ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN AUSTRIA 2005 - 2006

Executive Summary

The year 2005/2006 was marked by the reformed Austrian Cartel Act, which came into force on 1 January 2006 and which brought important amendments. Despite still very limited staff resources three sector inquiries were carried out between 1 July 2005 and 30 June 2006, around 490 national and 910 European cases were examined and a substantial number of detailed investigations were conducted, including a vast number of interrogations as well as one dawn raid.

I. Changes to competition laws and policies

I.1. Summary of new legal provisions of competition law and related legislation

On 1 January 2006 the reformed Cartel Act (Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen) and the amendment of the Competition Act (Bundesgesetz über die Einrichtung einer Bundeswettbewerbsbehörde) came into force. The amendments intend to bring national competition law fully in line with Council Regulation (EC) No 1/2003. The Austrian Unfair Competition Act 1984 was also amended and came into force on 28 June 2006. Furthermore, several changes took place in the Austrian energy law. The most important changes can be summarised as follows:

a) The reform of the Austrian Cartel Act

The Austrian typology of cartels with its differentiated rules was replaced by a general prohibition of restrictive practices following the example of Art. 81 EC Treaty. The national system of cartel notifications was abolished and a system of legal exception was implemented according to Regulation (EC) No 1/2003.

After the reform of the Cartel Act, mergers will have to be notified with the Federal Competition Authority (FCA) instead of the Cartel Court - as this was the case until now. However, the latter remains the institution which will take the final decisions. Two of the turnover threshold levels were raised. Cooperative ventures will be subject to merger control if they permanently fulfill all functions of an independent economic entity.

b) Amendment of the Austrian Competition Act

One of the most important changes of the recent reform was the implementation of a leniency programme. The FCA may refrain from applying to impose an administrative fine if the following conditions are met: The undertaking has stopped participating in a cartel; it has informed the FCA, before it found out about the facts of the case itself; it cooperates with the FCA without restrictions and it has not forced others to participate in the cartel. If the applicant only fails to inform the FCA in time he may apply for a reduced fine. For reasons of transparency the FCA has to lay down its practice in implementing the leniency programme in a manual. If an undertaking wants to call upon the leniency programme the authority will inform the applicant in a non binding notice if it will apply the programme. Due to transparency reasons the FCA has to publish its own and the Federal Cartel Prosecutor's (FCP) applications to the Cartel Court concerning a suspected infringement of Austrian or European Cartel Law. Such a notice must not contain any business secrets.

c) Amendment of the Austrian Unfair Competition Act 1984

Up to now the Austrian Unfair Competition Act 1984 provided that in several cases of unfair commercial practices not only concerned competitors but also the Austrian Federal Chamber of

Labour, the Austrian Federal Economic Chamber, the Austrian Chamber of Agriculture and the Austrian Trade Union Federation may file for injunctive relief.

The FCA is however frequently confronted with cases in which provisions against cartels or against the abuse of dominant positions cannot be applied but there might be an infringement of the Unfair Competition Act. These illegal unfair practices include practices such as contra bonos mores (e.g. boycott of suppliers, exploitation of the predicament of a supplier), misleading actions, deceptive packaging, prohibited free additions to products or services (premiums) and the distribution of warrants to consumers for the repeated purchase of goods.

For practical reasons the FCA has been empowered with the latest amendment of the Unfair Competition Act and the Competition Act to file for injunctive relief in the above mentioned cases.

d) Changes in the Austrian energy law
In 2006 major changes took place in the Austrian energy law. Several Acts were affected by these changes. The most important changes are as follows:

- strengthening customer rights
  - implementation of a supplier of last resort,
  - the general terms for the supply of electricity and gas have to be notified to the regulator,
  - the readability and information content of electricity and gas invoices, information and advertising material have to be improved; respective requirements can be found in the gas and electricity acts,
  - the price of the electricity has to appear as a separate item on the invoice, in contracts and general terms of the supplier.
- cross border transport of electricity
  - The regulatory authorities are responsible for monitoring compliance with the respective directive.
- cross border transport of gas
  - So far, cross border transports have not been subject to regulated network access. According to the amendment the general terms as well as the calculation methods of the cross border tariffs have to be notified to the regulator.

I.2. Special sectors

a) Broadcast

Broadcasting market analysis
In the reporting period KommAustria, the regulatory body for the broadcasting industry, notified two decisions to the European Commission in which Österreichische Rundfunksender GmbH & Co KG (ORS), a 60% subsidiary company of the PSB Österreichischer Rundfunk (ORF) was assessed to have a significant market position on the wholesale markets for terrestrial television broadcasting (analogue) and for terrestrial radio broadcasting (analogue, FM). KommAustria imposed remedies on ORS to remove the identified competition concerns in both markets. ORS appealed against both decisions to the Bundeskommunikationssenat (BKS), i.e. the appellate body. The proceeding is pending with the BKS.

