

# ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN AUSTRIA 2006 - 2007

## **Executive Summary**

Between 1 July 2006 and 30 June 2007 the FCA carried out – notwithstanding its staff shortage – a total of two sector inquiries, examined 440 national cases, handled 450 European cases, and made an extensive use of its investigatory powers, such as interrogations or dawn raids. Most important, the FCA concluded a comprehensive sector inquiry on buyer power of supermarkets. In the fight against cartels the FCA proved successful in a case brought against Europay which was eventually fined € 5 millions both for a cartel offence as well as for abusing its dominant position. Even though not legally binding yet, it is the largest fine ever imposed so far in Austria. 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. Several actions for the imposition of fines are pending before the Cartel Court involving some key industries.

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

### ***1.1. Summary of new legal provisions of competition law and related legislation***

#### **a) Consumer protection law**

Since December 2006 the Federal Competition Authority (FCA) is also responsible for certain issues in the field of consumer protection. These tasks are based on the national law (Verbraucherbehörden-Kooperationsgesetz, VBKG, BGBl I Nr 148/2006) and Regulation (EC) No 2006/2004 on co-operation between national authorities responsible for the enforcement of consumer protection laws. The FCA is responsible for the following cross-border infringements of consumer protection law: misleading advertising, consumer credit, package holidays, comparative advertising, indication of prices, unfair business practices.

If collective consumer interests are impaired by companies situated in Austria, the FCA prosecutes the relevant infringement and achieves either a judicial injunctive relief or a cease-and-desist declaration by the concerned company collateralised by an appropriate penalty.

If collective consumer interests of Austrian consumers are impaired by a company situated in another member state, the FCA requests the responsible authority of the member state to prosecute the infringement.

#### **b) Transposition of the Directive 2005/29/EC on Unfair Commercial Practices**

Directive 2005/29/EC on Unfair Commercial Practices aims at harmonizing divergent national rules concerning business-to-consumer commercial practices. It must be applicable in the Member States by 12 December 2007.

Although the leading provisions of the Directive comply with the relevant regulations in Austria some details had to be amended. The Implementation will be realised in form of an amendment of the Austrian Unfair Competition Act (Bundesgesetz gegen den unlauteren Wettbewerb 1984, BGBl Nr. 448/1984 idF BGBl I Nr. 106/2006).

## ***1.2. Special sectors***

### ***1.2.1. Broadcast***

#### **Broadcasting market analysis**

In the reporting period the Federal Communications Board (Bundeskommunikationssenat), the appellate body of the Regulatory Authority for Broadcasting (KommAustria), approved two decisions of KommAustria concerning the Broadcasting market analysis in May 2007. Those two decisions assessed Österreichische Rundfunksender GmbH & Co KG (ORS), a 60% subsidiary of the public service broadcaster Österreichischer Rundfunk (ORF), 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 meet the identified competition problems in both markets.

KommAustria is meanwhile carrying out 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. This review will take into consideration the recent developments in the digitization of terrestrial broadcasting.

#### **Digitization of terrestrial TV broadcasting**

In October 2006 the first terrestrial multiplex platform (MUX A) started with the distribution of DVB-T broadcasts. MUX A distributes the two programs ORF 1 and ORF 2 of the Austrian public service broadcaster and the program of the nationwide private TV channel ATV, as well as additional services on MHP basis. After some months of simulcast distribution of analogue and digital terrestrial signals, Österreichische Rundfunksender GmbH & CO KG (ORS, i.e. the holder of the first licence for two multiplex platforms A and B) started to turn off the analogue distribution in March 2007. Till autumn this year the simulcast distribution of analogue signals will be finished, whilst the further upgrading to a larger coverage of MUX A will be carried on.

The distribution via MUX B depends very much on the analogue turn-off in the start areas of MUX A and the thus effected release of additional frequency resources.

The second (also nationwide) platform MUX B will be regionalised and carry regional or nationwide private TV programs. In January 2007 ORS issued tender documents for potential applicants for the distribution of their programs via the second platform MUX B. ORS meanwhile closed provisory contracts with those broadcasters that complied with the criteria set out in the licence of KommAustria (beauty contest). One broadcaster, whose application was rejected, appealed against the decision of ORS, so that KommAustria will have to decide in this procedure in the next weeks. ORS presumably will start to distribute the selected programs via MUX B in October 2007.

In the first semester of 2007 KommAustria prepared the tender procedure for the third and fourth terrestrial multiplex platforms (MUX C and MUX D), which shall allow the distribution of local TV programs and mobile TV over DVB-H.

