

# ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN AUSTRIA 2007 - 2008

## **Executive Summary**

On 1 July 2007 Mr. Thanner was appointed as Director General of the Federal Competition Authority. He put emphasis on intensifying international co-operation with European competition authorities. The FCA therefore organised - together with the Czech Competition Authority - a high-level meeting between representatives of 12 national competition authorities of Central and Eastern European countries and the European Commission which resulted in the signing of a Memorandum of Understanding. Furthermore, a bilateral agreement was signed with the Croatian competition authority. Additionally, the introduction of a leniency policy, which took effect as of 1 January 2006, allowed the FCA to further intensify its efforts to tackle hard core cartels. While several proceedings are still pending, the Cartel Court has rendered a decision in the elevators and escalators cartel case which was the first leniency case the FCA dealt with. Even though not legally binding yet, it resulted in the largest fine ever imposed in Austria totalling € 75.4 m. The second leniency case brought before the Cartel Court concerns a cartel in the chemicals wholesale sector. The FCA has applied for the imposition of fines, the Cartel Court has however not rendered a decision yet. Clearly, these cases provide another example of the success of the leniency concept in Austria. Hence, the introduction of the leniency programme was an important step forward towards establishing a real culture of competition in Austria and at the same time fundamentally strengthens the FCA's ability to detect and prove cartels.

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

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

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

##### **Digitalization of terrestrial TV broadcasting**

Distribution of Digital TV (DVB-T) via the first (MUX A) and second (MUX B) terrestrial multiplex platform has been continuing since October 2006. The analogue turn off took place in autumn 2007, since then further enlargement of the coverage of MUX A has continuously been going on.

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

MUX B started distribution of Puls TV, ORF Sport Plus, 3sat and an electronic programme guide (EPG) in October 2007.

Changes in national law constituted the legal basis for two additional terrestrial multiplex platforms. An Amendment of Private TV Broadcasting Act (Privatfernsehgesetz) which came into force in August 2007 and an order by KommAustria which set out the selection criteria for the tender procedures empowered KommAustria to start the licensing procedures for local and regional multiplex platforms for terrestrial TV (MUX C) on the one hand and for the multiplex platform for nationwide mobile terrestrial TV based on DVB-H (MUX D) on the other hand.

Having carried out a complex administrative procedure KommAustria chose to award the license for a nationwide multiplex platform for mobile terrestrial television (MUX D) to MEDIA BROADCAST, owned by Telediffusion de France, due to the applicant's ability to better fulfill all main selection criteria. Three other applications were submitted in December 2007, including the main Austrian broadcasting network operator ORS, the main telecom network operator Telekom Austria and a group of Austrian publishers (Mobile TV Infrastruktur GmbH). The decision of KommAustria was announced in February 2008. It was contested by Mobile TV Infrastruktur

before the Federal Communications Senate, the Senate confirmed KommAustrias decision in March 2008. 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 in Vienna, Klagenfurt, Innsbruck and Salzburg; meanwhile the coverage of MUX D has been extended to all nine capitals of the Austrian provinces.

Regional terrestrial multiplex platforms (MUX C) are in the final stage of procedure. Licenses will be granted in autumn 2008. These platforms shall allow distribution of several different local and regional TV programmes in various parts of Austria.

### **Broadcasting market definition**

In December 2007 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). It was no longer recommended that the markets for broadcasting services were 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, due to 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 (Austria Telecommunications Act 2003). The review is still in process, taking into consideration that digital TV distribution in Austria is partly taking place on newly emerging markets.

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

#### **Market analysis procedure for the wholesale market for broadband access to the Internet**

On 14 May 2007 a market analysis procedure under Art. 37 TKG 2003 was initiated by Telekom-Control-Kommission (TKK) with the purpose of investigating whether one or more companies possess significant market power or effective competition prevails on the wholesale market for "broadband access to the Internet" under Art. 1 No. 17 TKMVO 2003 (as amended on May 2, 2005).

On 4 July 2008, the TKK issued its final decision, stating that Telekom Austria TA AG possesses significant market power on the above mentioned wholesale market for broadband Internet access. Contrary to foregoing market analysis decisions on this market, TKK concluded that (potential) competition problems only exist in a segment ("area 2") of the nationwide defined market. In "area 1" Telekom Austria TA AG is sufficiently constrained by other operators.

