc. | 9.600.000 | 2021 |
| Forbidden implementation of a concentration | OneMed Holding AB, SMEDICO AG | 30.000 | 2021 |

| Field | Company | Fines in € | Year |
|---|---|------------|------|
| Illegal Mergers | | | |
| Forbidden implementation of a concentration | Salesforce.com, Inc., USA | 100.000 | 2021 |
| Forbidden implementation of a concentration | Castanea Rubra Assets GmbH | 100.000 | 2020 |
| Forbidden implementation of a concentration | Aktieselskabet af 5.5.2010 | 75.000 | 2019 |
| Forbidden implementation of a concentration | Eurazeo SE | 30.000 | 2019 |
| Forbidden implementation of a concentration | KTM AG und Kiska GmbH | 60.000 | 2019 |
| Forbidden implementation of a concentration | WIG Wietersdorfer Holding GmbH | 70.000 | 2019 |
| Forbidden implementation of a concentration | Lagardère Travel Retail Austria GmbH/CP Convenience Partner GmbH | 17.500 | 2019 |
| Forbidden implementation of a concentration | REWE International AG | 212.000 | 2018 |
| Forbidden implementation of a concentration | Erne Group GmbH; TONOS GmbH | 30.000 | 2019 |
| Forbidden implementation of a concentration | TCH s.r.l. | 55.000 | 2018 |
| Forbidden implementation of a concentration | Containex ContainerHandelsgesellschaft mbH/Českoslezská výrobní a.s | 100.000 | 2018 |
| Forbidden implementation of a concentration | Luxembourg Holdings 70 S.a.r.l./Texbond S.p.A. | 40.000 | 2018 |
| Forbidden implementation of a concentration | Stahl Lux 2 S.A. | 185.000 | 2018 |
| Forbidden implementation of a concentration | Comparex AG | 40.000 | 2017 |
| Forbidden implementation of a concentration | Comparex AG | 30.000 | 2017 |

| Field | Company | Fines in € | Year |
|---|---|------------|--------------|
| Illegal Mergers | | | |
| Forbidden implementation of a concentration | Vulcan Holdings, L.P. und Apollo Management L.P. | 70.000 | 2017 |
| Forbidden implementation of a concentration | SWOCTEM GmbH; Dr.-Ing. E.h. Friedhelm Loh | 11.000 | 2017 |
| Forbidden implementation of a concentration | Europapier International AG | 750.000 | 2016 |
| Forbidden implementation of a concentration | Grosso holding Gesellschaft mbH | 50.000 | 2015 |
| Forbidden implementation of a concentration | W. Hamburger GmbH | 40.000 | 2015 |
| Forbidden implementation of a concentration | VAMED Management und Service GmbH & Co KG | 155.000 | 2014 2015 |
| Forbidden implementation of a concentration | Graz-Köflacher Bahn- und Busbetrieb GmbH | 40.000 | 2015 |
| Forbidden implementation of a concentration | Ankerbrot AG | 20.000 | 2015 |
| Forbidden implementation of a concentration | 21 Centrale Partners SA; Microcar S.A.S | 30.000 | 2015 |
| Forbidden implementation of a concentration | Stahlgruber Holding GmbH | 23.000 | 2014 |
| Forbidden implementation of a concentration | TGP Slowhand, LP/SERVCO Pacific Inc. | 8.800 | 2014 |
| Forbidden implementation of a concentration | DB Mobility Logistics AG | 100.000 | 2013 |
| Forbidden implementation of a concentration | EPP Professional Publishing Group/ATEC Business Information | 5.000 | 2013 |
| Forbidden implementation of a concentration | Klambt-Verlag GmbH & Cie (Special Interest Zeitschriften) | 10.000 | 2013 |
| Forbidden implementation of a concentration | WAB Privatstiftung | 15.000 | 2013 |

