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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN AUSTRIA

-- 2004-2005 --

This note is submitted by the Delegation of Austria to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 19-20 October 2005.

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Executive Summary

1. In its third year of existence, the Federal Competition Authority (FCA, Bundeswettbewerbsbehörde) as well as the Federal Cartel Prosecutor (FCP, Bundeskartellanwalt) successfully stated their position in the Austrian and European field of Competition. The year 2004/2005 was marked by the first prohibition of a merger (Lenzing/Tencel) and its confirmation by the Supreme Cartel Court and the successful closure of cases with landmark decisions (Recommended price scale for Chartered Building Engineers).

2. The Cartel Court imposed the highest fine ever in the Austrian antitrust history for violation of competition law and despite still very limited staff resources three sector inquiries were carried out. Between 1st July 2004 and 30th June 2005 about 494 national and 647 European cases were examined and a substantial number of detailed investigations were conducted, including a vast number of interrogations as well as one dawn raid.

3. The reformed Austrian Cartel Act will enter into force on 1.1.2006 and will bring national competition law fully in line with EU Council Regulation (EC) No 1/2003.

I. Changes to competition laws and policies

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

a) The reform of the Austrian Cartel Act

4. On 1 May 2004 Council Regulation (EC) 1/2003 on the implementation of EC competition rules entered into force. It provides a system of legal exception in individual cases instead of the former notification system and the decentralised implementation of Articles 81 and 82 of the EC Treaty. Because of the direct applicability of the Regulation there was no legal obligation to align Austrian national law to the new EC law. For transparency reasons and to harmonise the law for merely national cases, it was decided to reform the Austrian Cartel Act (Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen).

5. Major changes are: The Austrian typology of cartels with its differentiated rules was replaced by a general prohibition of restrictive practices following the example of Article 81 EC Treaty. The national system of cartel notifications was abolished and a system of legal exception was implemented according to Regulation No 1. Under certain conditions cartels are exempted from the above mentioned ban. The relevant provision adopts the wording of Article 81 para. 3 EC Treaty. There is still the possibility of block exemption regulations but they are only of declarative character. They ascertain what is allowed anyway by the law. Mergers will have to be notified to the FCA instead of the Cartel Court but the latter remains the institution which will take the final decisions in cartel matters. Two of the threshold levels which demand such a notification have been raised. Cooperative ventures will be subject to merger control if they permanently fulfil all functions of an independent economic entity. The reformed Cartel Act will enter into force on 1 January 2006.

b) Amendment of the Austrian Competition Act

6. On 1 July 2002 the Austrian Competition Act (Bundesgesetz über die Einrichtung einer Bundeswettbewerbsbehörde) entered into force which implemented the Federal Competition Authority. As a consequence of Regulation (EC) 1/2003 which introduced a new legal framework it was also decided to amend the Competition Act in order to allow a smooth execution of Austrian as well as of European competition law.

7. One major change in the amendment of the Federal Competition Act is the implementation of a leniency-program. The FCA may refrain from applying to impose an administrative fine on an undertaker or on an association of undertakings if the following conditions are met: The enterprise has stopped participating in a cartel in time. It has informed the FCA, before it found out about the facts of the case itself. It cooperates with the FCA without restrictions. It has not forced others to participate in the cartel. If an undertaker only fails to inform the FCA in time it may apply for a reduced fine. For reasons of transparency the FCA has to lay down its practice in implementing the leniency programme in a manual. If an undertaker wants to call upon the leniency programme the authority has to tell him in a non binding notice if it will apply the programme in this case. Due to transparency reasons the FCA has to publish its own and the FCP applications to the Cartel Court concerning a suspected infringement of Austrian or European Cartel Law. Such a notice must not contain any business secrets.

