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

-- 2010 --

*This report is submitted by Austria to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 19-20 October 2011.*

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## **Executive Summary**

1. In 2010 - 2011 the Federal Competition Authority (Bundeswettbewerbsbehörde, BWB) could further intensify its efforts to tackle hard core cartels. In the period under review (1 July 2010 - 30 June 2011) a significant increase of the investigated cartel cases can be noticed (41 cases compared to 15 in the year before). The investigation of several important cases was started and some already brought before the Cartel Court. Another focus of BWB's work remained to be the liquid fuel market where many investigations were carried out which should also help to build up further knowledge on the functioning of the market. Last but not least, the BWB continued to put emphasis on intensifying international co-operation not only within Europe but also outside the European Community.

## **Background**

2. The authorities responsible for competition law enforcement in Austria are the Bundeswettbewerbsbehörde (Federal Competition Authority, BWB), the Federal Cartel Prosecutor ("FCP", jointly referred to as "the Official Parties") and the Cartel Court.

3. Mergers are notified with the BWB and investigated in phase I by BWB and FCP. In merger proceedings the Official Parties have the exclusive right to initiate proceedings for an in-depth review of merger cases (phase II) before the Cartel Court, which is the sole decision making body. Also in antitrust proceedings, the Official Parties have no decision-making power but are empowered to take up and investigate cases which they can bring before the Cartel Court (as can individuals and other statutory parties). Parties can however offer remedies to the Official Parties to either convince them not to open a proceeding with the Cartel Court or to withdraw their application with the Cartel Court. These remedies are binding upon the parties and non-compliance is subject to fines. Decisions by the Cartel Court may be appealed against before the Supreme Cartel Court.

### **1. Changes to competition laws and policies - Special sectors**

#### ***1.1 Broadcast***

##### ***1.1.1 Broadcasting legislation***

4. New broadcasting legislation (Federal Law Gazette I No. 50/2010) has entered into force on 1 October 2010. Besides new regulatory issues especially concerning audiovisual media services and the supervision of the (public service) Austrian Broadcasting Corporation (ORF), it includes the restructuring of the broadcasting regulatory authority Austrian Communications Authority (KommAustria) which from 1 October 2010 is fully independent from the government.

5. The mentioned amendment created the legal basis for establishing KommAustria as a panel authority with the powers of a court; previously, KommAustria had been organized as a monocratic authority. KommAustria now comprises five members who are independent and not bound by instructions from any other authority in the performance of their duties.

6. Until the mentioned amendment went into effect on 1 October, 2010, the Federal Communications Board (Bundeskommunikationssenat, BKS) was the first instance authority responsible for legal supervision of the ORF. With the above-mentioned change in legislation, the (BKS) first instance adjudicative powers were shifted to KommAustria.

7. In addition to its existing duties in broadcasting regulation, under the Austrian Competition Act, under the Austrian Telecommunications Act (TKG) 2003, and in the field of journalism and press

subsidies, KommAustria is now responsible for legal supervision of the ORF and its subsidiaries, as well as additional duties under the Austrian Act on Exclusive Television Rights.

8. As a result of the implementation of the Audio Visual Media Services Directive in October 2010, KommAustria is now responsible for legal supervision of providers of audiovisual media services on the Internet.

9. Appeals against KommAustria decisions can be filed with the BKS, or in administrative penal cases with the Independent Administrative Board (UVS) in Vienna.

10. The Media Division of the Rundfunk und Telekom Regulierungs-GmbH (RTR-GmbH) provides administrative support to KommAustria, which relies on its services in turn. Both KommAustria and RTR are separate legal entities.

#### *1.1.2 Regulatory issues - Digitisation*

11. The analogue television turn-off was completed in summer 2011.

12. In addition to the two nationwide television multiplexes (MUX A and B), 17 local and regional terrestrial platforms (MUX C) have been established in various parts of Austria. Two more licences had been granted originally, one of which has been revoked by KommAustria; the other renounced by the provider. Many providers face economical problems which in some cases lead to breaches of the respective license requirements and consequently to regulatory procedures.

13. As of 31 Dec. 2010, the provider of the platform for mobile digital television (MUX D) renounced its licence. KommAustria has decided not to call for another tender for a platform for mobile digital television due to lack of interest from the market.