According to KommAustria's concept of digitization of July 2007, which will be submitted under a public consultation procedure, KommAustria will publish an order by the end of August 2007, where the selection criteria will be set out for the tender procedures for the regional and local multiplex platforms on the one hand (MUX C) and for the multiplex platform for mobile terrestrial TV over DVB-H (MUX D). This order is based on an amendment to the Private TV Broadcasting Act (PrTV-G) which will come into force by beginning of August.

## ***I.2.2. Telecommunication***

### **Market definition**

*Definition of the Wholesale markets for Bitstream access and of the Wholesale market for Transit services in the fixed public network*

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 two markets mentioned. After public consultation on the draft version of the new market definition, RTR completed its review of the above mentioned markets in October 2006 and May 2007 respectively.

Both markets are therefore still subject to *ex ante* regulation as specified in Art. 36 Par.1 TKG 2003.

### **Market analysis**

*Market analysis procedures concerning retail-markets for different telephone services*

In February 2006 several market analysis procedures under Art. 37 TKG 2003 were 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 different retail-markets mentioned below.

In April 2007, the TKK issued its final decisions, stating that Telekom Austria possesses significant market power on the mentioned markets with the exception of the market for publicly available international telephone services provided at a fixed location for residential customers.

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

- Access to the public telephone network at a fixed location for (non)residential customers
  - An obligation to enable Carrier (pre)selection for end-users;
  - A non-discrimination obligation, including the obligation to provide a reference offer for wholesale line rental based on a retail-minus calculation;
  - Price regulation based on cost orientation;
  - Separate accounting in order to prevent illicit cross-subsidization.
- Publicly available local and/or national telephone services provided at a fixed location for (non)residential customers
  - Price regulation based on cost orientation;
  - Separate accounting in order to prevent illicit cross-subsidization.
- Publicly available international telephone services provided at a fixed location for non-residential customers
  - Price regulation based on cost orientation;
  - Separate accounting in order to prevent illicit cross-subsidization.

The market analysis procedure regarding the market for publicly available international telephone services provided at a fixed location for residential customers was discontinued in April 2007, as effective competition was deemed to prevail on this market.

#### *Wholesale market for origination and termination in fixed-link networks*

In a resolution issued in February 2006, the TKK initiated procedures under Art. 37 TKG 2003 for the fixed-link origination market and for operator-specific fixed-link termination markets.

The following regulatory remedies were imposed on Telekom Austria once again due to its position of significant market power on the origination market and on its operator-specific termination market, as was already the case in 2004:

- An interconnection obligation under Art. 41 TKG 2003;
- An obligation under Art. 42 TKG 2003 to base charges for origination and termination services on the forward-looking long-run average incremental costs (FL-LRAIC) of an efficient operator (price regulation);
- A non-discrimination obligation under Art. 38 Par. 1 and Par. 2 TKG 2003;
- An obligation under Art. 38 Par. 3 TKG 2003 to publish a reference offer for origination and termination services;
- An obligation under Art. 40 Par. 1 TKG 2003 to maintain accounting separation and to set up a cost accounting system.

In contrast, the alternative termination network operators were only subject to price regulation in the form of benchmarking, as was already the case in the TKK's decisions in 2004.

#### *Market analysis procedure for the wholesale market for Transit services in the fixed public network*

The market analysis procedure regarding the mentioned market was discontinued in March 2007, as effective competition was deemed to prevail on this market.

#### *Market analysis procedure for the Wholesale market for trunk segments*

The market analysis procedure regarding the wholesale market for trunk segments of leased lines was discontinued in September 2006, as effective competition was deemed to prevail on this market: No company possesses a significant level of market power, and the number of companies already operating on the market as well as their geographical presence and network capacities ensure a sufficient degree of competition. In particular, in the medium term no operator would be able to raise prices above costs for connections between "trunk towns" without losing market share.

#### *Retail market for the minimum set of leased lines, which comprises specified types of leased lines up to and including 2 Mbit/s*

With regard to the retail market for leased lines comprising specified types of leased lines up to and including 2 Mbit/s, the TKK issued a decision on 27 November 2006 determining that Telekom Austria possesses significant market power on this market.

Telekom Austria was obliged to offer a minimum set of specified leased lines up to and including 2 Mbit/s (analogue leased lines with voice bandwidth of normal or special quality and digital leased lines with data rates of 64 kbit/s and 2,048 kbit/s), as well as leased lines with data rates of  $n \times 64$  kbit/s up to and including 2 Mbit/s.

