



**COMPETITION COMMITTEE**

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS  
IN AUSTRIA**

**2003 - 2004**

## **Executive Summary**

1. In its second year of existence, the Federal Competition Authority (FCA, *Bundeswettbewerbshörde*) as well as the Public Cartel Prosecutor (PCP, *Bundeskartellanwalt*) successfully enhanced its effectiveness: an increasing amount of mergers have been cleared only subject to important remedies; following an application of the FCA, the highest fine so far has been imposed in a case concerning the abuse of a dominant market position; despite still very limited resources several investigations of whole business sectors were carried out bringing about a change of attitude towards competition matters. Between 1<sup>st</sup> July 2003 and 30<sup>th</sup> June 2004 about 470 national and 350 European cases were examined and a substantial number of detailed investigations were conducted, including a vast number of interrogations as well as three dawn raids. To cope with the increase in quantity and quality more staff is needed - a request granted gradually by the government. A new Austrian Cartel Act which is currently being discussed will bring national competition law fully in line with Council Regulation (EC) No 1/2003.

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

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

2. Discussions on a reform of the Austrian Cartel Act have started in 2003, in the light of the changes in European competition law: As Council Regulation (EC) No 1/2003 foresees a decentralised implementation of Art. 81 und 82 of the Treaty since May 2004, discussions with the Cartel Court, the Public Cartel Prosecutor, the social partners and other relevant parties are held to update the Austrian Cartel Act in face of the new European setting.

3. The proposed amendments intend to bring national competition law fully in line with Council Regulation (EC) No 1/2003. The most important changes envisaged can be summarised as follows:

- The Austrian law will follow the wording of article 81 and 82, thus abolishing the historic cartel typology.
- Abolition of the national system of cartel notifications and implementation of the system of legal exception.
- The Cartel Court will be empowered to take commitment decisions.
- Introduction of a leniency programme.

#### ***I.2. Special sectors***

##### *Broadcast*

Amendments to the Private Television Act (PrTV-G), the Private Radio Act (PrR-G) and the KommAustria Act (KOG) (entry into force: 1<sup>st</sup> August 2004)

4. The amendments of the PrTV-G accounted for broadcasting issues of the new regulatory framework for electronic communication. The provisions include obligations for multiplex-plattform operators (concerning the dissemination of digital broadcasting programmes and additional services) and for operators of associated facilities like electronic programme guide (EPG), application programme interfaces (API) and conditional access systems (CAS) to give access on a non-discriminatory basis. Further provisions shall ensure the interoperability of digital TV sets. Ordinances of the regulatory authority for broadcasting, KommAustria, may specify these obligations.

5. The amendments to the PrR-G create a renewed system of frequency allocation and provide the opportunity for private radio station operators to assign licenses under certain conditions for the creation of nationwide radio broadcasting.

6. The amendments to the KOG improve the efficiency of legal supervision concerning advertising and the compliance with regulations. The KommAustria assumed new responsibilities which include monitoring the programmes of the public service broadcaster, the “Austrian Broadcasting Corporation” (ORF), and making reports for the Federal Communications Board (“Bundeskommunikationssenat”).

#### Market definition

7. Pursuant to Article 15(3) of Directive 2002/21/EC resp § 36 TKG 2003 KommAustria defined two relevant markets for broadcasting transmission services appropriate to national circumstances in Austria. The markets designated by KommAustria as being relevant for ex ante regulation – differing from those defined in the recommendation in accordance with Article 15 (1) Directive 2002/21/EC - are the markets for terrestrial television broadcasting and for terrestrial FM radio broadcasting, delivering broadcast content to end users (“Rundfunkmarktdefinitionsverordnung 2004”; entry into force: 16<sup>th</sup> January 2004). In its comments pursuant to Article 7(3) of Directive 2002/21/EC (11.12.2003, SG (2003) D/233450) the Commission did not doubt the compatibility of this measure with Community law. KommAustria is now carrying out the market analysis procedure (Article 16 of Directive 2002/21/EC resp § 37 TKG 2003).

#### Significant Cases: Frequency Sharing for Vienna

8. The public broadcaster ORF uses two frequencies in Vienna for the distribution of its second TV-Programme (ORF2), however, provides only approximately 30 minutes a day for different local programmes. Hence, the legislator obliged the ORF to share one of these frequencies with a new private commercial broadcaster (PULS TV). Since the commercial negotiations between the two parties failed (controversial points were the duration of the ORF local programme and the price the private broadcaster had to pay for the site sharing), the regulatory authority, KommAustria, had to decide on the conditions. The ORF appealed against the decision. On 1<sup>st</sup> July 2003 the Federal Communications Board, the appeal body to KommAustria, upheld KommAustria's decision and PULS TV went on air in June 2004.