14. New tenders for additional nationwide platforms for terrestrial digital television based on the DVB-T2 standard (MUX D and E) were launched in summer 2011. A tender for another nationwide terrestrial platforms based on the DVB-T2 standard (MUX F) is envisaged in the case of further demand.

15. As to digital radio, KommAustria will publish a call for interest for digital radio platforms. Based on the market's input, KommAustria will assess whether there will be a call for tender for multiplexes for digital radio based on the DAB+ standard.

#### *1.1.3 Regulatory issues - Radio*

16. As of 11 April 2011, KommAustria re-issued 16 licences for analogue terrestrial radio transmission. These cases involved licences which were set to expire on 20 June 2011.

17. The re-issued licences cover six radio programmes in the Austrian capital Vienna, four radio programmes in the province of Tyrol and one radio program each in the provinces of Carinthia, Lower Austria, Upper Austria, Salzburg, Styria and Vorarlberg.

18. In four licensing procedures at least two radio operators had applied for a license. KommAustria based its decision among these applicants primarily on the grounds of diversity of opinion and reference to the coverage area. In detail, the submitted programmes concepts were valued as to amount of information and local reference just as well as style of music. Possible overlaps with other, already broadcasted programmes in the coverage area, were also considered.

19. The BKS heard appeals against two of the said sixteen decisions. Both appeals were dismissed.

20. In a call for tenders for a new nationwide analogue-terrestrial private radio licence conducted from 16 August 2010 until 25 February 2011, no applications were submitted.

#### *1.1.4 Regulatory Issues – Television*

21. As of 18 May 2011, KommAustria entitled ORF to broadcast a special interest television channel for information and culture. After having carried out the mandatory “prior evaluation procedure”, KommAustria granted the mentioned license on the following conditions: 1.) ORF must not cross-promote the special interest channel in other ORF programmes. 2.) ORF must not sell airtime for the special interest channel in bundle with airtime for other ORF-programmes.

22. The BWB is official party in the licensing procedure in order to protect competition interests. To this end it can give an advisory opinion to KommAustria before it's decision but can also appeal against the decision. In the case of ORF's information channel, the BWB was of the opinion that the conditions imposed by KommAustria in its decision of 18 May were not far-reaching enough and did not consider all relevant aspects of the advisory opinion of the BWB. The BWB therefore appealed against the decision.

23. The BWB could finally agree upon further concessions by ORF. These foresee further restraints in the sale of advertising and for broadcasting of mainstream films. Moreover ORF is obliged to refrain from reinforcing better listing for the distribution of ORF III Information and Culture via cable, SAT and D-VBT. The name "ORF III Information and Culture" should clearly indicate the quality of the program as special interest channel. The BWB could therefore withdraw its appeal.

24. Within reporting period KommAustria by means of non-prohibition entitled ORF to offer several online-content offers on its websites.

#### *1.1.5 Regulatory Issues - Audiovisual Media Services*

25. With the implementation of the new regulatory framework, KommAustria – as mentioned above – was assigned the supervision of audiovisual media services. So far, ten providers of linear and 48 on-demand audiovisual media services have registered with KommAustria. In the coming months, KommAustria will conduct research to identify audiovisual media services providers who have not yet fulfilled their registration obligation.

## **1.2 Telecommunication**

### *1.2.1 Market analyses*

26. Within reporting time, several analyses concerning sector-specific telecom markets which had been defined in the Austrian Telecom Market Regulation adopted 2008 to be relevant for ex-ante regulation were carried out and concluded by the Telecom-Control-Kommission:

27. Market analysis decisions concerning the wholesale market for call origination in the public telephone network provided at a fixed location, several wholesale markets for call termination on individual public telephone networks provided at a fixed location and the wholesale market for terminating segments of leased lines and Ethernet services with guaranteed bandwidth up to and including 2,048 Mbit/s were adopted on 26 July 2010 but have already been part of last year's report.

28. On the aforementioned wholesale markets for call origination and call termination, the fixed network incumbent Telekom Austria TA AG (now “A1 Telekom Austria AG” after merging its fixed and mobile branches to one single entity in the course of 2010) had been found to have significant market power and was therefore obliged in both market analysis decisions to submit reference offers for wholesale call origination and wholesale call termination services.

