

# ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN AUSTRIA 2008 - 2009

## Executive Summary

In his second year as Director General of the Federal Competition Authority, Mr. Thanner put emphasis on intensifying international co-operation not only within Europe but also outside the European Community. Therefore he signed a memorandum of understanding with the Federal Antimonopoly Service of Russia to deepen the cooperation and support in the field of competition policy through study visits and training of experts while he took part in the International Competition Conference of the BRIC-States (Brasilia, Russia, India and China) in Kazan, Russia. The Austrian Cartel Court imposed fines in the second leniency case concerning chemicals - brought before Court by the FCA - totalling € 1.9 m.

Furthermore, Director General Thanner signed a cooperation-agreement with the Federal Criminal Police Office (Bundeskriminalamt) to strengthen the capacity for investigation of the FCA, eg by dawn raids or by analysing confiscated electronic data.

Hence, in the year 2008/2009 the FCA could further intensify its efforts to tackle hard core cartels.

## **I. Changes to competition laws and policies**

### ***I.1. Special sectors***

#### ***I.1.1. Broadcast***

##### **Digitisation of Terrestrial TV Broadcasting**

Distribution of Digital TV (DVB-T) via the first (MUX A) and second (MUX B) terrestrial multiplex platform started in 2006 and has been continuing during 2007, 2008 and 2009. The main analogue turn off took place in autumn 2007, since then further enlargement of the coverage of MUX A – accompanied by the switch off of the remaining smaller areas – has continuously been going on.

MUX A distributes the Austrian public service broadcasters' programmes ORF 1 and ORF 2, further the nationwide private TV programme ATV, as well as additional MHP-based services.

MUX B distributes Puls TV, ORF Sport Plus, 3sat and an electronic programme guide (EPG).

As KommAustria (Austrian Communications Authority) reported last year, the license for a nationwide multiplex platform for mobile terrestrial television (MUX D) was awarded to MEDIA BROADCAST, owned by Telediffusion de France, due to the applicant's ability to better fulfil all main selection criteria. The service was launched at the end of May 2008. It offers 15 TV channels (ORF 1, ORF 2, ATV, Puls 4, Pro7Austria, RTL, Sat1Österreich, VOX, LAOLA1.tv, LaLaTV, Red Bull, RTL2, N24, Super RTL and KroneTV) and five radio programmes (Ö3, FM4, Kronehit, Ö1 and LoungeFM). DVB-H started shortly before the European Football Championship took place in Vienna, Klagenfurt, Innsbruck and Salzburg; meanwhile the coverage of MUX D has been extended to all nine federal county capitals and further.

Furthermore, 16 licences for local and regional multiplex platforms for terrestrial TV were granted in seven Austrian provinces at the end of 2008. In detail, there were eleven procedures with a sole applicant and five procedures where KommAustria had to carry out a "beauty contest". The

selection criteria for the “beauty contest” had been set out in an order by KommAustria that defines 21 sub-criteria substantiating the six main criteria established by law (e.g. technical quality, distribution of programs that ensure a diversity of opinion). All of these licences are already binding now; two licences had been contested before the Federal Communications Senate, the Senate confirmed KommAustria’s decision in June 2009.

Partly the services were launched at the end of the year 2008 and during spring 2009; the rest will start by the end of 2009. The platforms allow the distribution of maximum four TV programmes. But for a start most of the licence holders will just offer one or two programmes. Due to the fact that the licence holders are basically cable or analogue terrestrial broadcasters, they will initially start or have already started with the digital distribution of their own programmes.

## **Broadcasting market definition and analysis**

KommAustria, who is also responsible for market definition and analysis of ex-market 18, defined and analysed two markets for broadcasting transmission services in 2004, resulting in SMP of the “Österreichische Rundfunksender GmbH & CO. KG” (ORS; Austrian Broadcasting Services) on both the wholesale markets for terrestrial television broadcasting and for analogue terrestrial ultra shortwave radio transmission.

On December 28<sup>th</sup> the European Commission issued a Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation (2007/879/EC). The markets for broadcasting services were no longer recommended to be defined by the national regulatory authorities. Nevertheless the latter should have the power to apply the three-criteria test (presence of market entry barriers, tendency towards effective competition and insufficient address of market failures through mere application of competition law) in order to assess whether, on the basis of national circumstances, a market is still susceptible to ex ante regulation.