KommAustria is meanwhile carrying out a review of the ordinance concerning the definition of the relevant markets pursuant to Art. 15 of Directive 2002/21/EC respectively Art. 36 TKG 2003.

Digitization of terrestrial TV broadcasting
On 23 February 2006 KommAustria granted the first licence to an operator of two terrestrial multiplex platforms (MUX A and MUX B) distributing DVB-T broadcasts. The licence was assigned to ORS, the only applicant of the tender procedure pursuant to Art. 23 – 26 of the Private Television Act. MUX A will start its service on 26 October 2006.

According to KommAustria's licence decision the operator of the multiplex platforms A and B has to comply with several obligations concerning must carry, coverage (roll out) and non-discrimination.

MUX A has to carry the two ORF channels and the nationwide private channel ATV. The capacities have to be offered for additional services on MHP basis (e.g. EPG). ORS has to provide a coverage for at least 60% of the Austrian population by 1 March 2007 and of 90% by 1 March 2009. In addition, bit rates of a certain level have to be offered on inquiry for programs (signal transmission) and the use of MHP standard for additional services. The award of additional capacities has to follow a tender procedure accomplished by ORS under certain selection criteria. A reasonable fee can be charged for distributing the channels. The correctness and appropriateness of this procedure and fees may be checked by KommAustria.

MUX B will transmit regional or further nationwide private broadcasting channels as well as five DVB-H channels. The coverage of 60% of the Austrian population has to be provided for by 1 January 2008.

Simulcast, i.e. the simultaneous digital and analogue broadcast, will last for about four months in each region, so complete analogue turn-off will be possible by the end of 2010.

b) Telecommunication

Market definition

Review of markets in the Telecommunications Markets Ordinance (TKMVO 2003)
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 future market analyses. For this purpose, in December 2005 / January 2006 a public consultation was carried out on the revision of the Telecommunications Markets Ordinance (TKMVO 2003).

Once the draft version of the market review in the TKMVO 2003 had undergone public consultation, RTR completed on 6 February 2006 its review of the markets below specified in the TKMVO 2003 as markets which are subject to *ex ante* regulation as specified in Art. 36 Par. 1 TKG 2003.

The following 13 markets are therefore subject to *ex ante* regulation:

- Access to the public telephone network at a fixed location for residential customers (retail market)
- Access to the public telephone network at a fixed location for non-residential customers (retail market)
- Publicly available local and/or national telephone services provided at a fixed location for residential customers (retail market)
- Publicly available local and/or national telephone services provided at a fixed location for non-residential customers (retail market)
- Publicly available international telephone services provided at a fixed location for residential customers (retail market)
- Publicly available international telephone services provided at a fixed location for non-residential customers (retail market)
- Call origination on the public telephone network provided at a fixed location (wholesale market)
- Call termination on individual public telephone networks provided at a fixed location (wholesale market)

- The minimum set of leased lines, which comprises specified types of leased lines up to and including 2 Mbit/s (retail market)
- Trunk segments of leased lines (wholesale market)
- Terminating segments of leased lines (wholesale market)
- Unbundled access, including shared access, to metallic loops and sub-loops for the purpose of providing broadband and voice services (wholesale market)
- Voice call termination on individual public mobile telephone networks (wholesale market)

Market analysis

Market analysis procedure for the wholesale market for broadband access to the Internet
On 2 May 2005, 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 under Art. 1 No. 17 TKMVO 2003 (as amended on 2 May 2005).

On 28 February 2006 the TKK issued its final decision, stating that Telekom Austria AG possesses significant market power on the above mentioned wholesale market for broadband internet access. Due to the competition problems identified, the following regulatory instruments were imposed on Telekom Austria in accordance with Art. 37 Par. 2 TKG 2003:

1. a special access obligation,
2. a non-discrimination obligation, including the obligation to provide a reference offer,
3. price regulation based on "retail minus" calculations,
4. separate accounting for the individual markets in the TKMVO 2003 in order to prevent illicit cross-subsidisation.

Market analysis procedures for mobile termination in individual mobile networks
On 24 October 2005 eight market analysis procedures under Art. 37 TKG 2003 were initiated by TKK with the purpose of investigating whether one or more companies possess significant market power or effective competition prevails on the individual wholesale-markets for termination in mobile networks (six procedures), respectively on the individual wholesale-markets for termination in fixed networks (two procedures).

These market analysis procedures were deemed necessary because Austrian mobile operators started to offer mobile end-user-products with the specific feature of providing a fixed network number for the end-user. This enables one to call a mobile end-user by dialing an “ordinary” fixed network number instead of a number reserved for mobile networks. In order to avoid competitive distortions the TKK issued on 6 February 2006 six decisions concerning all six Austrian mobile operators. TKK amended the already existing non-discrimination obligation by extending and adjusting it to the described new services. The corresponding two market analysis procedures on the individual wholesale-markets for termination in fixed networks are not yet completed.