29. A1 Telekom followed this obligation by publishing one single reference interconnection offer (RIO 2010) covering both fields including transit services. Since the terms and conditions in this offer apparently were in line with the remedies in the market analyses, the NRA did not take any further action. In order to comply with another obligation under the a.m. market analysis decisions, A1 Telekom submitted a migration scenario for transformation of its Public Switched Telephone Network into a Next Generation Network in May 2011 and published a further annex to its reference offer in May 2010 covering the migration of interconnection traffic.

30. With regard to the wholesale market for terminating segments of leased lines and Ethernet services with guaranteed bandwidth up to and including 2,048 Mbit/s where A1 Telekom had also been found to have significant market power, A1 Telekom published two reference offers in accordance with the market analysis which were consulted among market participants and have also been inspected by the NRA. As A1 Telekom modified several conditions of its reference offers after having received critical remarks from the NRA, the NRA decided on 20 Sept. 2010 not to raise any further objections.

- Wholesale market for access to physical network infrastructures at a fixed location:

According to the market analysis procedure, the Telekom-Control-Kommission as National Regulatory Authority concluded that A1 Telekom has significant market power on this market. As remedies against the competition problems identified on this market the following obligations were imposed on A1 Telekom:

- Access obligation concerning unbundling/sub-loop unbundling (LLU/SLU) and a wholesale-product “virtual-unbundling” (V-LLU); provision of ancillary services like collocation, duct/dark fibre access
- Non-discrimination obligation (mainly publication of reference offers for regulated services like ULL/SLU, the a.m. ancillary services and V-LLU)
- Price-control (minimum of cost-orientation - FL-LRAIC - and a margin-squeeze-free price for LLU/SLU, V-LLU and cost-based prices for ducts and dark fibre access)
- Transparency concerning network features and related data
- Accounting separation

The decision was adopted on 6 Sept. 2010.

A reference offer with regard to (physical) unbundling/sub-loop unbundling was published on 6 Oct. 2010, another reference offer with regard to virtual unbundling was initially published on 18 Nov. 2010 but rejected by the NRA as not being in line with the market analysis. A revised version of the V-LLU reference offer was published on 18 Jan. 2011. Both reference offers were consulted with market participants. After having extensively examined compliance of both reference offers with the market analysis decision and further modifications of both offers by A1 Telekom on the NRA’s written request, the NRA decided on 25 July 2011 not to raise further objections.

- Retail market for leased lines with low bandwidths up to and including 2,048 Mbit/s:

The undertakings in the relevant market are among others A1 Telekom, T-Systems and Tele2 Telecommunication. A1 Telekom was found to have significant market power on the relevant market. To combat the competition problems identified on this market the following remedies were chosen by the NRA:

- Notice of new or modified prices and terms and conditions to the NRA before product launch

- Publication of standard terms and conditions, service descriptions and pricing details on the operator’s website; indication of wholesale service details in tenders, invoices and performance records
- Tariff control on price-cap basis
- Obligations not to unduly discriminate end customers and not to unduly raise switching barriers by long contract duration periods
- Obligation to separated accounts

The decision was adopted on 6 Sept 2010.

- Retail markets for access to the public telephone network provided at a fixed location for residential and non-residential customers

The major undertakings in the relevant markets are A1 Telekom, Tele2 and UPC Austria. After concluding that A1 Telekom has significant market power on the aforementioned relevant market the Telekom-Control-Kommission decided to impose the following obligations on A1 Telekom:

- Carrier (Pre)selection
- Access on Voice-over-broadband basis for OLOs in order to provide such service to end customers
- Simultaneous provision of wholesale products equivalent to retails products offered (non-discrimination obligation)
- Obligation to publish a Reference offer for Voice-over-broadband services so that alternative operators can replicate the retail voice access service of A1 Telekom
- Accounting separation
- Tariff control on price-cap basis

Existing obligations on the a.m. markets like the obligation to submit and maintain a Wholesale Line rental reference offer were withdrawn.

The decisions were adopted on 20 Sept. 2010.

In accordance with the market analysis decisions, A1 Telekom submitted a reference offer by publishing a revised version of its Reference offer for wholesale broadband access on its website on 16 Nov. 2010 which now also covers a voice-over-broadband “standalone” service in addition to the “VoB option” added earlier before. The revised Reference offer was consulted among market participants and analysed by the NRA which send remarks on various clauses to A1 Telekom and proposed modifications. Since A1 Telekom changed its Reference offer accordingly, the NRA decided on 8 Feb. 2011 not to take further action.