Consequently, the Regulatory Authority for Broadcasting (KommAustria) started a review of the ordinance concerning the definition of the relevant markets pursuant to Article 15 of Directive 2002/21/EC respectively § 36 TKG 2003 (Austrian Telecommunications Act 2003). In spring 2009 KommAustria defined three markets, excluding analogue television broadcasting transmission due to the disuse of the analogue TV signal in Austria.

The respective ordinance sets definitions for the wholesale market for the digital television multiplexing of broadcasting signals via the platforms MUX A and MUX B, furthermore for the transmission of digital terrestrial television broadcasting signals to end users and again the market for analogue radio transmission. The ordinance has been notified to the European Commission. Recently the process of market analysis according to this ordinance has been started.

### ***1.1.2. Telecommunication***

#### **Renewed definition of telecommunication markets**

##### **Telecommunication market ordinance 2008:**

Art. 36 of the Austrian Telecommunications Act 2003 (TKG 2003) foresees a mandatory regular review of all ex-ante market definitions in place.

In order to account for current as well as expected market developments, Rundfunk und Telekom Regulierungs-GmbH (RTR) in its role as competent regulatory authority carried out preparations for the stipulated renewed market definitions of the Austrian telecommunication markets.

For this purpose, in November 2008 a public consultation was carried out on the revision of the market definitions as defined by Telecommunication market ordinance 2003 (TKMVO 2003).

After having carried out the above mentioned public consultation as well as the mandatory international coordination procedure on December 30<sup>th</sup> 2008, the Telecommunication market ordinance 2008 (TKMV 2008) subsequently got into force. The Ordinance is based on § 36 para. 1 of the Telecommunication Act 2003 (TKG 2003).

The TKMV 2008 defines nine telecommunication markets susceptible to sector-specific ex ante regulation. Concerning those telecommunication markets which were already defined for the purpose of sector-specific ex ante regulation by means of Telecommunications market ordinance 2003 (TKMVO 2003), the provisions of the latter expired on December 30<sup>th</sup> 2008. Concerning the remaining telecommunication markets already defined by means of TKMVO 2003, the TKMVO 2003 remained into force.

The TKMV 2008 is primarily based on the Commission recommendation of December 17<sup>th</sup> 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (OJ L 344/65 as of December 28<sup>th</sup>, 2007, hereafter: market recommendation).

The European Commission defines in its market recommendation the following markets:

Retail level

1. Access to the public telephone network at a fixed location for residential and non-residential customers.

Wholesale level

2. Call origination on the public telephone network provided at a fixed location.

3. Call termination on individual public telephone networks provided at a fixed location.

4. Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location.

5. Wholesale broadband access.

6. Wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated

7. Voice call termination on individual mobile networks.

The TKMV 2008 deviates from the above mentioned market recommendation as follows:

Market No. 1 of the market recommendation (Access to the public telephone network at a fixed location for residential and non-residential customers) is subdivided into two access markets for residential and for non-residential customers respectively.

Market No. 5 of the market recommendation (Wholesale broadband access) is not contained in the TKMV 2008.

Market No. 6 of the market recommendation (Market for wholesale terminating segments of leased lines) is subdivided in the following way: There are two markets for wholesale terminating segments of leased lines, each containing different bandwidths of wholesale terminating segments of leased lines.

In addition to the market recommendation the TKMV 2008 defines an Austrian retail market for the minimum set of leased lines.

All other markets contained in the TKMV 2008 are contained in the market recommendation.

The market definitions of the TKMV 2008 are the first step in order to possibly impose ex ante remedies on market-dominant operators in future proceedings according to Art. 16 Framework directive.

Amendment of Telecommunication market ordinance 2008:

On April 2<sup>nd</sup> 2009, an amendment of the TKMV 2008 got into force. After having carried out the foreseen public consultation as well as the mandatory international coordination procedure, RTR published an amendment to the TKMV 2008. With this amendment the retail market for business-calls for publicly available telephone services provided at a fixed location was defined as susceptible for ex ante regulation.

Market analysis

Market analysis procedures on the markets for Voice call termination on individual mobile networks" were carried out during reporting time. This market is mentioned in the market recommendation of the European Commission of December 17<sup>th</sup> 2007 on relevant product and service market as well as in the TKMV 2008 of RTR.