In connection with this minimum offer, the TKK also required Telekom Austria to observe the principle of non-discrimination and to base its leased line charges on forecast costs. Moreover, Telekom Austria is required to publish easily accessible information on technical features and specifications, rates and charges (including setup charges and regular base fees), as well as delivery terms and conditions with information on ordering procedures, typical delivery periods, the minimum contract period, typical repair times and reimbursement procedures. Telekom Austria was also subjected to the obligation to maintain accounting separation and a cost accounting system.

### *Market analysis procedure for the Wholesale market for terminating segments*

With regard to the wholesale market for terminating segments, the TTK issued an official decision in November 2006 which identified Telekom Austria's position of significant market power on this market.

In general, Telekom Austria is required to provide non-discriminatory access to terminating segments of leased lines in response to reasonable demand.

For all of the above-mentioned services on the market for terminating segments, Telekom Austria was required to publish a reference offer comprising sufficiently detailed sub-services by March 2007. While Telekom Austria's rates and charges for access to terminating segments at locations specified by the customer must be based on the costs of efficient service provision, the fees for other access services are to be based on actual costs. In addition, Telekom Austria is subject to a non-discrimination obligation which requires the company to give companies which provide similar services equal treatment to Telekom Austria's own services or those of its affiliates. Telekom Austria was also subjected to an obligation to maintain accounting separation and a cost accounting system for this market.

### *Wholesale market for unbundled access*

In an official decision issued in December 2006, the TTK determined that Telekom Austria has significant market power on the wholesale market for "Unbundled access (including shared access) to metallic loops and subloops for the purpose of providing broadband and voice services" as specified in Art. 1 No. 13 TKMVO 2003, also known as the "market for unbundled access".

As in 2004, the following regulatory remedies were again imposed on Telekom Austria:

- A special access obligation under Art. 41 TKG 2003;
- A non-discrimination obligation under Art. 38 Par. 1 and Par. 2 TKG 2003;
- An obligation under Art. 38 Par. 3 TKG 2003 to publish a reference offer for unbundling services;
- An obligation under Art. 42 TKG 2003 to base charges for unbundling services on the forward-looking long-run average incremental costs (FL-LRAIC) of an efficient operator (price regulation);
- An obligation under Art. 40 Par. 1 TKG 2003 to maintain accounting separation and to set up a cost accounting system.

In the procedure, the TTK also dealt extensively with the issue of proportionality, coming to the conclusion that these obligations are indeed necessary and proportional, and do not constitute an unacceptable intervention in Telekom Austria's legal sphere.

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

In official decisions issued in December 2006, the TTK determined that the mobile network operators Mobilkom, T-Mobile Austria, One, Hutchison 3G and Tele2UTA have significant market power on their individual markets for termination in public mobile telephone networks as defined in Art. 1 No. 15 TKMVO 2003.

The following regulatory remedies were imposed on all mobile network operators:

- An interconnection obligation under Art. 41 TKG 2003;
- Various forms of non-discrimination obligations under Art. 38 Par. 1 and Par. 2 TKG 2003;
- An obligation under Art. 38 Par. 3 TKG 2003 to publish a reference offer for mobile termination on their respective company web sites;
- An obligation under Art. 42 TKG 2003 to base charges for mobile termination services on the long-run average incremental costs (LRAIC) of an efficient operator (price regulation);

- An obligation to enable interconnection partners to rescind the terms of contracts for the service of termination in their public mobile telephone network in writing at any time with a maximum notice period of two months.

#### *Market analysis procedure for wholesale international roaming*

In 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 final decision in September 2006 TKK found no operator having significant market power.

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

In May 2007, 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 broadband access under Art. 1 No. 17 TKMVO 2003. The procedure is still ongoing.

### ***1.2.3. Energy***

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

The year 2006 brought major changes in Austrian energy law which affected several legal acts. They aimed inter alia at improving customer rights and at strengthening competition.

The general terms for the supply of electricity and gas now have to be notified to the regulator. If the general terms contain provisions that violate good morals or the law, the regulator has the right to oppose them. As the Austrian competition authorities as well as the European Commission addressed the lack of information and the lack of transparency of market information (e.g. price information) in their sector inquiries, the new law forces suppliers to provide price information on invoices, in contracts and in their general terms, as a separate section and in an understandable and customer-friendly way.

Furthermore, some changes in the market rules took place. For instance the switching process was shortened from 8 to 6 weeks and it is now guaranteed that all suppliers receive the metered consumption data in the same quality. Despite the legal changes, some suppliers still present prices and customer information in an intransparent way (e.g. as an average price for the whole billing period, irrespective of price changes). The insufficient unbundling of integrated companies also contributes to the intransparency of the market as integrated network operators and suppliers use the same company name and have the same market appearance.