- Wholesale market for provision of broadband access to non-residential customers

The major undertakings in the relevant markets are A1 Telekom, Tele2 and UPC Austria. According to the market analysis, the Telekom-Control-Kommission considered A1 Telekom as having significant market power on the aforementioned relevant market. As a consequence, the following remedies were imposed on A1 Telekom:

- Access to broadband bitstream products

- Simultaneous provision of wholesale products equivalent to offered retail products (non discrimination obligation)
- Access to “naked-DSL”-products in order to enable alternative operators to replicate voice-telephony products of the incumbent
- National and regional traffic handover
- Price control for regional traffic handover based on “Retail minus”
- Publication of a reference offer

The decision was adopted on 15 Nov. 2010. A reference offer was published by A1 Telekom on 17 Jan. 2011. Since the Reference offer due to the addition of the VoB standalone part had already been consulted with market participants and amended shortly before, the NRA refrained from a new consultation; there was no necessity for further modifications to the reference offer.

- Retail market for calls over the public telephone network provided at a fixed location to non-residential customers

The major undertakings in the relevant markets are A1 Telekom, Tele2 and UPC Austria.

According to the market analysis procedure, the Telekom-Control-Kommission concluded that A1 Telekom has significant market power on the aforementioned relevant market. In order to counter the identified competition problems the following obligations were imposed on A1 Telekom:

- price control on a price cap basis in order to prevent end-user prices above competitive level.
- Obligation to set end-user prices without causing a margin squeeze for alternative operators.
- accounting separation

The decision was adopted on 29 Nov. 2010.

### 1.2.2 Further proceedings

31. Further subjects of proceedings before the NRA with effects on the competitive situation of market participants were e.g.

- the rejection of a motion by an alternative operator that A1 Telekom should be obliged to submit a Wholesale Line Rental offer due to the lack of a respective obligation in the corresponding market analysis decisions concerning the voice access retail markets,
- various decisions regarding interconnection charges between fixed and mobile network operators,
- a decision resulting from the analysis of the wholesale infrastructure market implementing rules applicable to the use of transmission systems when upgrading a copper network to an NGA network,
- a decision on frequency allocations in the 2,6 GHz range for the provision of mobile broadband services.

### 1.2.3 *Legal initiatives*

32. In March 2011, the Ministry for Transport, Innovation and Technology submitted a Draft Amendment to the Telecommunications Act. The Amendment shall implement the European directives 2009/136/EC (“Better Regulation”) and 2009/140/EC (“Citizens’ Rights) on national level. While the Better Regulation Directive covers amendments to Directive 2002/21/EC (“Framework Directive”), Directive 2002/19/EC (“Access and Interconnection Directive”) and Directive 2002/20/EC (“Authorisation Directive”), the Citizens’ Rights Directive focuses on amendments to Directive 2002/22/EC (Universal Service Directive) and Directive 2002/58/EC (Privacy Directive). Among other, the Draft Act contains new provisions with regard to the bundling of market definition (currently within the Telecom Market Regulation adopted by RTR and published in the Federal Legal Gazette later on) and market analysis (in the form of legal proceedings completed by an administrative decision on designation of undertakings with significant market power and the imposition of regulatory remedies like e. g. access, cost-control, non-discrimination or transparency of the Telecom Control Commission) in one single process, an extension of the repetition period between market analyses from two to three years and the introduction of structural separation as an additional remedy. In addition, the coordination process with the European Commission and the Body of European Regulators for Electronic Communications concerning draft measures by the NRA shall be revised. According to the information currently available, the Draft Act is presumed to enter into force in the course of Winter 2011.

## 1.3 *Energy*

### 1.3.1 *Effects of EU - Third Package Transposition*

33. The 3<sup>rd</sup> legislative package was partly transposed into national law in 2010 and entered into force in 2011. However, some implementing law (regional law for electricity and federal law for natural gas) is still pending. The main noticeable effect on the electricity market is the union of the former three balancing zones. It is foreseen that Austria will have only one zone in the future which will reduce transaction cost for trading and supply within Austria and thereby also reduce entry barriers in out of area markets.