The undertakings in the relevant individual markets are mobilkom austria, T-Mobile Austria, Orange (formerly one), Hutchison 3G Austria.

According to the market analysis procedure Telekom-Control-Kommission concluded on June 15<sup>th</sup> 2009, that each mobile operator has significant market power in the relevant market for termination of voice calls on their respective mobile networks.

Each mobile operator has a market share of 100% on its own network; these markets were found to be persistent monopoly markets. The incentive to set prices above competitive level is high. Countervailing buyer power is not sufficient to restrict the market power. No (substantial) differences between small and big operators were identified.

Following regulatory obligations are proposed for each mobile operator:

- Obligation to interconnect on request (Art 12 Access Directive)
- Non discrimination obligations concerning quality and price (Art 10 Access Directive)
- Obligation to publish a reference interconnection offer concerning termination (Art 9 Access Directive)
- Access Directive)
- Price control: Cost oriented tariffs on the basis of LRAIC (Art 13 Access Directive).

The concrete rates for mobile termination have been set in line with a glide path, which foresees a target charge of Cent 2,01 (costs of the operator with the lowest costs in the year 2010). This level has to be reached by all MNOs on June 1<sup>st</sup> 2011. The glide path designs a linear symmetric approximation to the target level with two steps per year. The steps are similar for all mobile operators.

### ***1.1.3. Energy***

#### **Changes in Energy Law**

The law on the promotion of renewable energy which was passed in 2008 raised major concerns at the European Commission. Especially the cap of energy intensive industry was seen as a potentially illegal subsidy.

### **Mergers and acquisitions**

Since mid 2007 marginal structural changes on the Austrian electricity and gas markets took place. The public share in electricity and gas companies is still over 50 % and up to 100 %.

### **Unbundling**

Directives 2003/54/EC and 2003/54/EC stipulate minimum requirements for the unbundling of network companies.

In Austria the requirements of the Directive were literally transferred into national legislation. In the electricity sector, the Austrian provinces are responsible for the implementation at regional level.

Large integrated electricity and gas companies are obliged by law to legally unbundle their network business from other businesses. All distribution network operators (except one) rent the right to use the network and its equipment as well as human resources from their mother company instead of owning it independently or employing the employees themselves. Due to this approach several service agreements have emerged.

As only integrated companies are able to provide these services, there is no market test and cost transparency is reduced (intra-company expenses).

### **Price increases**

Only at the end of 2008 Austrian gas and electricity companies increased the energy prices for small customers (households and commercial customers). Total household electricity prices increased by some 5% which correlates to a prices increase of some 15% for energy only as the energy component of total prices is approximately one third.

Gas prices increased by 15%; this translated into some 30% concerning the pure energy price for households. Early 2009 some prices were reduced again half way the price increase of 2008.

The dramatic decrease in wholesale prices for gas and electricity since late 2008 which facilitates market entry (incumbents traditionally have long term portfolios at least for small customers and therefore have logged in high energy prices) has not yet resulted in major increases of potential savings by switching. Still switching rates have increased in 2009 due to the fact that after the announcement of high price increases in 2008 customers pay more attention to energy prices in general.

### **Potential for more liquid and competitive markets in natural gas**

In 2008 and 2009 the FCA and E-Control (the sector regulating authority) worked on a Competition Initiative together with the gas industry. In the gas sector major deficiencies were identified in the sector inquiry of 2006 which relate to the market mechanisms of upstream markets. Especially the lack of liquid and transparent wholesale trade was seen to be a major impediment to a competitive gas market in Austria. The gas hub in Baumgarten announced the establishment of a gas exchange in the second half of 2009 which in view of the present oversupply of natural gas in Europe might attract sufficient trade to become a liquid trading venue.

Similar to the electricity sector the initiative to improve competition also foresees several elements targeting small customers (transparent billing, codex of sound behaviour of suppliers). The talks with the industry are however not yet finished as the 3<sup>rd</sup> legislative package of the EU for the gas and electricity markets and the necessary national implementation also contain relevant stipulations which will have to be taken into account.