Area 1 consists of all MDF-areas where the following criteria are cumulatively fulfilled:

- Telekom Austria TA AG has a market share of less than 50 %,
- at least three major operators (including Telekom Austria TA AG) are active and
- at least 2.500 households are within the respective MDF-area.

In practice, area 1 consists of the most important urban areas of Austria.

Due to the competition problems identified, the following regulatory instruments were imposed on Telekom Austria in accordance with Art. 37 Par. 2 TKG 2003:

In area 2:

- Access to broadband bitstream products

- Simultaneous provision of wholesale products equivalent to offered retail products (non discrimination obligation)
- Access to “naked-DSL”-products
- National and regional traffic handover
- Price control for regional traffic handover based on “Retail minus”
- Publication of a reference offer

Nationwide (area 1 and area 2):

- Accounting separation

Following a decision of the Austrian Supreme Administrative Court, this market analysis procedure was the first to be carried out under legal participation of all affected competitors of Telekom Austria TA AG on this market. So far the Austrian Telecommunications Act 2003 explicitly stipulated that only the deemed SMP-operator had to be granted legal hearing.

### **Market analysis procedures for mobile termination in individual mobile networks**

On 15 October 2007 four market analysis procedures regarding mobile termination in individual mobile networks were issued under Art. 37 TKG 2003. The four operators concerned were Mobilkom Austria AG, T-Mobile Austria GmbH, ONE GmbH and Hutchison 3G Austria GmbH.

According to the market analysis procedure, TKG concluded that each mobile operator has significant market power in the relevant market for termination of voice calls on their respective mobile networks.

Following regulatory obligations were 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 reference interconnection offer concerning termination (Art. 9 Access Directive)
- Price control: Cost oriented tariffs on the basis of LRAIC (Art. 13 Access Directive).

The rates for mobile termination have been set in line with a glide path, which basically foresees a target charge of Cent 5,72 (costs of the operator with the lowest costs). This level has to be reached by all MNOs by 1 January 2009. The glide path designs a linear approximation to the target level with two steps per year. The steps are similar for the three GSM-/UMTS-operators; the steps for Hutchison are bigger. The bigger the operator the sooner he reaches the target level.

For formal reasons the Supreme Administrative Court annulled these decisions.

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

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

Following major changes in Austrian energy law in the year 2006, legal acts were adapted at the level of the Austrian provinces in order to fulfil the requirements of the federal framework law. Still some suppliers present prices and customer information in a non-transparent way (e.g. as an average price for the whole billing period, irrespective of price changes). Also the insufficient unbundling of integrated companies remains. This contributes to the lack of transparency of the market as integrated network operators and suppliers use the same company name and have the same market appearance.

In 2008 the Renewable Act was changed twice in order to increase the amount of renewable energy.

## **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**

Directive 2003/54/EC stipulates minimum requirements for the unbundling of network companies. In Austria the requirements of the Directive were literally transferred into national legislation. The Austrian provinces are responsible for the implementation at regional level, at least for the electricity sector.

Large 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. Due to this approach service agreements have emerged. Thus, only integrated companies are able to provide these services and cost transparency is reduced (intra-company expenses).

## **Price increases**

At the beginning of 2007, most electricity and gas suppliers increased their prices. Despite the price increases and the possibility to save up to 15 % of the total price by switching to the cheapest supplier, switching rates continue to be low throughout all customer groups. Even for the group of large industrial customers switching rates are comparatively low, although this is partly due to the behaviour of local players, which (ultimately) often submitted the lowest bid in a tender. Interestingly, local players offered electricity at higher prices outside their grid areas. The switching rate for residential customers for 2007 has increased from 1 % in 2006 to 1.5 % in 2007. Price increases in the wholesale market in 2008 resulted in discussions about necessary retail price increases. Mainly competitive out of area offers suffered from higher prices and some suppliers even stopped out of area offers until retail prices will have been brought in line with whole sale market prices by incumbents.

For the gas sector the switching rate remained stagnant at 0.5 %.

Austrian household energy costs have increased by an average of 7.1 % since November 2006, with electricity prices up by 9 % and gas prices by 7 %, according to surveys by Statistics Austria.

## **Need for stronger competition**

The investigation of the Austrian electricity industry carried out by the Federal Competition Authority and E-Control in 2005 led to the adoption of a raft of measures designed to enhance competition, and to a related independent monitoring.