### 1.3.2 *Market Dynamics*

34. For the first time a foreign (German) supplier entered the mass retail market in gas. This may be due to cheaper cost of service due to lower short term gas prices in Germany than in Austria.

35. Switching rates are still quite low in both markets, in electricity some 1.7% and in gas below 1% per annum.

36. Gas prices for households increased by some 9.4% in the first six months of 2011 whereas electricity prices remained stable. However price increases have been announced for both commodities due to rising whole sale market prices. In the case of electricity this is partly due to the German moratorium of nuclear power stations announced in March 2011 which led to a price increase for base Y12 of some 8 €/MWh.

### 1.3.3 *Transparency Tool for Gasoline Prices*

37. In July 2011 a new law on transparency of prices was approved by the Austrian Parliament. This law stipulates that all gasoline stations will have to send any price change to E-Control, the Austria Energy Regulator, which will make the prices available to drivers via an internet tool. The main idea is to provide to any point in Austria the nearest 10 stations on a map as well the nearest 5 stations with price information.

## 2. Enforcement of competition laws and policies

38. While most cases were dealt with by the Federal Competition Authority BWB (BWB) and the Federal Cartel Prosecutor (FCP) jointly, some were followed only by the BWB or the FCP. The annual report of the FCP for the year 2010 can be viewed at <http://www.justiz.gv.at/internet/html/default/8ab4a8a422985de30122a92c3e89637f.de.html><sup>1</sup> The annual report of the BWB can be found at [http://www.bwb.gv.at/Fachinformationen/Taetigkeitsberichte/Documents/1530\\_BWB\\_TB\\_2010\\_HOMEPAGE.pdf](http://www.bwb.gv.at/Fachinformationen/Taetigkeitsberichte/Documents/1530_BWB_TB_2010_HOMEPAGE.pdf).

### 2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions

#### 2.1.1 Summary of activities and description of cases, including those with international implications

39. In the period under review (1 July 2010 - 30 June 2011) 41 new cartel cases were examined, showing a significant increase compared to 15 cases in the year before. In addition, 17 new cases concerning the abuse of a dominant market position were examined. In several cases the Cartel Court has not rendered a decision yet.

#### 2.1.2 Agreements, recommendations and sector inquiries

- Cartel investigation into the beer market

The investigation was triggered by a complaint of a cash&carry company concerning an alleged infringement of Art 101 TFEU. According to the complaint, the main Austrian breweries would not supply cash&carry companies with draught beer as they were distributing their beer themselves or through small local beverage distributors. This boycott was based on an agreement which had been reached in the context of a trade association meeting, according to which no cash&carry company should receive draught beer. The complainant also informed the BWB about illegal resale price maintenance and restriction of sales.

The BWB sent requests for information, questioned witnesses and conducted inspections end of June 2011. Evidence was found that the breweries concluded an agreement within the framework of their professional association to not supply cash&carry markets with draught beer. Furthermore, the BWB found evidence of vertical restraints. The investigation is still ongoing.

- Suspected cartel in the sugar market

The BWB has brought a suspected cartel in the sugar market before the Austrian Cartel Court in autumn 2010. A leniency application revealed that two international sugar companies and their Austrian subsidiary allegedly engaged in geographic market sharing from approximately 2004 until the end of 2008 infringing Art 101 TFEU.

Whereas the leniency applicant will not face a fine, the BWB has requested the Cartel Court to impose a fine on the other company and their subsidiary involved. Court proceedings are ongoing.

- Cartel investigation into the insulation market

The BWB is currently investigating a possible infringement of article 101 TFEU by several suppliers of insulation materials (e.g. XPS, EPS etc). The sector has been of considerable interest

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<sup>1</sup> [http://www.justiz.gv.at/internet/file/8ab4a8a422985de30122a92c3e89637f.de.0/bkanw\\_jb\\_2010.pdf](http://www.justiz.gv.at/internet/file/8ab4a8a422985de30122a92c3e89637f.de.0/bkanw_jb_2010.pdf)

for the authority since an informer provided the BWB with documents, according to which the insulation companies infringe competition law by agreeing on prices.

In 2011, a second witness who had been working for one of the leading Austrian insulation companies for 20 years informed the BWB of anticompetitive behaviour in the insulation sector. This concerns information exchange with regard to price increases/prices as well as direct contacts between the companies if one company sold the insulation material below a certain level. In addition, the allegations related to illegal price maintenance.