## **II. Enforcement of competition laws and policies**

While most cases were dealt with by the Federal Competition Authority (FCA) and the Federal Cartel Prosecutor (FCP) jointly, some were followed only by the FCA or the FCP. The annual report of the FCP for the year 2008 can be viewed at [http://www.justiz.gv.at/cms\\_upload/docs/BKAnw\\_Jahresbericht2008\\_a.pdf](http://www.justiz.gv.at/cms_upload/docs/BKAnw_Jahresbericht2008_a.pdf)

### ***II.1. Action against anticompetitive practices, including agreements and abuses of dominant positions***

#### *a) Summary of activities*

In the period under review about 24 new cartel cases and 9 new cases concerning the abuse of a dominant market position were examined. In several cases the Cartel Court has not rendered a decision yet.

#### *b) Description of significant cases, including those with international implications*

##### *ba) Agreements, recommendations and sector inquiries*

#### **Austrian Cartel Court fined driving schools of Innsbruck with EUR 70 000**

On the basis of relevant evidence given by the Austrian Chamber of Labour which deals also with competition policy and consumer matters, the Cartel Court (CC) fined six owners of driving schools from the region of Innsbruck. The driving schools agreed on prices for driving courses. Five of them were punished with EUR 70.000. One entrepreneur was granted the status of a principal witness, thus he was not punished at all. The fined driving schools waived their right to appeal against the decision of the CC.

The decision is a clear signal that also smaller infringements against competition provisions can lead to prosecution and punishment. It is a request of the Federal Competition Authority to make clear that such infringements do not constitute trivial offences.

#### **Elevators & Escalators Cartel - Record Fine of € 75,4 Mio. imposed**

Upon application of the FCA the Cartel Court decided on Dec 14, 2007 on the imposition of fines totalling € 75,4 Mio. on five major producers of elevators and escalators because of their participation in cartel agreements in Austria. This decision has been upheld by the Supreme Cartel Court in its decision of Oct 8, 2008.

The investigations have been triggered late August 2006 when ThyssenKrupp filed an application for leniency. The undertaking provided the FCA with comprehensive information on the infringements for which full immunity has been granted. In the course of the extensive investigations, which have been carried out by the FCA, Otis filed a second leniency application, which has been rewarded with a 50 percent reduction of fines.

In its decision the Court held that the undertakings have - over years - participated in cartel agreements on the allocation of projects and prices, involving the exchange of other confidential market information. The cartel agreements concerned essential parts of the undertakings' business activities in Austria: new equipment installations, service and modernisation of elevators and escalators.

With this decision the so-far record fine in the history of cartel law enforcement in Austria has been imposed. Moreover, it was the first closed cartel case which has been triggered by a leniency application. The Austrian leniency program had entered into force on January 1<sup>st</sup>, 2006.

### 120.000 € Fine Imposed for Breach of Obligation to Provide Information

In the course of its comprehensive groceries sector inquiry FCA has sent questionnaires to a number of market participants (retailers and suppliers). A significant part of the addressees refused to provide the FCA with confidential information on business terms and conditions. In order to enforce the undertakings' statutory obligation to provide the BWB with the information needed to perform its tasks, the BWB initiated proceedings with the Cartel Court. In the course of the proceedings the BWB settled with all undertakings concerned, which consented to give the information required, except one undertaking, which kept refusing to provide this information. With regard to this undertaking the Cartel Court adopted a decision ordering it to provide the information. This decision was upheld by the Supreme Cartel Court. In their decisions the Cartel Court and Supreme Cartel Court respectively rejected the argument that confidential information was to be exempted from the obligation to provide information.

When the undertaking still did not comply with this decision, even after it became valid, the FCA applied for the imposition of fines and penalty payments. When the Cartel Court decided on the imposition of penalty payments for each day of non-compliance the undertaking finally provided full information. The Cartel Court decided on the imposition of fines amounting to € 60.000,- for breach of obligation to provide full information in a timely manner and on a final penalty payment in the amount of € 5.000,--. Both, the undertaking and the FCA appealed against this decision. The Supreme Cartel Court, in its decision of September 13<sup>th</sup>, 2008, allowed the FCA's appeal and raised the fine up to € 120.000,--. In its decision the Supreme Cartel Court highlighted the importance of the obligation to provide information for efficient enforcement of competition rules.