The package includes a number of voluntary commitments by the electricity companies, intended both to bring direct improvements for consumers, and to lead to closer and less expensive cooperation between suppliers and system operators. Agreement was reached on stimulating competition by the following measures: requiring system operators to accord non-discriminatory treatment to all suppliers with regard to the electronic transmission of system charges billing data; shortening the supplier switching process from eight to six weeks from start to finish; putting an end to questionable practices with regard to adjustments to all-inclusive prices; drawing up a code of conduct for suppliers; and distributing a fact sheet to energy consumers throughout the country. All these actions were to be implemented in the course of 2007. A report commissioned by the Association of Electricity Companies (VEÖ) and information gained from E-Control's general market oversight activities indicate that some of the measures contained in the package have been effective. However, while there has been progress on transparent billing

further efforts will certainly be required in this area in order to limit market power of incumbents in the retail market.

In the gas market, there was a change from negotiated to regulated third-party system access for cross-border natural-gas shipments (transits) as required by EU legislation. This should considerably ease access to the wholesale gas markets, lack of which is a major impediment to competition in the Austrian market and consolidate Austria's position as a major gas transit country.

## **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 2007 can be viewed at [http://www.bmj.gv.at/\\_cms\\_upload/\\_docs/ JB\\_BKAnw\\_2007\\_homepage.pdf](http://www.bmj.gv.at/_cms_upload/_docs/ JB_BKAnw_2007_homepage.pdf)

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

#### *a) Summary of activities*

In the period under review about 20 new cartel cases and 20 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*

### **Cartel agreements in the elevators and escalators industry: Fines totalling 75.4 imposed**

Upon application by the FCA the Cartel Court decided in December 2007 on the imposition of fines against the following five producers of elevators and escalators:

- Otis GmbH € 18.2 m
- Kone Aktiengesellschaft € 22.5 m
- Schindler Aufzüge und Fahrtreppen GmbH € 25 m
- Haushahn Aufzüge GmbH € 6 m and
- Doppelmayr Aufzüge AG € 3.7 m.

In its reasoning 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 Court proceedings have been initiated by the BWB after months of comprehensive investigations. The proceeding has been initiated late August 2006 when ThyssenKrupp filed an application for leniency. The undertaking provided the BWB with information for which full immunity has been granted. In the course of the investigations carried out by the BWB, Otis filed a second leniency application, which has been rewarded with a 50 percent reduction of fines.

The cartel agreements concerned essential parts of the undertakings' business activities: new equipment installations, service and modernisation of elevators and escalators. Agreements such as the ones at issue are deemed to be highly detrimental to the national economy and to consumers. The decision has not yet become final, the appeal procedure is still pending.

### **Alleged cartel agreements concerning the wholesale of industrial chemicals: FCA applies for the imposition of fines**

The second leniency case brought before the Cartel Court concerns a cartel in the chemicals wholesale sector. In December 2007 the FCA brought an action against two leading Austrian wholesalers for their alleged participation in allocating traditional as well as new customers for more than a decade until the end of 2006. The investigation started in spring 2007 when one of the two major Austrian wholesalers for industrial chemicals came forward with an application for immunity. The cartel involved all Austria from the outset. However, as regards two distribution areas the anti-competitive behaviour turned out to be time barred leaving only one distribution region (Styria, Carinthia and southern Burgenland) subject to further prosecution. The Cartel Court has not yet taken a decision.

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

In spring 2008 the FCA started an investigation into the Austrian gasoline retail markets (pump prices). Taking into account the scarcity of resources FCA did not intend to cover all the features of these markets but concentrated its efforts on specific issues. In July 2008 FCA published a first report ([http://www.bwb.gv.at/BWB/Aktuell/spritpreis\\_23072008.htm](http://www.bwb.gv.at/BWB/Aktuell/spritpreis_23072008.htm)) which covered two topics:

1. Do Austrian pump prices follow Platts notations in an asymmetric order?
2. Can variance screen tests give indications for tacit collusion on the Austrian market?

The FCA built up (with the help of auto-touring associations) a huge data bank covering on average 1700 (out of approximately 2500) gasoline stations over a period of five years. For gaps in the data series the estimations could only be based on the period September 2004 to March 2008. The result of the econometric estimations pointed to a lagged response (of approximately 2 days) of Austrian prices if Platts notations go down in comparison to the reaction to an upward movement of Platts notations.

Using the average price data the European Commission publishes weekly for Diesel as well as Super95 prices, the FCA tried to apply a variance screen test. The calculations were based on the time span January 2000 to May 2008 for fifteen member states. The calculation exercise was done with net as well as with gross prices; as statistics the variation of first differences as well as the variation coefficient of prices were applied. To summarize, the variance screen test showed no reliable results: The ranking of several member states differed significantly if net or gross prices were used and depended also on the type of statistics.