I.2 Special sectors

Broadcast

Nationwide radio licensing

8. On 6th December 2004 the Austrian Communications Authority (KommAustria) issued KRONEHIT Radio BetriebsgmbH the first license for nationwide private radio broadcasting in Austria. This nationwide license was created by transferring the individual licenses for ten radio stations in the Kronehit Group to KRONEHIT Radio BetriebsgmbH (formerly Radio Privat Niederösterreich GmbH). A total of 28 frequencies were included in this nationwide license. As all parties to the procedure waived their rights to legal remedies, the official decision went into effect on 16th December 2004, and broadcasting operations began on 17th December 2004.

9. The amendment of the Private Radio Act came into effect in August 2005 and constituted the legal basis for nationwide broadcasting licensing for private terrestrial radio. Until 30th April 2005 existing radio broadcasters were allowed to transfer their licenses to a joint-stock company, which could then apply for a nationwide license. One specific prerequisite for nationwide licensing is a technical range covering more than 60% of Austria's population.

Advertising monitoring

10. Due to the recent amendment of Austrian broadcasting laws, KommAustria has been responsible for performing regular analyses (at least at monthly intervals) of all broadcasters' programs containing advertisements. Since August 2004 KommAustria monitored repeatedly the Austrian Broadcasting Corporation's (ORF) two television channels, three nationwide and nine regional radio channels, as well as private television and radio stations and conducted a number of proceedings, in which the compliance with the partially asymmetric advertising regulations for private and public broadcasters' programs was controlled.

Broadcasting market analysis

11. KommAustria has been carrying out a market analysis procedure pursuant to Article 16 of Directive 2002/21/EC resp § 37 TKG 2003. The result has been delayed as the company had shifted its broadcasting infrastructure and operations to Österreichische Rundfunksender GmbH & Co KG (ORS).

12. KommAustria instructed the Austrian Broadcast and Telecommunication Regulatory Authority (RTR) to deal with the question which specific obligations would be most economically suitable for the Austrian Broadcasting Corporation (ORF), as a potential SMP company, in order to address competition problems identified in October 2004.

Digitisation of terrestrial broadcasting

13. In May 2005 KommAustria published the invitation to tender for Austria's first multiplex platform, pursuant to Article 23 – 26, Private Television Act, deadline was the 1.9.2005. The tender comprised the following tasks: the planning, construction and operation of a nationwide multiplex platform for digital terrestrial television. The only submission came from the Österreichische Rundfunksender GmbH & Co KG (ORS). The licence should be granted at the beginning of 2006.

Telecommunication

Market definition

14. The market definition ordinance of Rundfunk und Telekom Regulierungs-GmbH (RTR) set out in October 2003 was amended in May 2005. In addition to the already defined 16 markets as being relevant for ex-ante regulation, the wholesale market for broadband access was included. This market corresponds with market Nr. 12 (“Wholesale broadband access”) 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 procedure according to Art 6 of Directive 2002/21/EC a nationwide consultation had been carried out before amending the existing market definition ordinance.

Market analysis

15. The following market analysis procedures were issued by Telekom-Control-Kommission (TKK).

Market for fixed network origination:

16. TKK issued an official decision on December 20, 2004 stating in accordance with Art. 37 Par. 2 TKG 2003 that Telekom Austria AG (“Telekom Austria”) has significant market power on the fixed network origination market. Due to the competition problems identified, regulatory instruments were imposed on Telekom Austria in accordance with Art. 37 Par. 2 TKG 2003 (e.g. an interconnection obligation, an obligation under Art. 42 TKG 2003 to base charges for origination services on the forward-looking long-run average incremental costs (FL-LRAIC), a non-discrimination obligation, an obligation under Art. 38 Par. 3 TKG 2003 to publish a standard offer for origination services, an obligation under Art. 40 Par. 1 TKG 2003 to maintain separate accounts and to set up a cost accounting system on the basis of which it must also be possible to calculate the costs of an efficient operator).