### Fines imposed on industrial chemicals wholesalers

In October 2008, the Austrian Cartel Court imposed fines on two undertakings for infringement of Art 81 EC-Treaty totalling € 1.9 m. All of the addressees of the Cartel Court's decision are active in the wholesale of industrial chemicals which, in Austria, is dominated by the Brenntag Group and the Donau Chemie Group. The Cartel Court proceeding was initiated by the FCA following a thorough investigation triggered by an application for immunity by the Brenntag Group. Having cooperated fully with the FCA throughout the administrative procedure, the FCA granted Brenntag full immunity and, in accordance with the FCA's leniency program, ultimately applied only for a declaratory ruling against the leniency applicant.

The Cartel Court established that the cartel participants pursued a strategy of stabilising the wholesale market thereby making it a principle that every distributor keeps its own customers. In order to ensure the implementation of the established customer principle the cartel participants coordinated their pricing policy towards their respective customers which ultimately led to higher prices. Compliance was monitored mostly in bilateral meetings and telephone conversations during which the parties exchanged commercially sensitive information on negotiations with customers, including volumes and prices.

The cartel originally covered the whole of Austria. The cartel behaviour in the western and eastern regions of Austria, however, was subject to the statute of limitations allowing the FCA only to seek fines for the parties' activities in the southern part of Austria. When imposing the fines, the Cartel Court fully accepted the amount submitted by the FCA. In determining the fine, the FCA took into account the methodology as envisaged in the European Commission's guidelines on fines. The parties' appeal to the Supreme Cartel Court in this case is still pending.

### **Investigation into the gasoline retail markets**

#### Analysis of the liquid fuel market in Austria

The FCA has been investigating the Austrian markets for petrol and Diesel. Due to scarce resources a full-fledged sector inquiry could not be launched but instead the authority found it reasonable to focus its efforts on a limited number of important issues:

- Applying a variance screen test for collusion: Using European average national prices this tool proved not to be very reliable.
- Asymmetric response of retail-prices to input-prices: The pass-through of price rises is 2 to 3 days faster than with the reduction of input-costs.
- Suspicion of a regional cartel at the Austrian-German border: No clear indication found.
- Long-term development of margins: Though high short-term volatility the nominal gross margins of retail revealed to be remarkably stable over the period 1999 to II/2008 thus indicating no major changes in market structures.
- Platts: The past investigations of the domestic liquid fuel industry revealed that most contracts on the upstream markets (ex-refinery and wholesale markets) are closely linked to the Platts notations. Furthermore the vertically integrated players regularly motivate their price changes at the retail level by the corresponding changes of the Platts notations. Thus the FCA has requested Platts to provide some information on the number and general pattern of the contracts the notations are based on, and on its ability to shield the notations from manipulations. The FCA will now carry out an extensive analysis of the provided data in accordance with economic principles and anti-trust legislation.
- The oligopoly structure of the Austrian market: The FCA has transmitted a questionnaire to the vertically integrated oil companies to request the following issues: exploration and refinery, wholesale and retail. The answers received are currently analyzed.

Reports on the first two topics were published in 2008.

*bb) Abuse of a dominant position*

## **II.2. Mergers and acquisitions**

While most cases were dealt with by the Federal Competition Authority (FCA) and the Federal Cartel Prosecutor (FCP) jointly, some were followed only by the FCA or the FCP. The annual report of the FCP for the year 2008 can be viewed at [http://www.justiz.gv.at/cms\\_upload/docs/BKAnw\\_Jahresbericht2008\\_a.pdf](http://www.justiz.gv.at/cms_upload/docs/BKAnw_Jahresbericht2008_a.pdf)

*a) Statistics on number, size and type of mergers notified and/or controlled under competition laws*

Between 1 July 2008 and 30 June 2009 a total of 241 national concentrations were notified. In 6 cases an application for in-depth-investigations was filed by one or more of the official parties leading automatically to phase II proceedings.

*b) Summary of significant cases by FCA*

*Loacker Recycling GmbH; Häusle GmbH; Dockal Recycling GmbH*

In the year 2007, a merger in the waste industry in the federal state of Vorarlberg had been notified to the FCA. The FCA had started an in depth investigation at the Cartel Court. Then the merger was withdrawn. Thus, there was no final decision.