#### *Telecommunication*

##### Market definition

9. Pursuant to Article 15(3) of Directive 2002/21/EC resp § 36 TKG 2003 the regulating authority RTR defined sixteen relevant markets for communication services appropriate to national circumstances in Austria. The markets designated by RTR as being relevant for ex-ante regulation correspond with the markets contained in the Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation issued by the European Commission (OJ L 114/45). Following the consultation procedures according to Art 6 of Directive 2002/21/EC a nationwide consultation had been carried out before enforcing the market definition ordinance.

10. The markets designated as being relevant for ex-ante regulation in Austria are as follows:

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

3. Publicly available local and/or national telephone services provided at a fixed location for residential customers.
4. Publicly available local and/or national telephone services provided at a fixed location for non-residential customers.
5. Publicly available international telephone services provided at a fixed location for residential customers.
6. Publicly available international telephone services provided at a fixed location for non-residential customers.
7. Call origination on the public telephone network provided at a fixed location.
8. Call termination on individual public telephone networks provided at a fixed location.
9. Transit services in the fixed public network.
10. The minimum set of leased lines.
11. Wholesale trunk segments of leased lines.
12. Wholesale terminating segments of leased lines.
13. Wholesale unbundled access (including shared access) to metallic loops and subloops for the purpose of providing broadband and voice services.
14. Access and call origination on public mobile telephone networks.
15. Voice call termination on individual mobile networks.
16. The wholesale national market for international roaming on public mobile networks.

#### Mobile number portability

11. Following Art. 30 of Directive (2002/22/EC – Universal Service Directive) the Austrian National Regulatory Authority, the Telekom-Control-Kommission enforced the right of customers to retain their numbers, independently of the company providing the mobile service in case of changing their mobile service provider. The decision was made on 30<sup>th</sup> July 2004 and covers all relevant aspects of number portability, including consumer protection related aspects like tariff transparency.

#### *Energy*

12. On 1<sup>st</sup> July 2004 the new Directives for Electricity and Gas (Directive 2003/54/EC and 2003/55/EC of 26<sup>th</sup> June 2003) became effective. Austria implemented the Electricity Directive largely by an amendment of the Electricity Act in June 2004. The amendment of the Gas Act in 2002 already comprised the major changes of the Gas Directive.

13. The new Directives for Electricity and Gas were adopted in summer 2004 and regulate the total liberalisation of the electricity and gas market as well as the absolute and effective independency of the electricity and gas distribution companies as of 1<sup>st</sup> July 2004.

14. Besides the European Commission, the Directives also stress the important role of the national regulatory authorities. The national regulatory authorities are responsible at least for:

- ensuring non-discrimination,
- effective competition,
- the efficient functioning of the market and
- the monitoring of the electricity and gas market.

15. The European Commission has to monitor the implementation of the Directives in the Member States as well as the development of the markets concerning market concentration, market domination, predatory or anti-competitive behaviour and the effect of market distortions. The European Commission has also to submit a monitoring report to the European Parliament and to the Council on the basis of the above mentioned points.

16. Major changes of the Austrian Electricity Act concern the unbundling of the network from other parts of the value chain (generation, trading, retail) in order to guarantee a non-discrimination of all market participants which are not affiliated with the network operator. Distribution companies which are part of a vertically integrated electricity company and with more than 100.000 connected customers (in the gas market: 50.000 customers) have to ensure that the organisation and the power of decision is independent of other parts of the company. The main aim of the unbundling provisions is the equal treatment of all market participants.

17. According to the Green Electricity Act, which came into force on 1<sup>st</sup> January 2003, the electricity labelling had to be standardised by 1<sup>st</sup> June 2004. The main points of the standardised labelling are:

- obligatory supplier-mix
- the calculation base is the amount of electricity supplied to final customers,
- the calculation period is the previous (financial) year,
- for electricity where the origin is unknown the allocation is made according to the UCTE-mix,
- E-Control is the regulatory authority for the labelling.

18. Therefore, the regulating authority E-Control issued labelling guidelines which comprise comments and recommendations to the legal requirements for labelling.