| Field | Company | Fines in € | Year |
|---|---|--------------------|------------------|
| Illegal Mergers | | | |
| Forbidden implementation of a concentration | AGROFERT Holding a.s./ECOPRESS a.s. | 7.000 | 2013 |
| Forbidden implementation of a concentration | Alpenmilch GmbH/Käsehof GmbH | 165.443 | 2012 |
| Forbidden implementation of a concentration | Conrad Electronic Linz GmbH | 11.667 | 2012 |
| Forbidden implementation of a concentration | Conwert Immobilien Invest/ECO Business Immobilien | 25.000 | 2012 |
| Forbidden implementation of a concentration | Alpenpumpe GmbH/Schwenk/Berger | 5.000 | 2012 |
| Forbidden implementation of a concentration | a+f GmbH/Cellstrom GmbH | 5.000 | 2012 |
| As of: 12/2022 | Total of all fines/penalty payments | 348.968.008 | 2004-2022 |

23 Key Recommendations of the Competition Commission 2022

Proposals of the Competition Commission pursuant to § 16 (1) of the Austrian Competition Act to the Federal Competition Authority for priorities in the discharge of its tasks in the calendar year 2022.

23.1 Introductory Remarks

Within the framework of the annual submission of a priority recommendation for the work of the Federal Competition Authority (FCA), as provided for in the Competition Act, the Competition Commission (CoCo) takes the opportunity to point out, from its point of view, those areas that suggest more in-depth and ongoing work in the interest of fair competition. In developing these recommendations, the CoCo draws on findings from its ongoing work and on information it has received, and endeavours to focus the priority recommendation on those areas of competition policy whose more in-depth treatment by the FCA can be expected to be of maximum benefit. The CoCo's previous priority recommendations can be seen on the FCA's website. Some of the previous recommendations are still particularly topical and relevant due to developments (especially those on the subject of online trade).

23.2 Priority Recommendations for 2022

23.2.a Competition Monitoring

In recent years, the CoCo already recommended targeted competition monitoring in the sense of preliminary investigations of specific sectors, which may subsequently lead to a full sector enquiry.

The energy sector, online trade and service platforms were mentioned as possible sectors (see immediately below). Another sector, not least against the background of the COVID 19 experience, would be the healthcare sector.

23.2.b Energy Sector

The CoCo has repeatedly recommended the electricity and gas sectors for focus and continuous monitoring, as it did last year. The area of grid-based energy (electricity, gas, district heating) is a "permanent topic of competition policy" due to the economic importance of these sectors.

Against the background of current developments in wholesale prices (especially gas prices, but also electricity prices), the CoCo considers competitive monitoring (together with E-Control) in connection with the passing on of price changes to companies and consumers useful.

1 Staggered ban on the use of heating oil boilers for newly built houses from 2020 on; for heating system replacements from 2021 on, mandatory replacement of boilers older than 25 years from 2025 on; replacement of all boilers at the latest in the year 2035

2 Phase-out of gas-fired heating systems; in new buildings, from 2025 on gas boilers/new connections will no longer be permitted. No further expansion of gas grids for space heating, except for densification within existing grids.

The federal government has also announced the mandatory replacement of heating oil boilers and gas heating systems in the context of the decarbonisation target by 2040. Although the legal regulations envisaged for this (in the form of a "heating act") are not yet available and time periods still vary (heating oil¹, gas²), significant price increases and long waiting times for the replacement of heating oil boilers and gas heating systems are already evident. Due to the legal provision, the CoCo considers it important to install continuous monitoring in this area in order to be able to pick up on any anti-competitive behaviour and stop it as soon as possible. The announced mandatory replacement of the heating supply system must not be artificially made more expensive through agreements.

23.2.c E-Fuelling

Development of the charging infrastructure is in an early market development phase. The majority of the charging infrastructure is built by the statewide energy suppliers. Due to the (currently still) low portion of electric vehicles, utilisation of the charging infrastructure is not yet profitable for most charging stations, and the installation of the charging infrastructure can (currently) still be seen as an advance performance, despite subsidies. With the portion of electric vehicles increasing, the demand for charging infrastructure is also growing. It is recommended to pay special attention to the market for the installation of private and public charging infrastructure (manufacturers).