On 29th of August 2008, an almost identical merger was notified again to the FCA. The main concern regarding the merger in the first investigation in 2007 was that small waste collecting companies and small companies in general would become more dependent on the merging parties' recycling facilities within Vorarlberg. The investigation during the first notification showed that especially small competitors in waste collection had problems with the shipment of waste and with using the recycling facilities of competitors abroad.

Before the second merger, a market entry in Vorarlberg had occurred. Furthermore, small competitors had the necessary permissions for shipment of waste in order to use recycling facilities across the border.

Due to these changes, a market opening had occurred and there was no further need for an in-depth investigation. Thus, the clearance decision was given during phase one.

### 21 Centrale Partners S.A./Microcar S.A.S

This concentration involved the proposed acquisition of sole control over Microcar S.A.S, a French manufacturer of light motor vehicles by investment company 21 Centrale Partners S.A. Shortly before this transaction, 21 Centrale Partners already had acquired sole control over another manufacturer of light motor vehicles, Automobiles Ligier S.A.S.

The main specifications of light motor vehicles (class L6e) are governed by European and national legislation. Therefore in practice the different makes and models show a high degree of similarity. Another specific for this vehicle class is that no driving license is required.

The market for distribution of light motor vehicles shows a number of features making it prone to coordinated effects (eg homogeneous products, market transparency, and stable market). The market is dominated by Microcar and Aixam/Mega having cumulated market shares of 80-90%. The combination of Microcar and Ligier would have further strengthened this oligopolistic market structure. The FCA and the FCP therefore filed an application for examination with the Cartel Court.

In the further course of the proceedings the parties provided additional information showing the existence of a number of potential competitors with the ability of entering the market within relatively short term. Furthermore the parties proposed remedies under which the distribution of the Ligier brand was to be transferred to an independent importer with the ability to apply an own commercial strategy.

The transaction was finally cleared subject to this obligation.

The FCA dealt with this case in close cooperation with the Spanish and Italian competition authorities where the concentration had also been notified.

### STRABAG/CEMEX

The acquisition of Cemex' Austrian and Hungarian RMC and aggregates operations had been notified to the national authorities after a referral decision of the European commission according to Art 4/4 ECMR. The operations of the parties overlapped in several relevant regional markets

resulting in high market shares and a low number of competitors. The FCA and the FCP therefore filed an application for examination with the Cartel Court. The Cartel Court found that the transaction would create market dominant positions on three regional markets for RMC and cleared the transaction conditional on the divestment of several sites. The decision has been appealed. On July 1<sup>st</sup>, Strabag announced it would retire from the purchase.

#### Moser Holding AG / Styria Medien AG

The parties notified their plan to pool activities in the field of free of charge weekly regional papers. Outside the joint venture the parties continue independent marketing of different regional and national media activities. The FCA 's concern was focused on foreclosure effects caused by the JV to regional competitors (in particular other free of charge weekly regional papers).

The Cartel Court distinguished between local, regional and national advertising markets. The Court held that within each of those markets daily newspapers were competing with weekly newspapers. The merger was cleared without conditions due mainly to the dominating position of one daily newspaper in the national advertising market. This decision was appealed by the FCA because it didn't deal convincingly with concerns expressed by the FCA regarding the regional advertising markets and foreclosure effects for several smaller competitors. The decision of the Cartel Court was nevertheless confirmed.

#### *c) Summary of significant cases by the FCP*

#### Berglandmilch dairy /Landfrisch dairy

The dairy *Berglandmilch* is a *registered co-operative society with limited liability*. Pasching, Austria (*Berglandmilch*) notified a merger with a dairy named *Landfrisch Molkerei* registered *co-operative society*, Wels, Austria. While the Federal Competition Authority was analysing the market for dairy products, particularly butter, the Federal Cartel Prosecutor concentrated on the procurement market.

The procurement market for milk is subject to an oversupply of milk of 10% to 15% within the EU, despite a quota system (and appropriate punishing payments for "oversupply") which makes it completely different from other markets. So the export price for milk can be sometimes substantially below production costs. Purchases led by speculation and explained with an "additional demand from China" led to a short-term doubling of market prices in the year 2007 and set completely wrong price signals. This led to considerable production increases among milk farmers. In this market situation competitive concerns therefore concentrated on who would bear the biggest part of the reduction of production.