19. Furthermore, the Directive for Emissions Trading (Scheme for greenhouse gas emission allowance trading [directive 96/61/EC]) had to be implemented into national law until 31<sup>st</sup> December 2003. A national allocation plan was sent to the European Commission before 31<sup>st</sup> March 2004. The Commission approved the national allocation plan of Austria with some minor additional requirements.

## II. Enforcement of competition laws and policies

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

#### a) Summary of activities

20. In the period under review about 30 cartel cases, 45 cases concerning the abuse of a dominant market position, 76 vertical restraints and 13 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 and recommendations

#### Ski alliance amadé

21. The amadé Ski Alliance covers a vast ski area in the provinces of Salzburg and Styria, including 28 holiday resorts: It comprises 9 large and 7 small independent skiing regions with 865 km of pistes and operates around 270 ski lift systems. Ski amadé requires its members to use only its 'universal' ski pass, denying the individual large skiing regions the option of issuing local passes and fixing the prices of lift tickets for the small regions.

22. After a thorough investigation, the Federal Competition Authority, jointly with the Federal Chamber of Labour, initiated a cartel procedure before the Cartel Court. In November 2003 the court issued a ruling, which confirmed the view of the FCA that Ski amadé constitutes a cartel.

23. The defendant appealed to the Supreme Cartel Court, but the case could be settled by an agreement between the FCA and the Chamber of Labour on the one side and the ski operators on the other, which met the concerns of the FCA and the Chamber of Labour. Basis of the agreement is the empirical fact that the market has to be divided into the one-day-stay market and the market for a longer stay. Due to the fact that ski passes for a stay of several days (e.g. one week) produce a significant additional value for the consumer and requests co-ordination between the independent skilift-operators, the Competition Authority demanded only minor changes with the co-operation agreements for these ski passes but required the abolishment of all the restrictions concerning the one-day-market.

24. The new competition framework will be binding as of the start of the coming winter season.

#### Joint liability of saving banks (Haftungsverbund)

25. The case concerns a co-operation of Erste Bank der Oesterreichischen Sparkassen AG (one of the four biggest retail banks in Austria) and 53 saving banks implemented in 2002. The co-operation between the independent saving banks includes among others 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.

26. In January 2004, the FCA filed an application with the Cartel Court for prohibiting the agreement under Art. 81 para 1 EC which is not covered by the national exemption clauses. The case is still pending.

#### Analysis of the Austrian petrol market

27. Due to public concerns and media coverage of petrol prices the FCA has launched an analysis of the Austrian petrol industry. The report looks into the retail petrol market as well as the downstream refinery market. The main issues investigated are the possibility of (tacit) collusion concerning consumer prices, the market power in the refining industry and the vertical relationship between retailers and suppliers. First results of the review show the following: price differences in the market segment of petrol stations at motorways have been extremely low up to 2002, however, since then have increased. Moreover, general regular weekly price adjustments probably resulted from a non-binding price monitoring by the Ministry of Economic Affairs, which was abolished by April 2004.

#### Disposal of refrigerators

28. Undertakings disposing refrigerators and undertakings licensing the system for the disposal of refrigerators concluded several agreements. The parties filed a request to the Cartel Court to decide that these agreements do not fall under the Cartel Act. The FCA and the Public Cartel Prosecutor argued however that these agreements have to be qualified as vertical agreement and as a cartel respectively. The Cartel Court followed these arguments. Investigations of the FCA showed that several months after the Cartel Court's ruling neither the vertical agreements had been notified with the Cartel Court nor the other cartel agreements had been referred to the Cartel Court for their approval, as foreseen in the Austrian Cartel Act. Following an application for fines by the FCA, the Cartel Court imposed fines amounting to €3.500.

#### Dawn raids

29. Due to an informal complaint regarding price and/or quota cartels, the FCA carried out an inspection in an undertaking of the construction industry in March 2004. The FCA is still analysing the documents found. Up to now however, there are no indications of price and/or quota cartels.

30. This was the first inspection carried out by the FCA. Meanwhile, there have been two other dawn raids, both in May 2004, one on the behalf of the European Commission and one on behalf of the German Bundeskartellamt. The inspections were carried out in co-operation with the Federal Bureau of Criminal Investigation (Bundeskriminalamt), which is responsible for securing the enforcement of the search warrant if necessary.

#### Liberal professions

31. Being one of the priorities for action of the European Commission, DG Competition, a stocktaking exercise for professional services was launched in March 2003. The purpose is to analyse the justification for and effects of restrictive rules and regulations in liberal professions.