Markets for fixed network termination:

17. Termination services can only be rendered by the provider network to which the subscriber is connected. Therefore, as each subscriber network operator has its own termination market under Art. 1 No. 8 TKMVO 2003, there is no (uniform) termination market throughout Austria; instead, termination markets are specific to each network operator. On Telekom Austria's termination market, the same competition problems were identified as those prevailing on the origination market, Telekom Austria was therefore subjected to regulatory instruments analogous to those imposed on the origination market. In the termination markets of the other network operators in Austria (Informations-Technologie Austria GmbH, Colt Telecom Austria GmbH, tele.ring Telekom Service GmbH, Telekabel Wien GmbH, eTel Austria AG, Equant Austria Telekommunikationsdienste GmbH, UTA Telekom AG and LIWEST Kabelmedien GmbH), the only competition problem identified was an incentive to set excessively high prices in order to maximise profits. To tackle this competition problem, the operators were required under Art. 42 Par. 1 TKG 2003 to use a benchmarking method to calculate charges for the interconnection service of

termination in their public fixed-link telephone networks, with Telekom Austria's charge for regional termination serving as a base value.

Markets for access to the public telephone network at a fixed location for residential customers and for non-residential customers:

18. TTK issued two official decisions pursuant to Art. 37 Par. 2 TKG 2003 on December 20, 2004, determining that Telekom Austria possesses significant market power on the "market for access to the public telephone network at a fixed location for residential customers" as defined in Art. 1 No. 1 TKMVO 2003 and on the "market for access to the public telephone network at a fixed location for non-residential customers" as defined in Art. 1 No. 2 TKMVO 2003. Due to the competition problems identified, on both markets the following regulatory instruments were imposed on Telekom Austria:

1. an obligation under Art. 46 Par. 1 TKG 2003 to provide its subscribers with access to the services of all interconnected operators of publicly available telephone services by means of carrier (pre-selection);
2. an obligation under Art. 41 Par. 2 No. 2 TKG 2003 in conjunction with Art. 38 TKG 2003 to provide a standard offer with regard to the resale of access services within two months of the time when the official decision regarding these services goes into force;
3. a non-discrimination obligation under Art. 38 Par. 1 and Par. 2 TKG 2003;
4. an obligation under Art. 43 Par. 1 in conjunction with Par. 2 and Par. 3 TKG 2003 to submit its general terms and conditions of business as well as its retail rates and charges (except for special offers lasting up to three months) to the regulatory authority for advance approval (retail rates and charges have to comply with the cost-based standard);
5. an obligation under Art. 40 Par. 1 TKG 2003 to maintain accounting separation and to set up a cost accounting system.

Markets for publicly available local and/or national telephone services provided at a fixed location for residential customers and for non-residential customers:

19. TTK issued an official decision pursuant to Art. 37 Par. 2 TKG 2003 on February 21, 2005, determining that Telekom Austria possesses significant market power on the "market for publicly available local and/or national telephone services provided at a fixed location for residential customers" as defined in Art. 1 No. 3 TKMVO 2003 and on the "market for publicly available local and/or national telephone services provided at a fixed location for non-residential customers" as defined in Art. 1 No. 4 TKMVO 2003. Due to the competition problems identified, on both markets the following regulatory instruments were imposed on Telekom Austria:

1. An obligation under Art. 43 Par. 1 in conjunction with Par. 2 and Par. 3 TKG 2003 to submit its general terms and conditions of business (including service descriptions) as well as its retail rates and charges (except for special offers lasting up to three months) to the regulatory authority for advance approval (retail rates and charges have to comply with the cost-based standard),
2. An obligation under Art. 40 Par. 1 TKG 2003 to maintain accounting separation and to set up a cost accounting system.

20. Market for publicly available international telephone services provided at a fixed location for residential customers:

21. TKK issued an official decision pursuant to Art. 37 Par. 3 TKG 2003 on February 4, 2005, determining that no operator possesses significant market power on this retail market. This result was mainly justified by the fact that the market share of the largest operator – Telekom Austria – on this market is approximately only 45%.