Market analysis procedure for wholesale international roaming
On 2 November 2005 a market analysis procedure under Art. 37 TKG 2003 was initiated by TKK with the purpose of investigating whether one or more companies possess significant market power or effective competition prevails on the wholesale-market for international roaming. In its draft measure of 24 July 2006, the TKK found no operator having significant market power. The final decision is due in September 2006.

Allocation of GSM frequencies 450 MHz range

In late 2005 – immediately after the Austrian Federal Ministry of Transport, Innovation and Technology delivered the relevant terms of use – a call for bids was launched for the allocation of frequencies in the 450 MHz range. Due to their propagation characteristics, these frequencies

are especially well suited for covering large areas, thus making them ideal for providing services in rather thinly populated rural areas.

In contrast to the previous allocation procedures, this procedure was carried out as a sealed bid auction. The applicants were thus required to submit their final bids along with their applications, and changes were no longer possible after submission. The minimum bid amounted to EUR 100,000 or EUR 125,000 per frequency packet. The frequencies were finally awarded to Green Network AB und T-Mobile Austria GmbH on 19 April 2006.

Merger T-Mobile – tele.ring

On 11 August 2005, tele.ring Telekom Service GmbH and T-Mobile Austria GmbH submitted a joint request under Art. 56 Par. 2 TKG 2003 for regulatory approval of changes in tele.ring's ownership due to T-Mobile's intention to acquire tele.ring. Parallel, the merger was also notified to the European Commission in compliance with the Merger Control Regulation.

The regulatory authority is required under Art. 56 TKG 2003, in procedures concerning changes in ownership, to assess the technical and competition-related effects in each case. The authority's approval may include appropriate remedies to the extent necessary to avoid adverse effects on competition. Approval shall be refused in any case if, despite the imposition of appropriate remedies, an adverse effect on competition is likely to arise as a result of the ownership transfer.

Due to the fact that tele.ring and T-Mobile were immediate competitors on the Austrian mobile market, it could not be ruled out that this change in ownership might have an adverse effect on competition. Therefore, TKK commissioned official experts at the RTR to compose an expert opinion examining the effects the planned merger could have on competition and, if applicable, the conditions which might be imposed in order to obviate such effects.

At the European Commission's request, the results of this opinion were submitted to the Commission together with additional information. In general, the regulatory authority and the relevant units in the European Commission co-operated closely in the course of the procedure.

Following the approval of the merger by the European Commission, on 26 April 2006 TKK approved the change in ownership structure submitted jointly by the two companies on 11 August 2005 with regard to the transfer of frequencies. In granting its approval, however, the TKK specified certain conditions. This highly complex review involved numerous hearings as well as a public consultation on the draft measure.

In order to ensure that competition among Austrian mobile network operators remains as fair and sustainable as possible, the TKK imposed the condition that T-Mobile must offer two UMTS frequency packages for sale to its competitors Hutchison 3G Austria GmbH and One GmbH within nine months. If these frequency packages are not sold within the period stipulated, they will once again become the property of the Republic of Austria, without reimbursement. It was not necessary to impose conditions with respect to GSM packages in order to ensure fair competition.

Voice over Internet Protocol (VOIP)

With the publication of its guidelines for Voice over IP (VoIP) service providers in October 2005, RTR recognized the increasing importance of VoIP services and met the market participants' need for a classification of these services under the existing legal framework.

These guidelines for VoIP services primarily target communications service providers and network operators. The guidelines clearly define RTR's position on VoIP-related issues based on the provisions of the TKG 2003 and the accompanying ordinances.

It is noteworthy that the RTR classified publicly provided VoIP services into two main groups: VoIP services (regulated as telephone services) which enable access to the classic telephone network (Class A), and (unregulated) "Internet-only" VoIP services (Class B).

In line with the classification of VoIP services in two groups, the guidelines explain the resulting requirements in connection with general approvals. In addition, the guidelines contain brief comments on the topics of monitoring, interconnection and competition issues in the context of VoIP services.

c) Energy

Merger and Acquisitions
Since mid 2005 there have been marginal structural changes in the Austrian electricity and gas markets.

The merger “Energie Austria” ("Österreichische Stromlösung") which was approved by the European Commission[1] was still not implemented by mid 2006. The negotiations between Verbund (the largest producer and distributor of electrical energy in Austria) and Energie Allianz (a merger between the regional local players Wien Energie AG, EVN AG, Linz AG, Energie AG OÖ, BEWAG) – respectively the parties involved – have become controversial in the last year. On the one hand, Verbund and Energie Allianz agreed on a merger on the wholesale and retail level (residential, business and industrial customers). The final agreement differs from the merger approved by the European Commission. Verbund shall hold a share of 33.3 % in the retail companies of Energie Allianz which supply residential and business customers. On the other hand Energie AG and Linz AG are going to opt out of Energie Allianz by the end of September 2006.