32. Liberal professions can generally be defined as occupations requiring special training in arts or sciences. These include lawyers, notaries, accountants, architects, engineers and pharmacists. Across the EU, the professions are subject to regulations such as fee scales, advertising restrictions, exclusive rights and rules prohibiting inter-professional co-operation.

33. In Austria, the degree of regulation is very high in comparison to other European countries. Regulation concerns entry and exclusive rights, advertising restrictions, business structure and price regulations. In all liberal professions prices are recommended (either compulsory or non-binding), partly based on legal authorisation.

34. In general, recommended prices, like fixed prices, may have a significant negative effect on competition. They may facilitate the co-ordination of prices between service providers and can mislead consumers about reasonable price levels.

35. In order to get an overview over the various liberal professions and their different kinds of regulations, the FCA held meetings with representatives of the liberal professions and sent out requests for information. To start with, intensive discussions with one group of liberal professions are held, in order to make the provisions compatible with European competition law.

36. An interim report will be provided in autumn 2004 and submitted to the European Commission.

#### Non-binding recommendations ("Unverbindliche Verbandsempfehlungen")

37. Pursuant to the relevant decisions of the European Commission the FCA has been continuously examining all non-binding recommendations issued by various associations within the Federal Economic Chamber addressed to their members. Due to several meetings held with representatives of the associations as well as some proceedings before the Cartel Court, the associations adjusted their recommendations in order to ensure compatibility with EU and Austrian provisions. Meanwhile, most non-binding recommendations do not comprise price recommendations any more, but give a guideline to companies on how to calculate costs and prices individually.

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

##### Tariff system of Telekom Austria

38. In July 2003 Telekom Austria AG (TA) implemented its new tariff system for fixed line services. The cancellation of the tariff option "Minimumtarif" (MinT) was the most important change. Consumers which had been using the MinT were automatically transferred to the tariff option "Standardtarif" which has significantly higher access fees. The consumers' cheapest possibility to obtain TA's access service therefore was offered by TA's (already existing) "TikTak" tariff options which included various connection services.

39. TA has a dominant position on the Austrian markets of connection services as well as access services. The market of access services is still in a condition fairly close to monopoly with TA holding a 95% market share. Unbundling has not generated a relevant number of alternatives in fixed line services yet. Besides, TA did not allow alternative providers to buy its access services at wholesale conditions in order to resell them to consumers. Thus alternative providers could not match TA's tariff system with similarly designed offers for their own customers.

40. Choices for consumers in the market of access services are still extremely limited. The situation is different in the markets of connection services where consumers can also choose from a variety of call-by-call and carrier pre-selection providers. Given the aforementioned market situation call-by-call and carrier pre-selection are highly important for the development of effective competition. The call-by-call and carrier pre-selection consumers - the majority of whom still get the access service from TA - are especially interested in TA's cheapest access fee.

41. Therefore and given TA's abovementioned tariff system it was likely that call-by-call and carrier pre-selection customers would tend to opt for the TikTak-tariffs. It could also be expected that they would try to consume the included connection services they had - nolens volens - purchased together with the TikTak-tariffs' access fee. TA's tariff system was therefore able to impede the development of effective competition in the respective telecom markets.

42. The FCA suggested that TA should change their tariff system. TA filed an application with the regulatory authority to do so, but withdrew it later on. Consequently, the FCA applied to the Cartel Court to interdict the abuse of a dominant position and impose a fine.

43. Following the FCA's motion the Cartel Court found in its decision of March 2004 that Telekom Austria's tariff system constituted an abuse of a dominant position insofar as the consumers' cheapest possibility to obtain access service from TA was offered by tariff options which included connection services or where, after deducting the connection services or other privileges which had been tied to the access fee, the remaining access fee was below the cheapest pure access fee offered by TA. The Cartel Court ordered the abuse to be stopped and imposed a fine of €500.000,--.

44. TA has appealed against the Cartel Court's decision to the Supreme Court. The case is still pending.

#### Europay Austria (payment cards)

45. In the payment cards market (debit cards) a proceeding against Europay Austria Zahlungsverkehrssysteme GmbH (Europay), 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.

46. In December 2003 the Cartel Court declared 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. Furthermore, Europay 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.

47. The decision of the Cartel Court will most certainly have major effects on the market of payment cards as Europay's competitors will not have to pay unreasonably high interchange fees any more if they use Europay's systems. Europay appealed against the decision. The proceeding is still pending.