Changes to the Renewables Act contributed to an increase in intransparency, too. Instead of a subsidy scheme based on consumption, a lump sum metering point charge was introduced and the transfer price for renewable energy allocated to suppliers by the green power settlement agent was increased. Due to these changes, suppliers are now able to increase electricity prices for customers on the basis of the transfer price that is paid to the green power settlement agent. Customers do not have the possibility to check the calculations of the suppliers. Excessive transfer of the transfer price (so-called "additional expenses for renewables") to the customers can be evidence for a local player exploiting its dominant position.

Since January 2007, cross-border transports for gas have been regulated. Due to the amendment of the law the general terms and the calculation methods of cross-border tariffs have to be notified to the regulator.

By rearranging the import contracts in 2006, the structure of the Austrian wholesale market for gas changed. At the gas hub Baumgarten, the traded volume and the number of market

participants increased significantly last year. The improvement of the legal framework for the access to transit lines as well as market integration can boost the development of the hub.

Due to changes of the Gas Act, transparency on the market for gas storage increased. Storage companies are now obliged to publish more data. The number of storage users as well as the variety of storage products increased over the last years, too. Aside from seasonal products, storage companies also offer short-term products to their customers in order to increase flexibility.

### **Mergers and acquisitions**

Since mid 2006 there have been marginal structural changes on the Austrian electricity and gas markets. The public share in electricity and gas companies is still over 50 % and up to 100 %. After leaving the alliance EnergieAllianz, Energie AG and Linz AG merged their supply activities. No other activities are affected by the merger. Further cooperation and mergers are discussed among Austrian energy companies. This would lead to a decrease in the number of competitors and to a lower level of competition. The merger "Energie Austria" approved by the EU Commission was still not implemented by mid 2007.

### **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 federal states were responsible for the implementation on the regional level. Electricity and gas companies are obliged by law to legally unbundle their network business from other businesses. All companies 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 themselves. 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 16 % 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 the period from October 2005 to September 2006 was 0.9 %.

## ***1.2.4. Railway***

### ***Discrimination with locomotives and carriages***

In 2006 complaints were filed with the Austrian Rail Regulatory Body by Austrian railway undertakings which wanted to buy used operating facilities from the Austrian Federal Railway Company (OEBB). As the concession of a license is a very expensive and long lasting procedure, buying used locomotives that are licensed in Austria, is an interesting option for private railway undertakings. However, the OEBB does not sell these locomotives in Austria, but only abroad or even scraps them. This is a barrier for the development of the private railway undertakings.

Up to now no formal decisions were taken by the Austrian Rail Regulatory Body.

## **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 2006 can be viewed at [http://www.bmj.gv.at/\\_cms\\_upload/\\_docs/bka\\_jahresbericht\\_2006.pdf](http://www.bmj.gv.at/_cms_upload/_docs/bka_jahresbericht_2006.pdf).

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

#### *a) Summary of activities*

In the period under review about 25 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*

### **Alleged cartel agreements in the elevators and escalators industry**

The FCA filed in January 2007, an application for the imposition of fines against leading Austrian elevator and escalator manufacturers allegedly participating in prohibited cartel conduct as to the installation, services and modernization of elevators and escalators in Austria. The alleged anti-competitive conduct concerned project allocation and market sharing, price agreements as well as the exchange of other confidential market data. According to the FCA's information the anti-competitive behaviour started in the late 80ies and persisted until mid 2004. Those kinds of agreements constitute serious infringements of Austrian and European Competition Law. The case is still pending before the Cartel Court.

### **Dawn Raids**

In January 2007 there was an inspection by the European Commission in several Member States including Austria on the premises of two undertakings concerning the chemical industry. The FCA was also assisted by the national criminal investigation department.

### **Liberal Professions**

In Austria, liberal professions are organised in self-governed chambers which are empowered by law to issue regulations. The benefit of it seems to be a high quality of services, the disadvantages lie e.g. in high barriers to market entry and advertising bans.

Due to criticism by the OECD and the European Commission concerning the low level of competition in Austria, the Institute of High Studies (IHS) was commissioned to evaluate the developments and the progress of liberalisation in the field of liberal professions.

As a result of in-depth-investigations as well as competition advocacy by the Austrian Competition Authority and the Federal Cartel Prosecutor, some developments can be observed:

The Chamber of Architects revoked its recommendations concerning fee calculation by the end of 2006 and established provisional new guidelines, which now seem to be in line with European and Austrian Competition Law. Additionally, some changes in the field of continuing education were made.

The FCA negotiated with the Chamber of Chartered Public Accountants and Tax Consultants concerning their recommendations concerning fee calculation. As a result of intense discussions, both – the Chartered Public Accountants as well as the Tax Consultants – withdrew their

recommendations and changed them into clear guidelines in accordance with the existing competition law.