However, when assessing the merger today it should be remembered that at the time when clearance was granted, the notifying parties[2] (Energie Allianz and Verbund) as well as the European Commission[3] expected a rapid realisation of the European internal market for electricity. The actual developments in competition in the European electricity market[4] however raise serious doubts on the economic effects of “Energy Austria” in the form approved by the Commission from a competition policy point of view.

Verbund also filed a request to the FCA to buy back APC (Austrian Power Vertriebs GmbH), i.e. a subsidiary distribution Company of Verbund. This transaction would impede the implementation of Energie Austria because the commitments made to the European Commission are not fulfilled. Verbund also acquired 49 % of Energie Klagenfurt (municipal company) this year and plans to increase its share in two Austrian provincial companies (Kelag and Steweag-Steg) up to more than 50 %.

In April 2006 Verbund and OMV (latter is the quasi monopolist in the gas import market) announced the intention of a take over of Verbund by OMV in order to create a national energy champion. After serious intervention by some provincial companies which wanted to stick to the

[1] In contrast to the transaction as originally planned, Verbund had to divest its retail activities. This has since taken place.
[2] See para. 56 of the decision: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_092/l_09220040330en00910117.pdf
[3] See paras. 103, 145 and 156 of the decision: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_092/l_09220040330en00910117.pdf/.
[4] See Commission press release IP/05/11 of 7 January 2005 (“Commission’s report indicates that governments should do more to implement energy market opening measures”)

approved Energie Austria as well as by the political leaders of the provinces, Verbund and OMV stopped the negotiations.

Salzburg AG handed over 50 % of its share of the supplier MyElectric to Tiwag in 2005.

Retail Market
Since July 2005 Verbund has been active in the retail market. Verbund founded a supply company APS in order to enter the market for residential and business customers. Despite considerable expenses for marketing measures as well as low energy prices compared to the incumbents, the number of customers supplied by APS is still low after one year in the market. In the end of 2005 Verbund also started to supply metered customers.

The switching rates continue to be low in all customer segments. Even in the group of large industrial customers switching rates are comparatively low although this is partly due to the behaviour of the local player which (ultimately) often submitted the lowest bids in a tender. Interestingly, these local players offered electricity at higher price levels outside their grid area.

Although residential and business customers could save up to 15 % of their energy bill they still do not switch to a cheaper supplier. Since 2003 the yearly switching rates have declined from 1.1 % to 0.6 %.

Sector Inquiry EU and Benchmark Report
The first report of the sector inquiry as well as the so called Review Report 2005 of the European Commission[5] identified severe problems in the electricity and gas markets. The five main barriers presented in the Issues Paper[6] (November 2005) and Preliminary Report[7] are:

- market concentration,
- vertical foreclosure,
- lack of market integration,
- lack of transparency,
- price formation.

Before any conclusions can be drawn a number of issues have to be further analysed by the European Commission:

- the setting of prices on electricity wholesale markets, including power exchanges,
- the competitive assessment of the gas/oil price linkage in many contracts,
- various practices which inhibit customers from switching suppliers.

Furthermore, a number of issues require further action using competition and/or regulatory measures:

- the need to strengthen transparency obligations,
- increasing regulatory competencies in the area of interconnectors and international pipelines,
- the implementation of full structural unbundling,
- the increase of the powers of national regulators.

Unbundling
Even though the companies are obliged by law to unbundle their network business from other businesses, their market behaviour does not always adhere to its commitments yet. Integrated companies were still believed to increase their energy prices under agreements without all-

[5] COM(2005) 568
[6] www.europa.eu.int/comm/competition/antitrust/others/sector_inquiries/energy/issues_paper15112005.pdf
[7] http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/energy/

inclusive pricing clauses almost simultaneously in response to system charge reductions. Not just the timing but also the amount of the energy price increases that have accompanied reductions in system charges is questionable. Furthermore this behaviour sheds some light on the factual low intensity of competition.

The Directive 2003/54/EC stipulates minimum requirements for the unbundling of network companies. In Austria the requirements of the Directive have been implemented literally. The provinces are responsible for the implementation on the regional level. None of the provinces implemented the requirements on time. By June 2006 there were still some provinces which were late in implementing the legal requirements. Thus the integrated companies acted according to the law – but only its minimum requirements.