#### Billa: ex-Officio Investigation in the food retail market

##### Specifics of the Austrian food retail market

48. As stated in the 2003 OECD Report on Austria the increasing concentration of the food retailing sector has brought up a range of competition issues such as the dominance of vertical market power abusing their market power in relation to their suppliers, as well as general pricing and contract policies of big retail companies and the impacts on consumer choice.

49. According to several studies by AC Nielsen and other market specialists, REWE Austria (with its supermarket chains Billa, Merkur, Mondo, Penny - both discounters- and Tante Emma - small local corner shops -), and SPAR Österreichische Warenhandels-AG share between 65% and 70% of the grocery retailing market in Austria. Although discounters such as the "hard discounter" Hofer, Lidl, etc. and the "soft discounters" Zielpunkt as well as REWE's own discounter, Mondo, etc. prove to be in fierce competition with the big two retailers, REWE and Spar have been rapidly expanding nationally as well as internationally (particularly in the neighbouring Eastern European countries).

50. Moreover, there seems to be a higher supermarket density in Austria - REWE and Spar each have over a 1 000 branches, mainly between 400 and 1000 m<sup>2</sup> - in comparison to Germany. This again effects (such as productivity output per m<sup>2</sup>) and influences the overall pricing structure and development of the industry, which also needs to be looked at in the course of the analysis.

51. Additionally, there has been a fierce price competition between the two main supermarket retailers. To celebrate the 50<sup>th</sup> and 51<sup>st</sup> birthday of Billa, the company has been cutting the prices for some

products (for a period of two weeks per product, once or twice a year) up to 50 % and 51% in the consecutive year. Its biggest competitor, Spar did not take long to follow suit. Again, in the course of the investigation and evaluation of the market, one needs look into the impact of these promotional price off policies enforced by the supermarkets, particularly for the producers and suppliers.

#### Ex-Officio Investigation

52. June 2004 the FCA started an investigation in the contracting and pricing policies of retail companies in Austria, as well as an analysis of the vertical structures between the countries biggest retailers and its suppliers. In the course of the investigation the FCA is interviewing a range of market participants to get an overview of the relevant features of the industry as well as to substantiate the complaints made by - mainly - the supplier industry in Austria.

53. There are claims that the grocery retailers abuse their market dominance by imposing charges and making changes to contractual arrangements without adequate notice, request non-cost-related payments or discounts, threaten to not list certain products or not agree to price rises unless the suppliers agree to produce for the supermarkets own private labels, force suppliers to commit to exclusive delivery contracts and so forth.

54. Throughout the investigation the FCA interviewed suppliers, purchasing agents, representatives of the various interest groups, such as the food retailing industry, meat producing industry and a range of other sectors. Due to the limited staff availability the FCA can only interview a limited, however representative amount of market participants.

55. In the case of the suppliers the FCA has to issue summons since there is a great hesitance to talk to the FCA voluntarily. Documents of proof are currently given anonymously to the FCA via email, fax or even via the media.

56. Throughout the investigation following competition law aspects are looked into:

- the application of § 35 Abs 1 KartG; Art 82 EG: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts and
- the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, Nr. 2790/1999 (3,4,5).

#### Final Report

57. Once the actual investigation has been completed, the FCA will publish a report.

58. The overall problem of the so-called 'tapping' of dominant suppliers abusing their market dominance by demanding unjustified services, contribution etc. without returning an adequate service, has been occurring for quite some time in several other EU countries as well as internationally. To ensure the best possible way of conducting the investigation, as well as analysing the given information and possible action planning, the FCA has been in contact with several EU competition authorities and looked into their reports and proceedings.

## Schuh Braun

59. Schuh Braun, a shoe retailer in Salzburg, complained to the FCA that its company was boycotted by some shoe producers/wholesalers due to the fact that the retailer sells under the recommended price of the producers. During the investigation of the FCA it became evident that some shoe producers as well as wholesalers put pressure on retailers to comply with the "non-binding" recommendations of the producers. The issue attracted the national media interest as well as caused some general upheaval in the industry. The investigations are still ongoing.

**II.2. Mergers and acquisitions***a) Statistics on number, size and type of mergers notified and/or controlled under competition laws*

60. Between July 1<sup>st</sup>, 2003 and June 30<sup>th</sup>, 2004 a total of 302 concentrations were notified to the Cartel Court. In 14 cases an application for in-depth-investigations was filed by one or more of the official parties leading automatically to phase II proceedings.