The investigation is still in progress.

### **Trade in semen of the bovine species**

In 2007 the FCA received a complaint of a semen storage centre, pointing out that it faced difficulties to start business in Styria due to several practices of the regional monopolist. Investigations of the FCA showed that the difficulties encountered by the complainant were caused to a large extent by the legal framework.

According to the law of the Austrian provinces, semen of domestic animals of the bovine species must be sold to end users in a province only by enterprises accredited under the law of the respective provinces. The relevant categories of end users are veterinaries, artificial inseminators, own stock inseminators and cattle owners. In practice the mentioned laws create territorial monopolies as in most of the Austrian provinces only one semen collection centre or one semen storage centre is accredited. This legal framework is currently under revision, also due to EC infringement proceedings. As a result, provisions safeguarding exclusive supply for accredited collection centres or semen storage centres in their territories will be removed by the end of 2008.

The FCA interrogated the regional monopolists to find out about practises in the business. This investigation showed that the regional monopolists have concluded exclusive supply arrangements in order to tie the different categories of end users.

The relevant product market is the market for sales of deep-frozen semen of domestic animals of the bovine species to end users. In the present investigation it was left open, if this market can be further divided into categories of end users and/or according to the breed to which the bull sperm belongs. As a result of the legal framework the relevant geographic markets are the provinces of Austria. Even after the revision of the questionable provisions in the laws of the provinces market circumstances support a regional market delineation. Established market participants have built distribution systems supplying end users with semen and insemination utensils in rural areas directly. This infrastructure cannot easily be duplicated, in particular as most end users are tied by exclusive supply arrangements.

Competition concerns were raised with regard to the mentioned contractual practices obliging end users to deal exclusively with a regional monopolist. The questionable contractual practices include the tying of supply with semen and insemination utensils such as semen containers, continuous supply with nitrogen etc. Furthermore, the market investigation identified questionable clauses and practices being part of so called "bull co-operations", i.e. co-operations between semen collection centres with the aim of sharing risk and opportunities in testing and marketing breeding bulls. The contractual practices of bull co-operations result in market allocation and price-coordination.

Due to the FCA's negotiations all established market participants are having their contracts with endusers reviewed in order to remove exclusivity clauses. As part of competition advocacy the FCA made also clear that territorial merchandising activities must not impair parallel trade and advised market participants to insert clauses in "bull co-operations" that refer to the criteria set by the Commission Guidelines on Vertical Restraints.

### **Liberal Professions**

The FCA together with the FCP negotiated with the Austrian Chamber of Tax Consultants and Tax Accountants about their recommendation concerning fee calculation. The calculation included a base amount and surcharges which could be charged to a client. The recommendation of the chamber to its members constituted an infringement of the Austrian and EC competition law as it had to be qualified as a decision by an organisation of undertakings which was capable of leading to a restriction of competition. As a result of intense discussions, the Chamber withdrew their recommendations, thereby avoiding a legal procedure with the Cartel Court.

### **Breach of obligation to provide full information: 120.000 Euro fine imposed**

In the course of its comprehensive groceries sector inquiry (see earlier OECD report 2006-2007 and [http://www.bwb.gv.at/BWB/English/groceries\\_sector\\_inquiry.htm](http://www.bwb.gv.at/BWB/English/groceries_sector_inquiry.htm)) the FCA sent requests for information to a vast number of market participants, i.e. supermarkets and their suppliers. The requested information also included business secrets (business terms and conditions) which many of the addressees refused to disclose to the FCA. In order to enforce the undertakings' statutory obligation to provide information, the FCA initiated proceedings at the Cartel Court. The FCA settled with almost all of the undertakings in the course of the proceedings, which agreed to provide for the information the FCA needed for the purposes of its inquiry. Only one company kept on refusing the information and the Cartel Court (confirmed by the Supreme Cartel Court) obliged it to provide the information. In its decision the Cartel Court rejected the argument that the obligation to provide information would not apply to information containing business secrets.