As to notaries and lawyers, no changes can be noticed in the last years.

A proceeding against Austria – initiated by the European Commission - is pending regarding some aspects of the Pharmacies Law.

### **Sector Inquiry on Buyer Power of Supermarkets**

In 2004, the FCA started its sector inquiry on 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 were sent to market participants on the supply and demand side.

Since a significant number of companies refused to provide certain information related to terms and conditions, the FCA initiated legal proceedings at the Cartel Court in February 2005 to enforce the undertakings' obligation to provide such information. The last company provided the requested information only in late 2006. Due to these procedural difficulties, the FCA abstained from requesting additional information. The FCA concluded the inquiry in June 2007 with the subsequent main results.

The grocery sector in Austria is - even compared to other markets in Europe - highly concentrated. The main competitive constraint comes primarily from the growing limited assorted discounters. The entry barriers into the grocery market are high.

The inquiry on several upstream supply markets resulted in strong evidence for the existence of buyer power. The high dependency of suppliers is evident. A change of the sales channel, e.g. to exports, is in many instances not a viable option. The loss of a big customer leads to heavy financial losses. If there are neither strong brands nor any strong concentration on the supplier side, the buyer power of the retailers is almost unlimited.

An inquiry into the specific procurement markets is necessary to assess the degree of buyer power in the specific market. The higher the number of suppliers, the lower the alternative to the grocery sales channel, the lower the importance of brands (respectively the stronger the importance of private brands), the stronger is the buyer power of retailers. The positive effects of buyer power, like efficiency gains, have to be taken into account as far as they increase consumer welfare. The effects on consumer welfare depend on the level of competition between the supermarket chains. On the other hand, the possible reductions in product variety and innovation and the negative effects on investment due to buyer power have to be considered.

The terms and conditions between suppliers and retailers often lack transparency. Sometimes there is no quid pro quo, sometimes the services related to specific payments are rather unclear. The lack of transparency and the agreement on retrospective payments requirements reduce the planning security of suppliers. This may result in a reduction on investment and innovation.

The assessment of the abusive character of a specific agreement between a supplier and a supermarket chain requires complex, protracted investigation. However, because of the market situation described above the grocery sector will stay under scrutiny by the FCA - accordingly it will examine well-founded evidence on abusive conduct in the sector. Such investigations require sound evidence to be provided by suppliers, which have proven to be highly reluctant to provide such information in fear of retaliatory measures such as de-listing of products.

Another possible anticompetitive effect ensuing from enhanced buyer power is that smaller retailers may suffer a further loss in competitiveness in relation to their suppliers. New entrants

face the same problem, that is the lack of economies of scale in the negotiations with their suppliers. This may reinforce the trend towards higher concentration.

The central importance of competition in the grocery sector to the benefit of consumers demands intensive surveillance of the grocery sector and of the supply markets by the competition authorities, especially on those procurement markets characterised by high buyer power.

### **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; the final report was released in November 2006 and identified several problems. The main problems disclosed in the report as well as recent developments helping to solve these problems are the following:

- Access to transport capacity to the Austrian Gas Market: The change from negotiated to regulated access to transit-routes in Austria by amendments to the national law will strengthen the competences of the regulator and is a substantial progress towards creating equal conditions in the European gas-market. However, the net-operators (TAG GmbH, BOG GmbH, OMV) are being urged to eliminate existing capacity lacks and to upgrade their capacities.
- Hesitant development of the Central European Gas Hub (CEGH) in Baumgarten in the past. Meanwhile some progress has been made concerning the activities of CEGH as the operators have improved transparency and offer additional services in line with the authorities' recommendations. Still the further development will be under close scrutiny by the authorities.
- Long-term contracts in the downstream markets may be seen as market entry barrier although the situation in Austria differs substantially from the German situation. Long-term contracts have also been subject of the inquiry of the European Commission and principles for the evaluation of their impact on competition are being developed.

### **Competition Stimulation Package for the electricity sector**

Although the electricity sector is completely liberalised in Austria there was and still is a lack of competition. Thus, in the year 2006, 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 is currently monitored by an independent body (Ernst&Young) commissioned by VEÖ. The report will be released to the public in autumn 2007, but will be controlled by the regulator and the FCA subsequently.

#### *bb) Abuse of a dominant position*

### **AUA - OMV: Jet fuel at Vienna International Airport**

Following a complaint by Austrian Airlines (AUA) against the oil and gas corporation OMV in August 2006 the FCA investigated the market for jet fuel at Vienna International Airport (VIE). Initially the investigations covered a broad range of topics including price abuse as well as exclusionary practices and tacit collusion.