II. Enforcement of competition laws and policies

While most cases were dealt with by the FCA and the FCP jointly, some were followed only by the FCA or the FCP. The annual report of the FCP for the year 2005 can be viewed at http://www.bmj.gv.at/_cms_upload/_docs/bka_jahresbericht_2005a.pdf, the one of the FCA at http://www.bwb.gv.at/BWB/Service/Taetigkeitsberichte/taetigkeitsbericht_2005___2006.htm

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, 30 new cases concerning the abuse of a dominant market position, 30 new vertical restraints and 5 new non-binding recommendations 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

Driving schools

As reported in last year's annual report, the FCA launched a large investigation into the market of driving schools in the town Graz because of the suspicion of price-fixing agreements. As a result, sufficient evidence was found that driving schools fixed their prices at least during the period of May until June 2004 in order to apply for a fine at the Cartel Court for six driving schools. The FCP joined the application for a fine.

In the proceedings with the Cartel Court price fixing agreements were admitted. Consequently, the Cartel Court imposed a fine of a total of € 80,000 on all charged enterprises.

Joint liability of saving banks (Haftungsverbund)

The case concerns a co-operation of Erste Bank der Oesterreichischen Sparkassen AG (one of the four biggest retail banks in Austria) and 53 independent saving banks implemented in 2002 which included among other things intensive co-operation in product development, joint marketing and sales activities as well as joint processing and settlement. Co-operations of that kind are generally exempted from the Austrian Banking Act (Bankwesengesetz) and the national Cartel Act.

In January 2004, the FCA filed an application with the Cartel Court for prohibiting the agreement under Art. 81 EC which is not covered by the national exemption clauses.

In June 2006 the Cartel Court delivered its decision by prohibiting (in major parts) the cooperation between the savings banks. The case is now pending before the Supreme Cartel Court.

Recommended Fee Structure for Building Engineers (Honorarordnung der Baumeister HOB)
In June 2004, after extensive investigations, the FCP followed by the FCA took legal action against the recommended fee structure for building engineers. This fee structure was published as a so called "non-binding recommendation"[8] by the Fachverband Bundesinnung Bau (an association within the Austrian Federal Economic Chamber).

As reported in last year's annual report, the decision of the Cartel Court in April 2005 was an important landmark decision. For the first time the effect of a non-binding recommendation was examined in detail. It was clearly shown that this non-binding price recommendation was not compatible with Art. 81 EC, had the object of obtaining higher prices and thus restricting competition and was strictly against consumers' interest and that a non-binding recommendation constitutes a “decision of an association of undertakings”.

The Supreme Cartel Court upheld the decision of the Cartel Court in December 2005. In the meantime the non-binding recommendation was revoked and new calculation guidelines have been designed by the Fachverband Bundesinnung Bau in cooperation with economic experts in the field of the construction industry.

Licensing of media rights in Austrian Ski Worldcup events
Due to a complaint the FCA dealt with a long-term licensing contract between the Austrian Ski Federation and ORF, the former public law broadcasting monopolist. The contract conferred exclusive TV-transmission rights for Austrian Ski Worldcup events to the ORF. The FCA came to the conclusion that several clauses of the contract - in particular the long duration and the scope of the exclusivity granted - have the effect of restricting competition on the Austrian broadcasting market. An application for prohibition has therefore been filed by the FCA. The FCP supports the view of the FCA. Negotiations on commitments of the parties are ongoing.

Beer supply contracts
The FCA examined the beer supply contracts of the dominant Austrian beer producer with the catering industry regarding their compatibility with the relevant regulations of EC Community law.

The geographically relevant market was considered to be national. In line with test criteria already used in relevant decisions and/or decision drafts of the European Commission as well as the Dutch, Italian and Danish competition authorities, the contracts were reviewed and necessary modifications discussed. The most important result of the examination was that the former obligation of the catering industry to purchase more than 80 % of its need with the dominant beer producer was eliminated.

Dawn Raids
In May 2006 there was a two day inspection by the European Commission in several Member States including Austria on the premises of three undertakings concerning the energy-sector. 21 European Commission officials and 8 FCA officials searched for evidence on abuses regarding Art. 81 and 82 of the EC treaty. The FCA was also assisted by the national criminal investigation department.

[8] Non-binding Recommendations of Associations are measures of associations (mostly the Austrian Federal Economic Chamber) to help their members calculating prices. Most of these recommendations are titled "non-binding" but have a certain binding effect.

Sector Inquiry on Buyer Power of Supermarkets
In 2004, the FCA started its sector inquiry of buyer power of big supermarket chains vis-a-vis their suppliers. The inquiry has been triggered off by anonymous complaints and media reports. Subsequently, 180 questionnaires have been sent to market participants of the supply and demand side.

A significant number of companies refused to provide certain information related to terms and conditions. Since this information is essential for the completion of the sector inquiry, the FCA initiated legal proceedings at the Cartel Court in February 2005 to enforce the companies' obligation to provide the necessary information. Due to procedural difficulties - which have already been reported in last year's annual report - most of these proceedings lasted almost one year. By the end of last year the FCA achieved consensual solutions regarding how the information needs to be provided for the aims of the inquiry with all parties, except one company. In March 2006 the Cartel Court issued a formal order regarding the remaining company stating that the company has to provide the required information, with the exception of questions based on pure estimations. The company concerned filed an appeal against this decision which has not yet been decided on. Consequently, the final completion and publication of the concluding report still needs to be awaited.