Since - even after the Cartel Court's decision was upheld by the Supreme Cartel Court and became valid - the company still did not deliver (full) information, the BWB applied for the imposition of fines and penalty payments. Only after the Cartel Court decided on the imposition of

daily penalty payments the company disclosed full information. Finally, 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 plus an additional penalty payment in the amount of €5.000. Both, the FCA and the company appealed against the Court's decision. The Supreme Cartel Court, in its decision of 13 February 2008, allowed the FCA's appeal by upholding the Cartel Court's decision on the penalty payment and by raising the fine up to € 120.000. In its decision the Supreme Cartel Court stresses the importance the Cartel Act attributes to the obligation to provide information through its sanctions' system and emphasises its role for efficient enforcement of competition rules.

*bb) Abuse of a dominant position*

**Excessive Pricing: Remedies for the Jet Fuel Market at Vienna International Airport**

**a) Supply of jet fuel**

Following comprehensive investigations (for details see Annual Report 2006/2007) the FCA opened a proceeding concerning excessive pricing of the oil and gas corporation OMV in the jet fuel market at the Vienna International Airport (VIE) with the Cartel Court, the decision making body in antitrust matters.

The FCA aimed at imposing structural remedies able to address the two main competition issues:

- OMV controls - on the site of its refinery (in 7 km distance from the airport) - the only viable supply alternative: rail transport. Furthermore, the sole storage facilities linked to the rail discharging installations as well as the pipeline to the airport are part of the refinery installations of OMV.
- The control of the supply chain mentioned above together with the joint control of the hydrant installations under the airfield (FSH) enables OMV to closely monitor all the supply of the competitors.

To speed up the procedure, the FCA discussed intensively appropriate remedies with OMV. Finally, OMV agreed. After the commitments were subjected to a market test, the Cartel Court imposed three structural remedies on OMV in April 2008. (For details: [http://www.bwb.gv.at/BWB/Aktuell/vie\\_omv\\_04042008.htm](http://www.bwb.gv.at/BWB/Aktuell/vie_omv_04042008.htm))

1. The whole alternative supply chain from the railway discharging facility to the airfield has to be opened to all interested parties in a clear, transparent and foreseeable manner. As all these installations are imbedded into the refinery, a detailed technical annex for the conditions of use was elaborated and is integral part of the remedies.
2. OMV has to disinvest its share of FSH; a trustee is mandated with the disposal.
3. OMV has to prevent the information flow concerning the supply of competitors between its logistics units and its jet fuel sales unit.

A separate private litigation case initiated by Austrian Airlines (AUA) is still pending.

**b) Hydrant installations under the airfield (FSH)**

The FCA also investigated a possible price abuse of FSH. Its hydrant installations constitute an essential facility as no other means exist to deliver the jet fuel into the airplane. It is therefore comparable to other essential parts of airport infrastructure.

In the end the FCA decided not to file an application with the Cartel Court as competition problems could be solved by other means:

1. By its investigations the FCA initiated a change in the law governing airport infrastructure: as of January 2008 hydrant installations became subject to regulation.

2. The regulator (Ministry of Traffic) almost finalised the administrative procedures to which the FCA contributed its extensive cost calculations.

### **ORF / ÖSV Ski World cup media rights**

Since 2002 TV and radio broadcasting activities have been liberalized in Austria. ORF - the former public law broadcaster - still has considerable market power particularly with regard to TV advertising markets. ÖSV - the national association of regional and local skiing clubs - is marketing media rights relating to Austrian Ski Worldcup events. In 2001 ÖSV and ORF concluded an agreement conferring to ORF the exclusive right of transmission of all Austrian Ski World Cup events via TV (and partly as well on radio) for the seasons 2002/3 until 2011/12. Competitors had no opportunity to participate in tender procedures.

In 2006 the FCA informed ORF and ÖSV that several clauses of the contract were considered to violate Art. 81 EC and started negotiating on commitments. In July 2006 a formal procedure at the Cartel Court under §§ 26, 27 Cartel Act was opened by the FCA. In February 2008 the Cartel Court made the commitments agreed upon by decision binding on ORF and ÖSV.

As part of the commitment the parties agreed to abolish exclusivity granted by the treaty concluded by ORF and ÖSV in 2002/3. ÖSV agreed to tender pay TV rights, parallel TV news coverage and rights for radio transmission for the seasons 2008/9 to 2011/12. The commitments contain also basic rules for the tendering procedure for all media rights concerning Austrian Ski World Cup events for five seasons after 2011/12 (e.g. a no single buyer rule for TV transmission rights).

### **Opening of market for collection of waste accumulated in households: joint use of infrastructure**

In accordance with the condition and clearance decision of the EC Commission on cartel matters of 2003 (COMP D/35470 and COMP D/35473), the FCA worked on the opening of the market for the collection and recycling of waste accumulated in households.