61. In two cases (Henry Schein/demedis/Euro Dent and NRJ/Kronehit Radio) the parties withdrew their notification during phase II and did not notify again. In six cases the mergers were cleared only subject to remedies or the notification was modified. These cases were: Athesia Druck/Moser Holding, Wrigley/Joyco, FR Logistik/Cargo Center Graz, Agrana/Atys, Colgate/ Palmolive, Morawa/Mediaprint. In one case (Coca Cola Beverages Austria/Römerquelle) a court settlement was reached. Four cases are still pending.

*b) Summary of significant cases*

## Coca Cola Beverages Austria - Römerquelle

62. In October 2003 Coca Cola Beverages Austria notified the acquisition of Römerquelle GmbH. Coca Cola Beverages bottles drinks of The Coca Cola Company (e.g. Coca Cola, Sprite, Fanta), while Römerquelle mainly produces and distributes mineral water and mineral water products in Austria.

63. The FCA had reservations concerning the market for mineral water where Römerquelle was presumed to have a dominant position, especially in the direct consumption sector which is characterized by long-term contracts and rigid structures. Coca Cola Beverages Austria could strengthen this dominant position by its financial power, its know-how as distributor and bottler and its distribution network. Furthermore, the FCA was concerned about the market for functional drinks where Römerquelle has a very dominant position and Coca Cola Beverages Austria bottles a small but not insignificant brand (Almdudler Pro Ego).

64. In addition to the FCA's reservations the Public Cartel Prosecutor argued that "functional drinks" do not constitute a distinct market but are in the same market as carbonated soft-drinks (because of supply side substitution and similar market segments like "light softdrinks"), where Coca Cola holds very high market shares.

65. After intensive negotiations a court settlement was reached. The most important points the parties agreed on are the following:

- Coca Cola Beverages Austria distributes products of The Coca Cola Company directly to the catering industry. Up to three mineral waters which are not owned by the merging parties have to be distributed in addition under non-discriminatory conditions. This should

help especially mineral waters with a small or medium market share to gain access to the distribution channel.

- In the distribution to the catering industry (directly or via wholesaler) the delivery (including rebates and other contract conditions) of products of The Coca Cola Company must not be linked to the delivery of Römerquelle products.
- Coca Cola Beverages Austria has to cease the production of its functional drinks "Almdudler Pro Ego".

#### Moser Holding - Athesia Druck

66. In December 2003, Athesia Druck GmbH notified the acquisition of 50 % of the Moser Holding AG, which controls the major daily newspaper in Tyrol ("Tiroler Tageszeitung") and the regional Tyrolian radio "Antenne Tirol". Athesia Druck publishes the South-Tyrolian newspaper "Dolomiten" and runs the local radio "Arabella Innsbruck" in the capital of Tyrol.

67. The main concerns of the FCA focused on possible joint projects of the regional newspapers in the advertising market (resulting in a strengthening of the market dominance of the Moser Holding), the overlap on the regional radio market and media pluralism. The Public Cartel Prosecutor concentrated on the impact of the merger on media pluralism.

68. Following intensive investigations the FCA as well as the Public Cartel Prosecutor filed an application for examination with the Cartel Court. In parallel, remedies were negotiated in several discussions with the merging parties. The merger was finally cleared subject to the following remedies: By implementing different measures (e.g. different chief editors, no obligation to take over an information or article) the independence of the editorial offices of the newspapers as well as of the radio stations is guaranteed. Furthermore, only up to six joint projects of the newspapers like supplements are authorised per year. The remedies which also contain several reporting obligations are valid until the end of 2013.

#### Agrana Zucker und Stärke AG - Financière Atys SA

69. In January 2004 the Austrian undertaking Agrana Zucker und Stärke AG (Agrana) notified the acquisition, by stages until 2006, of sole control of the French undertaking Financière Atys SA (Atys).

70. The main sector concerned by the proposed transaction is the production and distribution of fruit preparations, where significant horizontal overlaps occur. In addition, there are vertical aspects in particular regarding the upstream market for industrial sugar, where Agrana has a very strong market position in Austria.

71. The notifying party proposed that from the geographical point of view, the market for fruit preparations had to be considered as national in scope. The FCA argued that the geographic market needs to be construed smaller than proposed by the notifying party, due to transport costs, demand preferences as to taste, quality, requested flexibility of supply, short-term deliveries, actual import rate etc.

72. Because of the significant competitive overlap between the merging parties, the buyer's financial strengths as well as possible vertical effects, the FCA filed an application for an examination of the concentration with the Austrian Cartel Court.