On the customer side, the following challenges are currently apparent, as a uniform billing unit is still missing:

1. Comparability of tariff
2. Transparency of the composition of the tariffs (comprehensibility of the cost items)
3. Clear and unambiguous price labelling in case of ad hoc charging

It is therefore recommended – in analogy to the "petrol price calculator" – that price monitoring or a sector enquiry be carried out and the information and purchasing conditions for e-fuelling be standardised (with special consideration given to the urban-rural gradient and motorway service stations as well as charging speeds).

23.2.d Waste Management

Initiated by a decision of the Directorate General for Competition in 2003 and under the impression of market abuse proceedings, the 2013 amendment to the Waste Management Act attempted to implement the necessary framework conditions for the upcoming market opening in packaging waste collection and licensing. Now the introduction of a one-way deposit for beverages in plastic bottles and cans is also being discussed in Austria.

In light of this, the CoCo recommends that the result of this market opening process in the waste management sector – also with a view to the procedure and successes in Germany – be examined more closely.

23.2.e Online Commerce

In view of the steadily growing market power of global and network-based international companies based outside the EU, during the last two years examination of the competitive conditions in online trade and, if necessary, initiatives to ensure a level playing field for all players were recommended (see in more detail the CoCo's priority recommendation for 2019, 2020 and 2021).

Therefore, the CoCo recommended to the FCA to place a special focus on the investigation of online trade, especially in the context of deliveries from third countries (especially China). This raises questions not only of competition law *sensu stricto*, which are relevant for the FCA, but in any case also of location policy. Thus, it can be assumed that Austria will lose jobs, income tax, VAT and social security contributions, etc., and that companies operating in Austria will be increasingly exposed to competitive disadvantages.

Since, in addition to issues of competition law, questions of location policy also arise, the CoCo suggested setting up a corresponding task force that could take a closer look at this cross-competence topic – if possible with the involvement of other ministries with responsibility in this area.

Against the background that this is at least an EU-wide problem, the CoCo recommended EU-wide cooperation between competition authorities (including the European Commission) and ministries. Despite the progress already made, this is a highly current issue that requires special attention from the political and enforcement sides.

23.2.f Service Platforms

Digitalisation also poses new challenges for competition enforcement, especially in connection with large platforms. The CoCo therefore recommends furthermore that the FCA monitor compliance with the framework conditions under competition law on various service platforms accordingly. In particular, those companies whose main business activity is the collection of data or that have the corresponding market power should be examined more closely.

Another important building block is the establishment of the FCA by the BMDW as an authority with the power to take legal action (together with the Schutzverband gegen den unlauteren Wettbewerb and the AEC) for the enforcement of the P2B Ordinance. Close cooperation between the FCA and RTR facilitates positive synergies here. The legislature is called upon to create specific provisions for enforcement.

23.2.g Digitalisation – Algorithms

The FCA should continue to deal intensively with future-oriented topics, such as the influence of algorithms, and further expand its relevant expertise in these areas together with RTR and continue to focus the attention of its activities on this topic area.

The manifold application of algorithms in the digital economy carries the risk of the emergence of new forms of behavioural coordination. The FCA's active enforcement activities in the area of the digital economy are intended to generate the experience and specific use cases on the basis of which an adjustment of the legal framework would have to be made.

23.2.h Horizontal Cooperation

With the KaWeRÄG 2021, the Austrian legislator has reworded the justification in § 2 (1) of the Austrian Cartel Act ("sustainability defence"). Due to the novelty of the regulation, it would be welcome if the FCA were to develop a position on the inter-pretation of the justification ground with the involvement of relevant stakeholders.

23.2.i Healthcare Sector

The health sector in particular, especially the pharmacy sector, has come under increased scrutiny in recent years. The coronavirus pandemic has brought the healthcare sector in general into the focus of public interest. In the course of the management of the pandemic, procurement processes for preventive products (protective masks, etc.) have repeatedly led to market distortions. The CoCo recommends that the FCA extend its monitoring of compliance with the framework conditions of competition law, starting from the sector of pharmacies, to other sectors of the health sector, in particular laboratories and preventive products.