Competition Stimulation Package for the electricity sector
Although the electricity sector is completely liberalised in Austria there is still a lack of competition. Thus, over the last few months the FCA in cooperation with the energy regulator E-control reached with VEÖ (Austrian Association of Electricity Companies) a consensus, called the "competition stimulation package".

The most important results can be described as follows:
- the readability and information content of electricity invoices, information and advertising material have to be improved,
- the price of the electricity has to appear as a separate item on the invoice, in contracts and general terms of the supplier,
- transparency will be enhanced by not using clauses with fix prices,
- a code of conduct for electricity suppliers was agreed on.

The compliance with these measures will be monitored by VEÖ once a year; the report of VEÖ will be controlled by the regulator and the FCA.

Sector inquiry gas
Due to gas price increases in autumn 2004 the FCA decided to conduct a sector inquiry in the Austrian gas market in co-operation with the regulatory authority E-control. The first interim-report of the sector inquiry was published in September 2005 and identified severe problems. The main problems identified in the report are the following:

- access to transport capacity to the Austrian Gas Market
- access to the market for storage and balance energy
- market concentration caused by mergers (EnergieAllianz, EconGas)
- market dominance of the incumbents
- vertical foreclosure
- lack of change of supplier
- lack of transparency
- long term contracts can be seen as market entry barrier

The FCA expects to conclude its sector inquiry in gas by autumn 2006 depending on the negotiations with gas companies on the solution of the above mentioned problems.

bb) Abuse of a dominant position

Constantin Filmholding GmbH: Fines for abuse of market power
In last year's annual report the Supreme Cartel Court's finding on the abuse of dominance conducted by a film distributor, i.e. the discrimination and refusal to deal with competing cinemas, was reported. End of 2005 the Cartel Court imposed a fine of € 150,000 for several competition breaches. This finding was confirmed by the Supreme Cartel Court in June 2006.

The film distributor was found to be dominant due to its superior market position vis-à-vis multiplex cinemas (i.e. cinemas with more than eight screens). Moreover, it was taken into account that the film distributor also has an established dominant position on the market for cinemas as he also holds cinemas.

The violating conduct of the film distributor was qualified by the Cartel Courts as being a systematically applied abuse as part of a purposeful corporate strategy. The incumbent was found to have refused to deal without objective justification, in several cases, with competing cinemas when at the same time its own cinemas have been supplied with films though their turnovers were lower than the turnovers of competing cinemas. Even a given consent to supply, however only less than four weeks before the film start, was considered to be abusive, since this would impede effective promotion and it was unlikely that the film distributor did not know earlier about the use of the film in its own cinemas.

Europay Austria (payment cards)
In the payment cards market (debit cards) a proceeding against Europay Austria Zahlungsverkehrssysteme GmbH (Europay Austria), i.e. a subsidiary of almost all Austrian banks and a major Austrian provider of payment cards and payment systems, was brought before the Cartel Court by Europay's competitor easycash. The suit was supported by the FCA.

In December 2003 the Cartel Court decided that Europay committed an illegal cartel with almost all Austrian banks with respect to a provision in the payment card contract. Only after approval by Europay, Austrian banks were allowed to acquire a stake in a competitor of Europay. Europay also abused its dominant position (85 - 90 % market share) on the market for payment with debit cards at POS-terminals: Competitors like easycash had to pay an unreasonably high interchange fee for using Europay's POS-terminals.

In October 2005 the Supreme Cartel Court rejected the decision on formal grounds and referred the case back to the Cartel Court. This was reasoned by the fact that the defendant (Europay Austria) has stopped the illegal behaviour (after the finding of the first instance) and according to the opinion of the Supreme Cartel Court it cannot deliver a decision on a behaviour which occurred in the past.

However the FCA and the FCP filed an application for a fine with the Cartel Court against Europay Austria. The case is still pending.

McArthur Glen Designer Outlet
In December 2005, the factory outlet centre operator *European Outlets GmbH & Co Leoville Entwicklungs- und Verwertungs KEG/European Outlets GmbH & Co Leoville Betriebs KEG* filed a claim under Art. 5 Cartel Act and Art. 82 EC Treaty respectively with the FCA, with the aim of stopping the alleged abuse of market power, exercised by its only competitor *MGE-RB Parndorf Gesellschaft m.b.H (McArthur Glen)*, in Austria. The FCA after an extensive investigation filed an application of abuse of market dominance in combination with a fine, with the Cartel Court.