In its market delineation the FCA came to the conclusion that the relevant market comprises the supply of fuel of the specification Jet A1 as the demand of jet fuel by airlines has to follow well defined and standardised chemical traits. Geographically the market has to be restricted to VIE as the only viable alternative, i.e. tankering at other airports, is unfeasible for long-haul flights and can even with short and medium haul flights only be applied to a certain extent depending on weather, security, traffic and other conditions (following the data furnished by airlines other than AUA).

OMV is considered to hold a dominant market position on the relevant market due to following reasons:

The sole domestic source of jet fuel is a nearby refinery, owned by OMV, which is connected to VIE by a short (7 km) pipeline. Also the other oil companies active in VIE procure the demanded volume of fuel almost exclusively from this source. The main reason is that the other refineries in the neighbouring countries are either servicing predominantly their home markets, as they observe a discrepancy between their own productive capacity and the demand (net importers), or are solely or jointly owned by OMV itself which is the case in Bavaria (at the western border to Austria). As with other finished oil products being output of joint production, the supply of jet fuel is inelastic.

The only economically viable transport alternative to VIE is by rail. It has been used - to a limited extent - by OMV itself as well as by the complainant, AUA. Yet the discharging facilities as well as all storing facilities are embedded into the above mentioned refinery. Moreover, OMV - together with four other oil companies - jointly controls Flughafen Schwechat Hydrantengesellschaft (FSH), i.e. the owner of the hydrant installations under the airfield, which provide for the only means to deliver the jet fuel into the airplane. The control of these facilities enables OMV to closely monitor all the supply of the competitors.

With regard to the conduct, first inquiries produced the result that 1) there are no grounds for assuming any exclusionary practice of OMV and 2) the evidence for tacit collusion is too weak to qualify for further in-depth investigations.

Therefore, the FCA concentrated on the alleged price abuse. As jet fuel is a joint-product, which contributes only a small portion to the net production value of a refinery, a cost-based approach was considered to be unfeasible as it would only provide arbitrary results. Thus the only way left to approach the issue was price comparison. Being aware of the trickiness inherent in comparing prices the FCA tried to follow several strings of analysis: econometric estimations as well as simple arithmetic averages were applied and different samples of comparable airports were used.

The measure for the comparisons was not the price for jet fuel as such but the airport specific differential which regularly tops the (variable) international quotation for jet fuel (so called Platts quotations).

All the methods of computation revealed an elevated level of prices at VIE but with a wide range of deviations from the respective relevant benchmark differentials. Consequently, the FCA drew the conclusion that a price abuse cannot be excluded with the necessary degree of certainty. Therefore, it decided to submit the case to the Cartel Court, the decision making body in antitrust matters, in June 2007.

A way to impede possible abuses would be the reduction of the market power of OMV. The FCA identified several structural features limiting the access to the market. As mentioned above these include the control (or joint control) of discharging, storing and hydrant facilities by OMV as well as the information flow which enables OMV to closely monitor the supply of the competitors.

Structural remedies addressing these issues could lead to a more competitive environment for the supply of jet fuel at VIE.

The FCA also investigated a possible price abuse of FSH. Its hydrant facilities constitute an essential facility comparable to other airport infrastructure. While FCA already sent letters of objections to the joint owners of FSH, it did not yet decide whether to file a respective application with the Cartel Court.

The case is still pending. AUA filed a separate application with the Cartel Court dealing with a much broader range of alleged anti-competitive behaviour.

### **Europay Austria (payment cards)**

As reported in the last annual report, 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, - as applied by FCA and FCP - in December 2006 the Cartel Court imposed a fine of €5 millions on Europay Austria. The case is still pending with the Supreme Cartel Court.

### **McArthur Glen Designer Outlet**

In August 2006 the FCA filed an application of abuse of market dominance in combination with a fine with the Cartel Court. The FCA had reason to believe that the factory outlet centre operator MGE-RB Parndorf Gesellschaft m.b.H (McArthur Glen) abused its dominant position with a radius clause in its lease contract with its shop tenants. This clause prohibited the tenants of closing additional lease contracts with other factory outlet centres within a radius of 60 km.

In January 2007 the parties reached a settlement approved by the Cartel Court that the radius clause will no longer be enforced by McArthur Glen in Austria. The Cartel Court did not decide on the relevant geographical market, the market dominance and the radius clause.