23.2.j Submission Agreements

Not only does bid-rigging damage the tendering entity, and thus often the taxpayer, but it can even lead to market foreclosure, so that companies that do not participate in the bid-rigging do not get a chance. By detecting and prosecuting such collusion, the FCA can achieve a special and general preventive effect. This serves both Austria as a business location and the end consumers.

23.2.k Cryptocurrencies

For several years, the importance of cryptocurrencies such as Bitcoin has been steadily increasing, and this form of payment is enjoying ever greater acceptance and popularity in economic life. In Austria, assignment of the sector of cryptocurrencies either to the financial sector or to the commercial sector has not yet been finalised by the authorities. The FCA should in any case – taking into account the upcoming regulatory initiatives of the EU – take on this current topic and build up expertise in this area in order to be able to focus on activities in the cryptocurrency sector as the need arises (in coordination with the FMA).

23.3 Concluding Remarks

Reliable and efficient enforcement of competition law is an essential advantage for Austria as a business location. The FCA should therefore continue to guarantee independence, efficiency, transparency and fast procedures. In addition, reference may be made at this point – even though it is primarily addressed to the legislator – to the position paper "Current Challenges for Modern Competition Law – Recommendations for Action for European and National Legislators", which was completed in September 2020 and was jointly written by the BAK, IV, LKÖ, ÖGB und WKÖ. It also contains recommendations and ideas for the further development of European and Austrian competition law derived from the considerations made. The CoCo thanks the FCA for the measures already taken and the exchange of ideas and experiences that has taken place, and wishes it continued success in its activities to improve the competitive situation.

Vienna, 29 September 2021

Hon. Prof. DDr. Jörg Zehetner

Chairman of the Competition Commission

24 List of Abbreviations

List of Abbreviations

| | |
|----------|---|
| AG | Aktiengesellschaft (stock corporation under Austrian law), Antragsgegner(in) (respondent) |
| AI | Artificial Intelligence |
| a.i. | ad interim |
| AK | Arbeiterkammer (Chamber of Labour) |
| Art | Artikel (article) |
| B2B | business to business |
| B2C | business to consumer |
| BA | Bachelor of Arts |
| BAK | Bundesamt zur Korruptionsprävention und Korruptionsbekämpfung (Federal Office for the Prevention of and Fight against Corruption) |
| BFG | Bundesfinanzgesetz (Federal Finance Act) |
| BGBl | Bundesgesetzblatt (Federal Law Gazette) |
| BKartAnw | Bundeskartellanwalt (Federal Cartel Prosecutor) |
| BMAW | Bundesministerium Arbeit und Wirtschaft (Federal Ministry of Labour and Economic Affairs) |
| BMF | Bundesministerium für Finanzen (Federal Ministry of Finance) |
| BMJ | Bundesministerium für Justiz (Federal Ministry of Justice) |
| BVA | Bundesvoranschlag (Federal Draft Budget) |
| BVwG | Bundesverwaltungsgericht (Federal Administrative Court) |
| CCRL | Competition Council of the Republic of Lithuania |
| Co KG | Compagnie Kommanditgesellschaft |
| CoCo | Competition Commission |

List of Abbreviations

| | |
|------------------------------|---|
| COVID-19 | Corona virus disease-2019/Coronavirus-Krankheit-2019 |
| CPI | Corruption Perceptions Index |
| DG | Director General, Directorate General |
| DG Competition | Directorate-General for Competition |
| EBAI | Expertengruppe zur Beobachtung und Analyse der Inflationsentwicklung (Expert Group on Inflation Monitoring and Analysis) |
| E-charging infrastructure | Electric charging infrastructure |
| ECMR | Merger Control Regulation |
| ECN | European Competition Network |
| EK | European Commission |
| ELAK | elektronischer Akt (electronic file) |
| ELSA | European Law Students' Association |
| E-mobility | Electromobility |
| etc. | et cetera |
| EU | European Union |
| EUR | Euro |
| FCA | Federal Competition Authority |
| FH | Fachhochschule (university of applied sciences) |
| FMA | Financial Market Authority |
| FRB | Food Retail Business |
| FWBG | Faire-Wettbewerbsbedingungen-Gesetz (Fair Competition Conditions Act) |