Market for publicly available international telephone services provided at a fixed location for non-residential customers

22. TKK issued an official decision Art. 37 Par. 2 TKG 2003 on February 4, 2005, determining that Telekom Austria has significant market power on the market for publicly available international telephone services provided at a fixed location for non-residential customers as specified in Art. 1 No. 6 TKMVO 2003. Due to the competition problems identified, the following regulatory instruments were imposed on Telekom Austria in accordance with Art. 37 Par. 2 TKG:

1. An obligation under Art. 43 Par. 1 in conjunction with Par. 2 and Par. 3 TKG 2003 to submit its general terms and conditions of business (including service descriptions) as well as its retail rates and charges (except for special offers lasting up to three months) to the regulatory authority for advance approval (retail rates and charges have to comply with the cost-based standard),
2. An obligation under Art. 40 Par. 1 TKG 2003 to maintain accounting separation and to set up a cost accounting system.

Market for unbundled access

23. With its official decision issued on October 27, 2004, TKK determined under Art. 37 Par. 2 TKG 2003 that Telekom Austria has significant market power on the market for "wholesale unbundled access (including shared access) to metallic loops and sub-loops, for the purpose of providing broadband and voice services" as specified in Art. 1 No. 13 TKMVO 2003. Due to the competition problems identified, the following regulatory instruments were imposed on Telekom Austria in accordance with Art. 37 Par. 2 TKG 2003:

1. An obligation under Art. 41 TKG 2003 to provide access to local loops in its network, including parts thereof (partial unbundling), shared use and the annex services required for this purpose,
2. An obligation under Art. 38 Par. 3 TKG 2003 to provide a standard offer for the market services in question within one month of the official decision's entry into legal effect.
3. A non-discrimination obligation under § 38 TKG 2003,
4. An obligation under Art. 42 TKG 2003 to offer the market services in question in unbundled form and at costs no higher than those of efficient service provision (FL-LRAIC),
5. An obligation under Art. 40 Par. 1 TKG 2003 to maintain accounting separation and to set up a cost accounting system,
6. An obligation under Art. 42 Par. 1 TKG 2003 to deploy a cost accounting system which

also enables the calculation of the costs of efficient provision for the market services in question.

Retail market for the minimum set of leased lines for certain types of lines up to 2 Mbit/s

24. In its official decision on October 27, 2004, TTK determined under Art. 37 Par. 2 TKG 2003 that Telekom Austria has significant market power on this market. Among other remedies, Telekom Austria was obligated to offer a minimum set of certain leased line types up to 2 Mbit/s in accordance with the principles of non-discrimination, cost-based pricing and transparency. In connection with providing this minimum offer, the TTK also obligated Telekom Austria to observe the principle of non-discrimination, to base its leased line charges on forecast costs, and to have its terms and conditions of business as well as its rates and charges approved by the regulatory authority before application. Moreover, Telekom Austria is required to publish information in an easily accessible form regarding 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.

Wholesale leased lines market for terminating segments:

25. TTK issued an official decision on October 27, 2004 which identified Telekom Austria's position of significant market power on this market. Telekom Austria was also subjected to specific obligations in this case. In general, Telekom Austria is required to provide non-discriminatory access to the terminating segments of leased lines in response to reasonable demand. This means that Telekom Austria is required to enable access to terminating segments of various bandwidths at locations specified by the customer, or (upon request) the interconnection of terminating segments to its own infrastructure as well as that of third parties. While Telekom Austria's rates and charges for access to terminating segments at locations specified by the customer are to be based on the costs of an efficient service provider, the fees for other access services are to be based on full costs. With regard to companies which provide similar services, Telekom Austria is subject to a non-discrimination obligation, which requires equal treatment to Telekom Austria's own services or the services of affiliated companies. In addition, an obligation to maintain accounting separation and a cost accounting system for this market was imposed on Telekom Austria.