73. In May 2004 the merger was cleared only subject to remedies. They aim at resolving the problem of dominant position, particularly in relation to small undertakings on the demand side which constitute 25% of the overall demand in Austria. These are - due to small order quantities - not able to acquire fruit

preparations from other countries than Austria. The measures imposed by the Court provide for a linkage between the prices applicable to small demand to the average prices for larger delivery quantities in order to avoid price-discriminatory practices. In addition, the Court imposes an obligation on the parties to report periodically to the FCA on the fulfilment of the conditions.

#### Wrigley - Jocyo

74. The Wm. Wrigley Jr. Company, USA, one of the worlds leading chewing gum producers notified the merger with Joyco Inversiones, S.A., which is part of the Spanish Corporacion Agrolimen S.A. (Agrolimen), in February 2004. The geographic market was defined as the national one. Wrigley sells chewing gum, bubble gum and mints and Joyco - via a distributor - mainly Bubble Gum in Austria. Wrigley and Jocyo are the two biggest producers of Bubble Gum in Austria. Moreover, Wrigley has a very dominant position in the chewing gum sector.

75. After thorough investigation, the FCA filed 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.

76. Following an independent expert opinion, the Cartel Court rendered a final decision in June. The Cartel Court disagreed with the proposed market definition put forward by Wrigley, and came to the conclusion that the relevant market is Bubble Gum plus a certain amount of the fruit and wine gummy candy market. This would amount to market shares for the undertaking parties which do not exceed the 30% threshold that presumes a market dominating position.

77. Moreover, it was also concluded that there are no predatory portfolio effects, since there was no economic evidence that there would be a substantial increase in revenue and enlargement of the product range of the undertaking parties. Secondly, it was argued that there is no economic evidence that any of the competitors would be forced out of the market due to the merger, due to their strong branding of the merging parties as well as their international standing.

78. However, to ensure product diversity within the market of Bubble the following remedy was adopted: Wrigley must continue the sales of all current Joyco Bubble Gum products for the next two years in Austria.

#### Henry Schein Inc. & demedis GmbH & Euro Dental Holding GmbH

79. In March 2004, Henry Schein Inc., the largest provider of healthcare products and services to office-based practitioners in the combined North American and European markets, announced the acquisition of demedis GmbH, a leading full service distributor of dental consumables and equipment in Germany, Austria, and the Benelux countries, and of Euro Dental Holding GmbH, a holding company of distributors of dental consumables in Italy and Germany. In Austria, demedis is primarily active in the dental arena through its wholly owned subsidiary, Austrodent Handelsgesellschaft mbH.

80. After a careful analysis of the merger, the FCA came to the conclusion that in acquiring demedis/Austrodent, Henry Schein would reach a dominant position on the sales and service market for dental equipment as well as on the market for dental consumables in Austria. As a result, effective competition would be significantly impeded. Given the high market shares of Austrodent and Henry Schein on the Austrian market, the FCA was concerned that the merged entity would have an increased ability and incentive to eliminate actual and potential competitors leading ultimately to higher prices for practitioners and consumers. Hence, the FCA filed an application for examination of the concentration with the Cartel Court.

81. During trial, the FCA took the line that solely the divestiture of Austrodent would sustain workable competition on the Austrian market. Henry Schein considered the commitment proposal as too far reaching, since it would foil its strategy to enhance its position particularly in the dental equipment sales and service arena. However, the Cartel Court and the FCA regarded the commitments, finally proposed by the parties, as insufficient.

82. In August 2004 – six days before the decision of the Cartel Court was due to be rendered – Henry Schein withdrew its notification including a waiver of claim in anticipation of an unfavourable outcome.

#### Morawa - Mediaprint

83. In April 2004 Morawa Pressevertrieb GmbH (MPV) and Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG (Mediaprint) notified the creation of the joint venture "Morawa Grosso". Morawa Grosso will take over the distribution of press products from publishers to Austrian retailers (especially tobacconists and food retail stores). The distribution of Mediaprint's daily newspapers (e.g. the market dominating "Kronenzeitung") will however not be transferred. MPV will hold 75,1 % of the shares of Morawa Grosso, Mediaprint 24,9 %.

84. Beside MPV and Mediaprint only one further company was active in the field of press distribution in Austria. Furthermore, Mediaprint has a very dominant position in the market of press products, especially in the newspaper market. The FCA was concerned about the further concentration in the press distribution market as well as about possible negative consequences for competition and media diversity due to the participation of Mediaprint. Thus, the FCA as well as the Public Cartel Prosecutor filed an application for examination of the concentration with the Cartel Court.