Dairies organised as co-operative societies, like the merging parties, who process milk into higher-order products and invested into the building up of export markets offer their members a milk price above the general market rate. On the other hand co-operative societies hardly accept new co-operative society members, what gave cause for complaints.

The definition of the geographical market was controversial. The merging parties assumed a national market for the procurement of raw milk, on which the merging parties hold a market share of little more than 30%. At first the federal cartel prosecutor consulted the decisions of the German Bundeskartellamt *Bayernland eV- Käserei Bayreuth and Humana Nordmilch*, in which the Bundeskartellamt assumed a geographic market of about 100 to 200 km.

Assuming a procurement market for the region of Upper Austria, the market shares increased from [45 to 50%] and [20 to 25%] the market shares to altogether [60 to 70%] for the

procurement of raw milk. Looking at an all Austrian market for raw milk with the exception of Tyrol and Vorarlberg (the merging parties have no activities there) the common market share would increase of up to [50 to 55%]. The market shares for organic milk were below the market shares for conventional milk. At all events the legal assumption of a dominant market position of more than 30% market share was met.

The merging parties offered as remedy the introduction of an additional distribution channel for raw milk: Within a certain frame the merging parties will procure milk of non-member-farmers at a generally available index price for export. So farmers who are not member of a co-operation and whose contracts of sale to other dairies were discontinued were offered access to the market at market price.

#### Schäcke Elektrogroßhandelsgesellschaft; Helmut Thurner Electro Wholesale Trade

The Federal Cartel Prosecutor requested the Cartel Court for in-depth-investigation of the notified acquisition of assets of the *Helmut Thurner electric wholesale trade* by the *Rexel group*. The *Rexel group*, represented by the brands *Schäcke* and *Regro*, is the number one wholesaler for electric installation material. (The wholesale- market for electrical goods has to distinguish this market from other markets like the wholesale of consumer electronics or home appliances.) The European Commission discussed in its 2008 decision COMP/M.4949 *Sonepar/Hagemeyer* the Austrian market for electric wholesale trade. *Rexel* was already at that time the number one in Austria with a market share of 30 to 40%, which is above the legal assumption of 30% of a market dominant position according to Austrian anti-trust law. Other sources described the electrical wholesale trade market for electric installation material as extremely concentrated with a market share of the top three enterprises of more than 90%. The overwhelming financial power of the *Rexel group* had to be taken into account as well (with a worldwide total turnover of 13.7 bn euros), an almost worldwide presence and thus connectedly to one appropriately large purchase volumes.

The Federal Cartel Prosecutor assumed reinforcements of a market dominant position for electric installation material on an Austrian market as well as on the local market Tyrol.

The merging parties disputed the market dominant position since they acted on the basis of a market definition including the wholesale trade of electric installation material and white goods. Moreover they stressed the low turnover of the target enterprise with little more than 5 m. Euros.

In the end, the question of the market definition and the market control could be left open: The merging parties proposed remedies in connection with future acquisitions and the refraining from the participation in a market reporting systems. In the light of the remedies offered, the Federal Competition Prosecutor withdrew his application for in-depth-examination of the merger by the Cartel Court. The case was closed.

#### Scholz Austria GmbH/Gebrüder Gratz GmbH

Since its entry into the Austrian market in the year 2006 the *Scholz-Austria group*, a joint venture between *Voestalpine AG* and *Scholz AG*, has become undisputed market leader on the market for collection and trade with iron and not iron scrap metal.

Due to critical statements of third parties the Federal Competition Authority and the Federal Competition Prosecutor requested an in-depth-investigation by the Cartel Court.

The Cartel Court appointed an independent expert, whose expertise showed that the merger would result in a market dominant position around the target company on the market for the collection and processing of iron scrap metal: On the market for the collection and processing of iron scrap metal in Upper Austria and its surrounding areas the merging parties market share is more than 50% (100 km) or more than 45% (150 km) at consideration of all enterprises, running

the adjacent region into Lower Austria and Bavarians as well as northern Salzburg. A particularly distinctive effect showed itself on a local market with a market share of over 90%.