### **Sitour: outdoor advertising in ski areas**

The FCA investigated the market for outdoor advertising in ski areas following complaints against the dominant company in this market, Sitour Produktions- und Werbe GmbH (Sitour). Sitour's owner is currently also the president of the Austrian Ski Association (ÖSV). Based on the results of the questionnaires sent to cable car companies as well as advertising customers the FCA defined a separate market for outdoor advertising in ski areas. Complaints about an alleged abuse of Sitour or ÖSV by tying sponsor contracts with ÖSV to advertising contracts with Sitour could not be confirmed. However, exclusionary practices by Sitour vis à vis cablecar companies were admitted and consequently terminated by Sitour.

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

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

Between 1 July 2006 and 30 June 2007 a total of 309 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 two cases the parties withdrew their notification during phase II and did not notify again. In four cases the mergers were cleared only subject to remedies. These cases were: Atlas Copco - ABAC, Moser Holding - Oberösterreichische Rundschau Group, eTel - Telekom, ECHO Zeitschriften und Verlags GmbH - Vorarlberger Medienhaus GmbH. In three cases the application for examination with the Cartel Court was withdrawn by the official parties and three cases are still pending.

### *b) Summary of significant cases*

#### **ETel - Telekom Austria**

In December 2006 the acquisition of sole control of eTel-group (eTel), a full range telecom provider with focus on business customers and fixed line services, by Telekom Austria (TA), the incumbent full range telecom provider, was notified to the FCA.

The FCA and the FCP investigated the merger extensively, cooperating closely with the regulatory authority, Rundfunk und Telekom Regulierungs-GmbH (RTR). Concerns arose primarily due to the fact that incumbent TA already owns the Austrian public fixed telephone network while eTel was among the relatively few alternative telecom operators.

The investigation showed in particular that due to the involvement of two full range service providers, the merger affected many markets of the telecom sector, most of which featured high concentration levels even before the merger was put into effect. Several facts indicated that TA held a dominant position pre-merger: very high market shares (stable, partly growing); close to monopoly situation on access markets; few and significantly smaller competitors, almost no alternative full service providers; highly fragmented buyer side (especially on retail markets); RTR had declared TA to have significant market power on many affected markets.

Thus, the merger would – if conducted as notified – have had several negative effects on competition, such as

- further increase of TA's already high market shares;
- loss of one of TA's scarce close competitors and an important competition force in particular due to the fact that eTel was one of very few full service providers;
- significant obstacles for customers wishing to change their provider (long term contracts, switching costs, few alternatives);
- on markets where interconnection of different networks is necessary, dominant companies often have the ability to restrict competitors' growth (raising rival's cost, lowering quality);
- increasing dependence of TA's wholesale customers due to loss of credible alternative provider;
- negative effects especially on retail markets for business customers since eTel had focus on business customers;
- no market entry to be expected.
- Telecom markets are (still) subject to regulatory provisions due to the fact that sustainable competition could not be established so far. A merger involving the by far largest and already dominant provider and one of its very few significant competitors is very likely to have negative effects on competition.

Therefore the FCA and the FCP filed an application for examination with the Cartel Court in January 2007, at the same time entering into negotiations with TA and eTel in order to discuss commitments that would allow clearance.

Negotiations resulted in the proposal of several commitments by FCA and FCP. The Cartel Court requested RTR to comment on the proposal.

RTR stated that some of the commitments would be necessary and per se sufficient. RTR particularly expressed worries about those commitments that would affect areas where RTR has statutory responsibility to define market conditions and firmly opposed overlaps of sector specific and general competition authorities' responsibilities which it detected in certain parts of the proposal.

The FCA and FCP however insisted on commitments that would significantly go beyond those deemed sufficient by RTR.

Finally TA accepted the commitments required by the FCA and FCP which are basically aimed to grant competitors additional business opportunities and facilitate future market entries in the telecommunication markets in Austria. They include the following:

- sale of eTel-infrastructure to competitors;
- temporarily sustaining certain wholesale agreements;
- additional TA wholesale offers;
- lowering prices of certain TA wholesale offers;
- improvement of unbundling processes;
- information obligations concerning possible special rights of contract termination for consumers;
- limited use of eTel-brand.

Following TA's commitments the FCA and FCP withdrew their applications thus clearing the merger.

### **Moser Holding AG / Oberösterreichische Rundschau**

In February 2007 the envisaged acquisition of joint control of the Oberösterreichische Rundschau Group (OÖ Rundschau Group) by Moser Holding AG (MH) together with the existing shareholders Investment Holding GmbH and Lancelot Media Holding GmbH was notified.

The OÖ Rundschau Group is publishing several weekly newspapers in the region of Upper Austria. With regard to weekly newspapers there is little competition in the region: Only one strong competitive title is covering the whole of Upper Austria, several smaller papers are published only locally.