The FCA has conducted dawn raids with a focus on the XPS and EPS insulation market at the beginning of August 2011. The documents which have been seized in the course of the investigation seem to corroborate the allegations. Investigations are still ongoing.

- Investigation of the BWB into the Austrian liquid fuel market

In April 2011 the BWB finalised its market inquiry in the liquid fuel market in Austria. The aim of the investigation was to provide an overview on the national market, namely the Upstream, Midstream, and Downstream sectors.

The main conclusions which can be drawn from the sector inquiry can be summarised as follows:

- The single national refinery in Schwechat, having a production volume of around 50 percent of domestic fuel demand, is of paramount domestic importance. Nevertheless, there exist a considerable number of foreign producers which are relevant for the Austrian market, too. An analysis of procurement quantities of major retailers for the domestic market showed that 21% of liquid fuel is related to refineries further then 200 to 600 kilometers away, and 6 percent is from locations even further than this. Related to output in these refineries, the combined production in the period from 2003 to 2008 increased by 16.9 percent for Diesel and by 9.3 percent for gasoline.
- An analysis of the majors' supply relations ex-refinery showed that such relations exists only from the OMV (the Austrian major owning the refinery in Schwechat) to the other majors operating domestically (Shell, BP, Agip, Conoco Phillips)
- The wholesale volumes of liquid fuel show a relatively stable pattern in the period 2003 to 2008. Around 25 percent of Diesel and 15 percent of gasoline is sold by majors on a wholesale base.
- In the retail sector, a dominant oligopoly on the regional petrol station markets formed by OMV, Shell, BP, Agip and Conoco Phillips is confirmed by the sector inquiry. Together the five dominant companies have a combined share of approximate 76 percent of the annual fuel sales.
- With respect to the network of petrol stations, around 60% of all domestic stations are operated by or under the brand of a major company.
- Finally, retail prices were under investigation. Concerning prices at stations of the Majors and independent stations, prices differentials are found to be heterogeneous between the nine provinces ("Bundesland"). The price spread is highest in Salzburg and Vienna and lowest in Burgenland and Upper Austria. Furthermore, the analyses showed that differentials increased over time for the period 2004 to 2010.
- An increase in differentials was also found for fuel prices at motorway petrol stations and off-motorway stations. An investigation on retail margins showed that margins on motorway

petrol stations are higher and more volatile than on off-motorway stations. The estimated increase in retail margins on motorway stations is 1.5 Euro-cent p.a. for fuel and 1.3 Euro-cent p.a. for diesel for the sample 2004 to 2010. An equivalent increase in margins for off-motorway stations can not be confirmed.

### 2.1.3 *Abuse of a dominant position*

- Alleged abuse of dominant position in the railway sector

Triggered by several complaints, the BWB started investigations in the transport of intermodal transport units by rail in Austria in 2008. These investigations revealed the following alleged conduct: The incumbent is suspected to apply a discriminatory pricing policy for the transport of intermodal transport units by rail within Austria. If a competitor operates the main international transport, the incumbent is said to set a significantly higher price.

According to the results of the investigations, there is a specific demand for transport of intermodal transport units by rail within Austria. Accordingly, the incumbent supplies this service with a loss. Thus, for certain services, the BWB assumes that it is not possible for other competitors to enter the market and provide these services. The conduct allegedly infringes Article 102 TFEU. The possible infringement started in 2004 and it is not yet clear if the alleged conduct has ended. The BWB filed an application for examination with the Cartel Court in December 2010. The case is still pending.

- Contracting of new release film copies to cinemas

In May 2011 the Cartel Court rendered a decision on the basis of § 27 Cartel Act declaring remedies binding upon a dominant film distributor. The remedies were negotiated by the official parties FCP and BWB.

According to Austrian case law, dominant film distributors are obliged to deal with cinema operators or to substantiate the reason for a refusal to deal. The remedies foresee that in the future the allocation of new release film copies will not depend any more on a decision by the film distributor but rather on a decision of the cinema operator. The latter will have to bear some economic risks inherent to the production and marketing of film copies.

The remedies are operative for a period of two years and support the change over to the new business model. After this period there is no need to give binding guidance to the film distributor for the application of the new business model.