The expert also emphasized the much bigger financial power of *Scholz Austria* vis-à-vis most competitors. He also stressed the mutual dependences of the enterprises on the procurement markets as a competitor and as a subcontractor or buyer in the area of the third-party deals („Streckengeschäft“) and the pre-material (e.g. for shredder). Due to the vertical integration of *Scholz Austria* with the largest Austrian steel producer, *Voestalpine*, there is an important link to *Voestalpine* as final customer and supplier.

A specific point of concern was car shredding plants, as the merger would eliminate competition of two neighbouring shredding plants. Considering a wider area of Austria without Vorarlberg and Tyrol, only one competitor would remain and the market share would increase considerably from 40% to more than 70%. The expert also saw the possibility of disciplining the competitors as well as the danger connected with that of coordinate behaviour, i.e. that smaller competitors are forced "to the restraint". Merely on the trade market for iron scrap metals no emergence or reinforcements of a dominant position could be established.

As the expert had no proposals for remedies, the merging parties withdrew their notification which terminated the proceedings and led to a de-facto prohibition of the merger.

### **III. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies**

The FCA may comment on issues of general economic policy from a competition point of view and communicate the implications and benefits of fair competition to the general public, thus covering the field of competition advocacy.

The FCA uses its good bilateral contacts to offer the broad competition-community in Austria a forum to discuss interesting topics with high-level representatives, eg with the Chairman of the Board of the Dutch Competition Authority (Nederlandse Mededingingsautoriteit), Mr. Pieter Kalbfleisch the role of the competition authority "in a small open economy facing the challenges of the financial crisis".

Besides numerous press contacts the FCA regularly releases information on important cases. Due to the amendments in the Cartel Act and the Competition Act, the FCA now publishes also information on notifications, the application for the examination with the Cartel Court by an official party, the decision clearing a merger under certain remedies as well as decisions of the Cartel Court in other than merger cases.

Director General Thanner puts emphasis on intensifying international co-operation with other European competition authorities both on bilateral and European level. Furthermore, bilateral agreements were signed with the Croatian competition authority. In February 2009, the FCA joined the Central European Competition Initiative (CECI), which was founded in 2003 by five Competition Authorities (Czech Republic, Hungary, Poland, Slovakia and Slovenia).

On joint initiative of the FCA and the Czech Office for the Protection of Competition the Marchfeld Competition Forum (hereinafter: MFC) has been set up as a form of informal regional cooperation between the competition authorities of Austria, the Czech Republic, Slovakia, Hungary, Poland, Slovenia, Croatia, Estonia, Lithuania, Latvia, Bulgaria, Romania, Switzerland and the European Commission in a constitutive meeting in summer 2008 in Hof Castle, Marchfeld/Austria. The main purpose of this initiative is the strengthening of regional cooperation between NCAs from EU Member States as well as non-members, e.g. by discussing topical competition-related issues in regular meetings and by exchanging experience and information, building on the European Union's framework (ECN).

On February 27<sup>th</sup>, 2009 a further MCF-Meeting has been held on the occasion of this year's FIW symposium, namely a luncheon discussion on the topical issue of "Competition Policy in Times of Financial Crisis". Philip Collins triggered the discussion by delivering a keynote address on the OFT's view and so-far experience. Apart from high level representatives from some of the NCAs named above, namely Austria, the Czech Republic, Hungary, Slovakia, Lithuania, Latvia and Switzerland, Bernhard Heitzer, President of the Bundeskartellamt, also participated in the meeting.

#### **IV. Resources of competition authorities**

On 1 July 2007 Mr. Thanner was appointed as Director General of the Federal Competition Authority. Between 1 July 2008 and 30 June 2009 the FCA increased its staff by 1 lawyer and 2 economists. By then - additional to the Director General and the Deputy Director General - 15 lawyers, 7 economists, one other professional and 6 persons as support staff, i.e. all together 31 persons, were working at the FCA. More staff is still needed. Each case handler is responsible for all cases (mergers and antitrust) in specific sectors.

The Federal Cartel Prosecutor and his Deputy are supported by the registry of the Cartel Court in administrative matters.

As the decision making body, the Cartel Court comprises five panels being composed of two professional judges and two lay judges. The Cartel Court employs currently seven professional judges who are partly involved in other matters and are supported by fifteen lay judges. Additionally, the Cartel Court relies on advisory opinions of independent economic experts of its own choice.

The Supreme Cartel Court comprises one panel being composed of three professional judges and two lay judges.