After a complex analysis of the market definition, the FCA concluded that the relevant geographic market is regional, defined by the size of the catchment area which itself is defined by the travel time by car of 90 minutes between the consumers' home and the factory outlet center (FOC). The defendant's market share on the market of FOC operators, measured by the square meters of its sales area, is currently 51,5 %.

The FCA has reason to believe that McArthur Glen factory outlet centre abuses its dominant position with a radius clause in its lease contract with its shop tenants. This clause prohibits the tenants of closing additional lease contracts with other factory outlet centers within a radius of 60 km.

In principal, the FCA does not see an abuse in a radius clause as such, as long as it can be justified, for example in the case of initial extensive investment costs for the development and running of a new FOC. However, if a radius clause exists over a longer period, where substantial investments are no longer necessary, radius clauses, as in this case, significantly impede competition.

The final decision on whether this radius clause infringes Art. 5 of the Cartel Act and Art. 82 EC Treaty respectively, and therefore will need to be ceased by the concerned undertaking, will be made by the Cartel Court.

II.2. Mergers and acquisitions

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

Between 1 July 2005 and 30 June 2006 a total of 338 national concentrations were notified. In 12 cases an application for in-depth-investigations was filed by one or more of the official parties leading automatically to phase II proceedings.

In one case (Vossloh - Pfleiderer) the parties withdrew their notification during phase II and did not notify again. In four cases the mergers were cleared only subject to remedies or the notification was modified. These cases were: Airport Vienna - Airport Bratislava, Österreichische Rundfunksender GmbH - Medicur Holding GmbH, Bridgepoint - Tunstall, Strabag - Storf. In two cases a proceeding concerning the prohibited implementation of a merger prior to notification was opened and in one case the merger was cleared without remedies. In the other cases the application for examination with the Cartel Court was withdrawn by the official parties.

b) Summary of significant cases

Airport Vienna - Airport Bratislava
In February 2006 the indirect acquisition of 66 % of Bratislava Airport (BTS) by a consortia composed of Vienna International Airport (VIE) and a group of investors was notified to the FCA. The remaining 34 % shares would have been kept by the Slovak Republic. However, the merger will not take place: The Slovak government pulled out of the privatisation contract in mid August 2006 since the obligation, stipulated in the privatisation contract, of a clearance by the Slovak Antimonopoly Office by 15 August 2006 was not fulfilled. Hence, the intensive investigation conducted by the FCA will only be reported briefly.

The crucial point in the analysis of the FCA was the question which competition effects the merger would have on direct short and medium haul flights. Especially the question whether the demand for airports for these flights differs between low cost carriers (LCC), full service airlines (FSA) and charter airlines was examined as well as whether the catchment area of the airport

Vienna and Bratislava overlap. The FCA therefore sent out questionnaires to 68 airlines and met with tour operators.

The result of the market inquiry was that LCC, FSA and charter airlines differ clearly in their demand behaviour. E.g. in the last five years only LCC took BTS into account as viable alternative to VIE and vice versa. VIE and BTS were therefore interchangeable for LCC. On the contrary, for FSA BTS was per se no alternative for VIE. However, BTS was influencing competition in VIE, e.g. concerning airport charges or flight prices. Charter airlines and tour operators did not expect important effects of the merger as BTS does not seem to be an alternative for charter passengers yet. The main concerns of the airlines were related to airport charges and cross-subsidisation.

Consequently, the FCA as well as the FCP filed an application for further examination with the Cartel Court. After intensive negotiations the FCA, FCP and the notifying parties agreed on remedies in April 2006. The remedies aimed at compensating the loss of competitive pressure due to the merger. They included most importantly the establishment of a price cap on airport infrastructure services offered by VIE: for that 14 European airports that were thought to represent the current competitive constraints to VIE, were selected for benchmarking the prices of VIE. Furthermore provisions concerning capacity and slots as well as the unbundling (in accountancy terms) of airport infrastructure services vertically (with respect to other airport businesses) as well as horizontally (VIE versus BTS) were agreed on. The remedies would have been controlled by the FCA by means of a trustee.

As already stated the merger will however not be implemented due to the decision of the Slovak government.

Österreichische Rundfunksender GmbH - Medicur Holding GmbH
In August 2005 the acquisition of 40% of the shares of Österreichische Rundfunksender GmbH (ORS) by Medicur Holding GmbH (Medicur) was notified. ORS is not only active in the terrestrial transmission of broadcasting signals, but has already been qualified as likely aspirant for the only Austrian multiplexing licence for digital broadcasting issued before 2010. Medicur holds strong or even dominant positions in several media markets (daily newspapers, magazines, outdoor advertising).

The FCA as well as the FCP were above all concerned about the danger of impairment of media plurality due to the vertical integration of Medicur as strong media company as well about possible distortions of competition concerning the Electronic Program Guide (EPG; i.e. an electronic overview of all programmes disseminated by the multiplexer) to be issued by the multiplexer ORS. Consequently, an application for examination with the Cartel Court was filed. KommAustria, the Austrian broadcasting regulatory authority, was involved in the merger control procedure.