## 2.2 *Mergers and acquisitions*

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

Between 1 July 2010 and 30 June 2011 a total of 264 national concentrations were notified.

40. In 6 cases parties withdrew their notification in phase I, in one case they agreed on remedies in phase I, thereby avoiding a phase II proceeding.

41. In 6 cases an application for in-depth-investigations was filed by one or more of the official parties leading automatically to phase II proceedings.

42. In one case the parties withdrew their notification during phase II and did not notify again. In three cases the application for examination with the Cartel Court was withdrawn by the official parties

partly due to commitments of the parties. In two cases the Cartel Court cleared the merger only subject to remedies.

### 2.2.2 *Summary of significant cases*

- Strabag/Colas

In April 2010 a merger was notified regarding the acquisition of all shares of COLAS by Bitunova Building Materials Technology Ltd., a subsidiary of Strabag SE. STRABAG SE is a known construction company operating primarily in Europe. Its affiliate, Bitunova Baustofftechnik GmbH, operates with bitumen emulsions. COLAS GmbH deals with the production, processing and distribution of bitumen emulsions.

BWB investigated the proposed merger, sent requests for information to competitors, got in touch with customers and suppliers and could therefore provide a comprehensive picture of the bitumen market in Austria. Bitumen emulsions consist of bitumen, a product of petroleum processing, water and emulsifiers. It is used in road construction, corrosion protection and Building industry. Bitumen is either sold to paving companies for local use or to private and public customers for repairing of road damages.

In the Austrian Bitumen market only six producers of bitumen emulsions exist. Correspondingly, the market shares of the notifying companies were above 40% of the bitumen emulsion production according to calculations by the Federal Competition Authority. In the market for bituminous pavement transitions the companies Colas and Bitunova held together nearly three quarters of the market. As a result of its investigation the BWB assumed that the parties would obtain a market dominant position. Furthermore, also vertical effects could not be excluded.

The BWB and the Federal Cartel Prosecutor therefore filed an application for examination with the Cartel Court. Subsequently, applicants withdrew their notification.

- Merger in the cash and carry market: Pfeiffer/Nussbaumer:

In March 2011 Pfeiffer notified the acquisition of sole control over Nussbaumer. Both companies are cash and carry markets.

The BWB applied a SSNIP-Test (experiment approach) to determine the relevant market. The market analysis of the BWB (SSNIP Test, turnover as well as distance analysis) showed that first, the pick up cash and carry market needs to be distinguished from the delivery cash and carry market and that, second, the geographical market for the pick up market is maximum 30 km from the business premises and for the delivery market 100 km from the business premises.

In the market for pick up cash and carry the BWB identified the regional area of Bruck/Mur for remedies on the basis of the market concentration in combination with the feedback from customers. The favoured remedy by the BWB was a divestiture of Nussbaumer's cash and carry in Bruck/Mur. Unfortunately, this remedy was not realisable due to the fact this location also included a coffee roasting facility which was part of the merger. Insisting on a structural remedy, would have led to a shut down of the location in Bruck/Mur which is less preferable than conduct remedies to ensure supply in this undeveloped region. The BWB therefore conduct remedies which were then officially imposed by a decision of the Cartel Court. One conduct remedy foresees a guaranteed internal price level in comparison to the competitive location in Vienna over a period of 10 years. This guarantees that the prices of all goods at the location Bruck/Mur

are equal to the location in Vienna (competitive location). The remedy is monitored by an independent expert who reports to the BWB every 6 months. Any deviation in price will be fined. The second remedy concerns an unlimited prohibition of future acquisitions within the region Styria/South Burgenland to prohibit further announced acquisitions in this region.

- Merger in the rail freight sector

In April 2011 Graz-Köflacher Bahn und Busbetrieb GmbH ("GKB") notified its plan to increase its share at LTE Logistik- und Transport-GmbH ("LTE") from 50% to 100% through the acquisition of a 50% share from a non-state-owned company. LTE provides rail freight services, GKB provides railway services in parts of Austria. GKB and the incumbent railway company ÖBB-Holding AG (ÖBB) are both owned by the Federal Ministry for Transport, Innovation and Technology.

Due to the strong position of the incumbent railway company ÖBB and due to lack of sufficient competition in some segments for rail freight services where LTE operates, there were indications that the dominant position of ÖBB in certain rail freight services markets might be strengthened by this merger. Thus, the BWB filed an application for an in depth investigation with the Cartel Court in May 2011.