The EC decision stipulated that ARGEV (ARGEV is one of the undertakings of the waste and recycling system ARA in Austria) has to allow third parties to use its infrastructure for the collection of waste accumulated in households. On this market only the ARA system is active, whereas on the market for waste accumulated in undertakings several waste and recycling systems exist. ARGEV implemented some provisions in its relevant contracts with the partners (on the one hand undertakings of the recycling industry and on the other hand undertakings/public bodies collecting their waste for ARGEV).

However, the FCA had to ask ARGEV for clarification of some points and published the result on the website after consulting competitors. These amendments and their clarification should enable market entrance of possible competitors and thus competition on the market for waste and recycling system for waste accumulated in households.

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

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

Between 1 July 2007 and 30 June 2008 a total of 302 national concentrations were notified. In 13 cases an application for in-depth-investigations was filed by one or more of the official parties leading automatically to phase II proceedings.

In three cases the parties withdrew their notification during phase II and did not notify again. One merger (First Choice Austria GmbH - Splashline Event und VermarktungsGmbH) was cleared

only subject to remedies and one was cleared without remedies. In three cases the application for examination with the Cartel Court was withdrawn by the official parties due to commitments of the parties and in three additional cases without any commitments. Two cases are still pending.

*b) Summary of significant cases*

**Porsche - Autohaus Stipschitz**

In April 2007 Porsche Austria group notified the acquisition of Autohaus Stipschitz. Porsche is a global player in the automotive industry. Its Austrian business includes import as well as retail trade of and services for VW group products (VW, Audi, Seat, Skoda; 56 locations in Austria, 14 thereof in Vienna and Province Lower Austria, thus being by far the biggest retailer of VW-products) plus wholesale of spare parts for VW group cars. Stipschitz is licensed retail and service partner for the VW and Audi brands in Lower Austria.

The FCA and the FCP filed an application for examination with the Cartel Court in May 2007 particularly for the following reasons:

- Porsche holds massive market shares on all relevant markets.
- Porsche gains a multiple of the revenues of its closest competitors most of which are family run businesses.
- Vertical Integration: due to the nature of distribution systems in the automotive industry (licensed) retailers and repairers are to a very high extent dependent on manufacturers/importers. Porsche covers all stages of distribution and therefore is the largest competitor to other VW-brands retailers and repairers as well as their (to a large extent exclusive) supplier at the same time.
- In its area of operations Stipschitz was Porsche's biggest and most aggressive competitor and able to disturb possible coordination between competitors. Furthermore, Stipschitz featured lower prices than Porsche did.
- The notified transaction concerned the two most important undertakings in the relevant market(s).
- Possible newcomers to the relevant markets face serious barriers to entry.
- Consumers (apart from a limited number of high volume customers who are usually reserved to the importer) typically cannot exert demand side power to discipline excessive supply side behaviour.

The Cartel Court nevertheless cleared the notified transaction and did not impose any obligations on the parties to the concentration. The Cartel Court held:

- Market definition: brand-specific services for cars 0-4 years old;
- The abovementioned brand-specific services markets (secondary markets) are closely connected to the market for sale of new cars (primary market).
- There is intense competition on the primary market.
- The market power an undertaking may have on a secondary market is crucially limited by competition on the primary market. Even though the relevant markets are brand-specific, undertakings on the secondary markets are – via the primary market – crucially limited by competition from other brands.
- On the relevant (secondary) market Porsche and Stipschitz – despite high market shares and financial superiority – could therefore not act independently of competition because consumers would switch to other products on the primary market.

### **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. 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 put emphasis on intensifying international co-operation with other European competition authorities both on bilateral and European level. In July 2008 the FCA - together with the Czech NCA - organised a high-level meeting between representatives of 12 national competition authorities of Central and Eastern European countries and the European Commission which resulted in the signing of a Memorandum of Understanding. Furthermore, a bilateral agreement was signed with the Croatian competition authority.

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

On 1 July 2007 Mr. Thanner was appointed as Director General of the Federal Competition Authority. Between 1 July 2007 and 30 June 2008 the FCA increased its staff by one lawyer. By then - additional to the Director General and the Deputy Director General - fourteen lawyers, five economists, one other professional and seven persons as support staff, i.e. all together 29 persons, were working at the FCA. More staff is still needed. Each case handler is responsible for all cases (mergers and anti trust) 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.