A possible impairment of media plurality was seen in the fact that - as multiplexer - ORS would be in a position to act as broadcaster. Due to the control of different media companies by Medicur such a broadcasting activity would however clearly not be in line with Art. 11 of the Austrian Private TV law (PrTV-G): This article excludes companies with qualified dominant positions in the markets for daily or weekly magazines, in radio broadcasting or in cabling from broadcasting activity under PrTV-G. This was important as the FCA - when analysing media plurality according to the Cartel Act - considers not only the wording and purpose of the relevant provisions of the Cartel Act, but takes into account the special laws dealing with media plurality such as Art. 11 PrTV-G as well. Therefore the parties agreed to a commitment not to act as broadcaster unless a change of law occurs.

Regarding the Electronic Program Guide (EPG) the parties agreed not to assign the production of the EPG or the marketing of advertising on the EPG to a media company or a company

aligned to a media company. Moreover, the parties agreed to market advertising on the EPG in a non discriminatory way.

The monopolist position that will be held by the multiplexer ORS has not been dealt with in particular as the PrTV-G contains sufficient rules concerning the access of competitors and non-discrimination.

Subject to the above mentioned remedies the merger was cleared in December 2005.

Vossloh - Pfleiderer
The acquisition of Pfleiderer, the worldwide second biggest rail systems company, by Vossloh, the worldwide biggest rail fastening systems company, was notified in August 2005. The FCA as well as the FCP were concerned about conglomerate effects - especially patent accumulation - and decided to file an application for examination with the Cartel Court.

In close collaboration the FCA and the German Bundeskartellamt faced the parties with serious competition concerns in each country. Consequently, the parties withdrew their notification in Austria and Germany in phase II.

Bridgepoint - Tunstall
The acquisition of Tunstall Holdings Limited ("Tunstall") by Bridgepoint Capital Group Limited ("Bridgepoint") was notified in July 2005. As Bridgepoint was bound by contract to cease its label "Attendo" after three years, it planned to concentrate the production from its subsidiary Attendo AB at Tunstall. The FCA was concerned about the high concentration in the Austrian market for social emergency call and communication systems and decided to file an application for examination with the Cartel Court.

Following negotiations between the FCA and Bridgepoint, the Cartel Court cleared the merger subject to the following remedies:

- Bridgepoint has to sell the Austrian subsidiary of Attendo AB, i.e. Attendo Systems GmbH, to the former manager (management by out).
- Attendo Systems GmbH receives exclusive production and label licences (technology licence agreement).
- Attendo Systems GmbH has to enter a direct supply contract with the manufacturer of Attendo products (supply agreement).
- Attendo AB and Attendo Systems GmbH conclude an agreement to ensure that Attendo Systems GmbH could enter supply agreements with competitors.

Wrigley - Joyco: non-compliance of a remedy
As mentioned in the Austrian annual report 2003 - 2004, the FCA filed in the merger case of Wrigley/Joyco an application for examination with the Cartel Court. The FCA disagreed strongly with the market definition proposed by the merging parties and had serious concerns about occurring predatory portfolio effects. The Cartel Court appointed an expert who proposed a remedy to ensure the product diversity within the market for bubble gum and which was agreed by all parties - although the FCA pointed out to the Cartel Court that the remedy would not be sufficient to solve the competition problems. The remedy laid down that Wrigley must continue the sales of all at the time of the Cartel Court decision existing Joyco brands in the market for bubble gum in Austria for the next two years. To specify the concerned Joyco brands and products in the market of bubble gum, Wrigley submitted a product list to the Cartel Court.

After investigation at the beginning of 2006, the FCA found out that Wrigley has not complied with the remedy, moreover that the submitted list of the concerned products was flawed, in the sense that some of the products listed actually were not sold at the time. Wrigley admitted its non-compliance. The FCA has filed for a fine for non-compliance. The case is pending with the Cartel Court. This is the first non-compliance with remedies case for the FCA.

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 (interviews of the Director General, requests for information by the press) the FCA regularly releases information on important cases and has given several speeches (e.g. various competition symposiums in Austria and abroad).

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. Furthermore, the FCA commented for instance on the amendment of the Waste Management Act (Bundesgesetz über eine nachhaltige Abfallwirtschaft) as well as on the Security of Supply Act (Energieversorgungssicherheitsgesetz), containing amendments to several acts governing the energy sector.

IV. Resources of competition authorities

Between 1 July 2005 and 30 June 2006 the Federal Competition Authority increased its staff by one lawyer. By then - additional to the Director General and the Deputy Director General - twelve lawyers, five economists, one other professional and seven persons as support staff, i.e. all together 27 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.