85. Most important for the FCA was the reduction of influence capabilities of Mediaprint on the joint company and the non-access of Mediaprint to the distribution data of other print media. Furthermore, the FCA considered it essential that also other market participants can take advantage of the synergies created by the merger and that uncertainties of the present press distribution customers can be reduced.

86. In August 2004 the Cartel Court cleared the merger only subject to wide ranging restrictions and remedies. Mediaprint's influence on Morawa Grosso was reduced substantially. In particular, Mediaprint will not have a voice in the operative business of Morawa Grosso. Moreover, it will not get access to data and conditions offered to other publishers. Furthermore, Morawa Grosso was obliged not to change the conditions granted actually to customers for five years and not to pass on increased costs due to road pricing.

### *II.3. Activities of the Public Cartel Prosecutor*

87. While most cases were dealt with by the FCA alone or the FCA and the Public Cartel Prosecutor (PCP) jointly, the PCP concentrated on following main cases:

88. In the case Public Cartel Prosecutor vs 1. TEERAG-ASDAG Aktiengesellschaft 2. Allgem. Straßenbau GmbH 3. Alpine Mayreder Bau GmbH 4. ASPHALT & BETON GmbH Nfg OHG the PCP (supported by the FCA) filed a request for interdiction and for a fine, as a co-operative joint venture for the production of asphalt was incorporated despite the fact that a very similar joint venture had been prohibited by the Cartel Court in 1998 as a merger. The PCP argued that the co-operative joint venture was created without notification and had serious impact on competition. The case is still pending.

89. In the case of the vertical agreement between the fruit and vegetable distributor **San Lucar Obst- & Gemüse Handels GmbH** and the food retailer **Billa Aktiengesellschaft** the PCP filed a request for countermand, as this agreement was in several major points not in line with the relevant EC regulation on

vertical agreements (Commission Regulation (EC) No 2790/1999 of 22 December 1999). After modifications of the agreement the PCP's application was withdrawn.

90. In the case **Fachgruppe Finanzdienstleister-Wirtschaftskammer NÖ** (Chamber of Commerce of Lower Austria, Section Financial Service Providers) a non-binding recommendation was withdrawn after the PCP and the FCA had shown that the recommendation foresaw overly high prices and therefore would be anti-competitive and not in the interest of the consumers.

91. In the merger procedure **Lenzing/Tencel**, both companies active in the sector of viscose and Lyocell fibres, the PCP filed an application of in-depth investigation of the case, as in a very similar case the European Commission had blocked the acquisition of Lenzing by CVC (the former company controlling Tencel) in 2001. The case is still pending before the Cartel Court.

92. In the merger procedure **Bausparkasse Wüstenrot AG/LBA LandesBausparkasse AG**, two building and loan associations the Cartel Court followed PCP's argument for a distinct market for deposits in building and loan associations. However, as consumers only ask for the products of the building and loan association provided by their house bank (rates are of astonishing low importance) and there are still two big competitors, the merger had very limited impact on the competition and was therefore cleared.

93. In the case **Public Cartel Prosecutor vs. Brau Union Österreich Aktiengesellschaft**, a brewing company, the Cartel Court accepted the arguments of the PCP (supported by the FCA) that a merger, where a company increases its share in a target company from 33 % to 100 % has to be notified separately. Irrespective of the question whether sole control has already been acquired (what was not proven in the first merger notification concerning the acquisition of 33 %), the exceeding of the threshold of 50 % triggers the notification obligation. The merger had not been notified to the Cartel Court. The decision is now pending before the Supreme Cartel Court. If the Supreme Cartel Court upholds the decision, the Cartel Court will decide on PCP's application for a fine.

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

94. The Federal Competition Authority 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 disseminates information on important cases and has given several speeches (e.g. various competition symposiums in Austria and abroad). Furthermore, the FCA commented for instance on the Private Radio Act (Privatradiogesetz) as well as the Private Television Act (Privatfernsehgesetz).

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

95. Between July 1<sup>st</sup>, 2003 and June 30<sup>th</sup>, 2004 the Federal Competition Authority could increase its staff by two lawyers, one economist and one support staff. By then - additional to the Director General and the Deputy Director General - eleven lawyers, three economists, one other professional and six persons as support staff, i.e. all together 23 persons, were working at the Federal Competition Authority. More staff shall be employed in the future. Each person is responsible for specific sectors and treats all cases (mergers, abuse of dominant position etc.).

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

97. 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 supported by fifteen lay judges. Additionally, the Cartel Court relies on advisory opinions of independent economic experts of its own choice.