MH is not yet active in media publishing in the region but is publishing the weekly freesheet "Bezirksblätter" in several regions, some of them bordering Upper Austria. Due to their high coverage particularly in rural areas they are a valuable means to local and regional advertising customers. Their high and cross-regional coverage however attracts also national advertising customers. With the market know how and the established organisational structure in the region the OÖ Rundschau Group could help to expand the "Bezirksblätter" also to Upper Austria thereby strengthening the position of OÖ Rundschau Group on the weekly newspaper market.

The FCA's major concern was however caused by co-operations between the parties and one of the other major regional player, the Wimmer Media Group. MH had contractual relations with the Wimmer Media Group regarding the publishing of a regional daily newspaper. Furthermore, the OÖ Rundschau Group and the Wimmer Media Group were shareholder of a firm not yet active

but created for activity in the field of media service in Upper Austria. Thus, competition between the Wimmer Media Group and the parties was already constrained. The implementation of the notified merger with the mentioned co-operations could have been used as structure for market foreclosure mechanisms exercised by OÖ Rundschau Group and Wimmer Media Group in the relevant markets in Upper Austria.

Therefore the FCA filed an application for examination with the Cartel Court in March 2007.

The investigation showed that the parties will neither acquire a dominant position on the market for cross-regional or national advertising nor for regional/local advertising in regional and local papers in Upper Austria. Competitive constraints are exercised by the two daily newspapers "Die Krone" and "Oberösterreichische Nachrichten (OÖN)". Thus competition in the media markets in Upper Austria is balanced between three major groups: the OÖ Rundschau Group, the Wimmer Media Group (OÖN) and Mediaprint (Die Krone).

As however the FCA's concern regarding the co-operation between MH and the Wimmer Media Group remained valid, the merger was cleared in May 2007 only subject to the following conditions: the parties conceded to terminate their co-operations with Wimmer Media Group. The parties moreover guaranteed not to enter in any form of exclusive cooperation with the Wimmer Media Group until the end of 2015 relating to the publishing and marketing of newspapers in Upper Austria. Simple licensing of the title "Neue" to the Wimmer Media Group by MH was exempted.

### **Atlas Copco / ABAC**

The acquisition of ABAC by Atlas Copco, both worldwide operating producers of air compressors, was notified in August 2006.

The FCA was concerned about unilateral effects, especially regarding the high concentration for screw compressors in combination with the multi-brand strategy of Atlas Copco. For the first time the Austrian Cartel Court agreed to investigate unilateral effects according to the horizontal merger guidelines of the European Commission.

The Court concluded that the merger would likely lead to a dominant market position for screw compressors above 22kW in Austria. Therefore the Court cleared the merger only subject to structural remedies, namely the assignation of the brand "AGRE" including the access to the distribution and maintenance contracts for screw compressors in Austria. However, the Court neglected to formulate a structural remedy which includes also the production facility located in Germany. The FCA abstained from an appeal of the Court's decision, as the German Bundeskartellamt, which decided on the same merger case, cleared the merger under the structural remedy to assign the production facility in Germany, which also includes the production facility for the Austrian screw compressors. Taking into account the remedies imposed by the Austrian Cartel Court and the German Bundeskartellamt, the merger will not lead to a dominant market position in Austria.

### **Strabag - Storf**

In April 2006 the construction company Strabag notified the acquisition of a Tyrolian civil engineering company, Storf Hoch- und Tiefbaugesellschaft mbH. As in several former proceedings the Cartel Court declared Strabag to hold a dominant position in road construction in Tyrol, the Federal Cartel Prosecutor filed an application for examination with the Cartel Court. As a result of negotiations Strabag agreed to divest the road construction division of the target company.

In November 2006 the new acquirer of the road construction division, a family business, was notified to the competition authorities. Its economic viability was scrutinized and approved by the FCA and the FCP.

### **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 and has given several speeches (e.g. various competition symposiums in Austria and abroad). Furthermore, a workshop on airport tariffs was held with airports in order to make them aware of potential conflicts with relevant provisions in competition law.

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), of the Civil Procedure Code providing for a legal basis for the filing of collective and model actions (Zivilprozessordnung: Gruppenklage, Musterklage), of the Private TV Broadcasting Act (Privatfernseh-Gesetz) and the ORF Act (ORF-Gesetz) concerning the introduction of mobile TV, as well as of recent legislation concerning telecom universal service (Universaldienstverordnung).

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

Between 1 July 2006 and 30 June 2007 the Federal Competition Authority increased its staff by one lawyer. By then - additional to the Director General and the Deputy Director General - thirteen lawyers, five economists, one other professional and seven persons as support staff, i.e. all together 28 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 six 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.