List of Abbreviations

| | |
|-------------|--|
| FWT | Food Wholesale Trade |
| GCR | Global Competition Review |
| GIF | Graphics Interchange Format |
| GmbH | Gesellschaft mit beschränkter Haftung (limited company under Austrian law) |
| GNVA | Georgian National Competition Agency |
| H3A | Hutchison Drei Austria |
| HCC | Highest Cartel Court |
| HGB | Handelsgesetzbuch (Commercial Code) |
| Hon.-Prof. | Honorarprofessor (honorary professor) |
| HSchG | Hinweisgeber:innenschutzgesetz (Whistleblower Protection Act) |
| ICN | International Competition Network |
| IGE | International Group of Experts on Competition Law and Policy |
| iHv | in (der) Höhe von (in the amount of) |
| Inc. | Incorporated |
| IT | Informationstechnik (information technology) |
| IV | Industriellenvereinigung (Federation of Austrian Industries) |
| KartG | Kartellgesetz (Cartel Act) 2005 |
| KaWeRÄG | Kartell- und Wettbewerbsrechts-Änderungsgesetz (Anti-Trust and Competition Law Amendment Act) 2021 |
| KommAustria | Kommunikationsbehörde Austria (Austrian Communication Office) |
| KWR | Karasek Wietrzyk Rechtsanwälte GmbH |
| LKA | Landeskriminalamt (State Office of Criminal Investigation) |
| LL.M. | Master of Laws |
| LKÖ | Landwirtschaftskammer Österreich (Austrian Chamber of Agriculture) |

List of Abbreviations

| | |
|--------|---|
| LSE | London School of Economics |
| MA | Master of Arts |
| M&A | Merger and Acquisitions |
| Mag. | Magister/Magistra |
| Mio | Million(en) |
| M.Jur. | Magister Juris |
| MNO | Mobile Network Operator, having its own core and access network |
| MoU | Memorandum of Understanding |
| MSc | Master of Science |
| MVNO | Mobile Virtual Network Operator / Mobile Network Operator without own core and and access network |
| OECD | Organisation for Economic Cooperation and Development |
| ORF | Österreichischer Rundfunk (Austrian Broadcasting Service) |
| ORF-G | ORF-Gesetz (Austrian Federal Broadcasting Act) |
| P2B-VO | Plattform-to-Business Verordnung (Plattform-to-Business Regulation) |
| Pkw | Personenkraftwagen (passenger car) |
| Prof. | Professor/Professorin (professor) |
| RA | Rechtsanwältin/Rechtsanwalt (attorney-at-law) |
| RTR | Rundfunk & Telekom Regulierungs-GmbH |
| s | siehe (see) |
| SCRPA | State Consumer Rights Protection Authority of the Republic of Lithuania |
| SMEs | Small and Medium Enterprises |
| SSK | Speditionssammelladungskonferenz |
| TFEU | Treaty on the Functioning of the European Union |

List of Abbreviations

| | |
|--------|---|
| TKG | Telekommunikationsgesetz (Telecommunications Act) |
| TKK | Telecommunications Control Commission |
| UNCTAD | United Nations Conference on Trade and Development |
| USA | United States of America |
| UTP | unfair trading practices |
| UWG | Bundesgesetz gegen den unlauteren Wettbewerb (Federal Act against Unfair Competition) |
| VAB | Verwaltungsakademie des Bundes (Federal Administration Academy) |
| VAT | Value-Added Tax |
| VfGH | Verfassungsgerichtshof (Constitutional Court of Austria) |
| WettbG | Wettbewerbsgesetz (Competition Act) |
| WKÖ | Wirtschaftskammer Österreich (Austrian Economic Chamber) |
| WU | Wirtschaftsuniversität (Business School) |