Remedies on non-coordination between LTE and ÖBB and an obligatory resale of the 50% share within at the latest 2,5 years were agreed upon with the BWB. The BWB believes that these remedies sufficiently address possible negative effects on competition and withdrew its application for review. The case was therefore cleared by the Cartel Court in June 2011.

- Merger Berglandmilch - Tirol Milch

In December 2010, a merger between Berglandmilch and Tirol Milch was notified with the BWB. Together, the parties process more than 40% of milk in Austria. After its initial investigations in phase I, the FCA and the Federal Cartel Prosecutor filed an application for an in depth examination with the Cartel Court.

Assuming Austrian markets for certain milk products, the assumption for a dominant position was fulfilled. Possible negative effects on competition were seen in some milk product segments and for local farmers that are dependent on the merging parties for buying their raw milk. The merging parties declared that they will purchase a certain amount of milk from milk farmers in the region Tirol. Furthermore, a price-monitoring for certain products for food retailing was agreed upon. The case was cleared by the Cartel Court in February 2011 subject to these obligations.

- Merger in the media market: Mediaprint - NÖ Gratismedien

Mediaprint, the dominant media company in the national advertising market in print media in Austria, notified the acquisition of 30 % of and thereby joint control over Niederösterreichische Gratismedien (NÖG), a company publishing a free newspaper in the region of Lower Austria, in February 2011. As a result of the notified merger, NÖG would have been controlled jointly by Mediaprint and Niederösterreichisches Pressehaus (NÖP), a company publishing a major weekly newspaper in Lower Austria. A shareholder of Mediaprint already owns 20 % of NÖP.

The main concern of the BWB as well as the Federal Cartel Prosecutor (FCP) concerned the possible adverse effects on media diversity: As described above, NÖP is already partly owned by

a shareholder of Mediaprint and Mediaprint would now have gained joint control over a subsidiary of NÖP. The BWB was concerned that by these means the independence of NÖP would have been further reduced, thereby reducing media pluralism. Additional concerns were related to the unclear market position of Mediaprint and NÖG especially on the regional and the local advertising market in Lower Austria as well as to portfolio effects.

Therefore, the BWB as well as the FCP filed an application for in-depth examination with the Cartel Court. Subsequently, the parties withdrew their notification.

- Fine due to non-compliance with remedies

Following respective applications of the BWB and the Federal Cartel Prosecutor, the Cartel Court imposed a fine of € 200 000 for non-compliance with obligations: In 2008 a merger in the automotive sector was cleared subject to remedies. However, the acquirer, a private equity investor, did not fully comply with the obligations, amongst others breaching obligations concerning the trustee and reporting. Thus the aforementioned fine was imposed.

### **3. International co-operation**

43. The BWB puts great emphasis on intensifying international co-operation with other (Non-)European competition authorities both on bilateral and European level.

44. Besides many bilateral contacts at different occasions, the BWB invited several European competition authorities as well as the Russian Antimonopoly Service FAS for intensive bilateral meetings. In May 2011, a bilateral co-operation agreement between the BWB and FAS was signed further intensifying the good co-operation.

45. Director General Thanner also had the honour to co-chair the UNCTAD review conference (6th United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices) from 8 to 12 November 2010 and to chair the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, eleventh session, from 19 to 21 July 2011 in Geneva.

46. In December 2010, the BWB signed a twinning project with the Moldavian competition authority. It will assist the Moldavian Competition Authority in co-operation with Latvia and Rumania.

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

47. The BWB 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.

48. Besides numerous press contacts the BWB regularly releases information on important cases. Due to the amendments in the Cartel Act and the Competition Act, the BWB 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.

49. In order to arrange the BWB's website more clearly and to provide also more extensive information in English, the website was restructured completely. It went online in spring 2011 and offers comprehensive up to date information in a new design.

**5. Resources of competition authorities**

50. By 30 June 2011 - additional to the Director General and the Deputy Director General - 15 lawyers, 7 economists, three other professionals and 5 persons as support staff, i.e. all together 32 persons, were working at the BWB. More staff is still needed. Each case handler is responsible for all cases (mergers and antitrust) in specific sectors.

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

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

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