Wholesale leased lines market for trunk segments:

26. The market analysis procedure regarding the wholesale market for trunk segments of leased lines was discontinued in July 19, 2004, after the completion of a consultation and coordination procedure. The procedure was discontinued because effective competition prevails 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.

Market for wholesale mobile origination:

27. TTK issued an official decision pursuant to Art. 37 Par. 3 TKG 2003 on July 5, 2005, determining that no operator possesses significant market power on this retail market.

Market for wholesale mobile termination:

28. Termination services can only be rendered by the provider network to which the subscriber is connected. As each mobile network operator has its own termination market as defined under Art. 1 No. 15 TKMVO 2003, network operator-specific termination markets exist. For these reasons, the TTK came on October, 27, 2004, to the conclusion that Mobilkom, T-Mobile Austria, One, tele.ring and Hutchison 3G

Austria GmbH (H3G) have significant market power on their own termination market. In light of the objectives of regulation and the central principle of appropriateness, the mobile network operators were equally subjected to the following obligations:

1. Non-discrimination obligation: With regard to the quality of termination services, mobile network operators are to offer other operators the same terms and conditions which they provide for themselves, affiliated companies or other companies. With regard to the price of termination services, the mobile network operators are to offer other operators the same terms and conditions which they provide for affiliated companies or other companies,
2. Obligation to publish a standard offer for termination services,
3. Obligation to allow interconnection,
4. Obligation to charge a fee for the interconnection service of termination in their public mobile telephone networks based on the long-run average incremental cost (LRAIC) to an efficient operator.

Allocation of WLL frequencies

29. In October 2004 TTK carried out a procedure to allocate frequencies in the 3.5 GHz range. These frequencies are to be used specifically for wireless local loop (WLL) technology, which will be used in order to connect fixed-link subscribers using wireless technology. Six companies took part in the auction. The auction resulted in frequency allocations to Schrack Mediacom GmbH (nationwide), Telekabel Wireless GmbH (nationwide, except Vorarlberg), Telekom Austria AG (nationwide, except Vorarlberg) and Teleport Consulting und Systemmanagement GmbH (Vorarlberg). Total revenues from the auction came to EUR 464,000.00.

Allocation of GSM frequencies

30. In November 2004 TTK carried out an allocation procedure for frequencies in the GSM-900 and GSM-1800 ranges in 2004. Frequencies were allocated to Mobilkom Austria AG & Co KG, One GmbH and tele.ring Telekom Service GmbH. The revenues from the auction amounted to EUR 968,000.00. The frequencies allocated will be used to expand the capacities of each operator.

Energy

31. Since mid 2004 there have been marginal structural changes in Austrian electricity and gas market.

32. EnBW (Energie Baden-Württemberg AG) the only foreign company supplying Austrian businesses and industrial customers, closed down its subsidiary by the end of 2004 and left therewith the Austrian electricity retail market. The current business transactions in the sector suggest that it is more profitable to invest directly into already existing electricity companies, as the increase of EnBW's shareholding in the Lower Austrian energy company EVN shows. Rising energy prices which led to public discussion of the competitive situation of the Austrian electricity and gas market prompted FCA to carry out sector inquiries for the electricity and the gas market.

33. The merger “Energy Austria” approved under the obligation of remedies by the European Commission¹ was still not implemented by mid 2005, although in summer 2004 Verbund fulfilled all its commitments to sell its holdings: APC (the company of Verbund serving large customers) to ISTRABENZ ENERGETSKI SISTEMI, d.o.o., Unsere Wasserkraft and MyElectric.

34. However, when assessing the merger today it must be considered that at the time when clearance was granted, both the notifying parties² and the European Commission³, viewed the agreed commitments, anticipated a rapid liberalisation of the national electricity markets in the EU. Recent competition developments in the European electricity market⁴, currently the subject of an in-depth review by the European Commission, cast doubts on the economic effects of “Energy Austria” from a competition policy point of view. Since conditions did not change in the expected way (e.g., no market entry from foreign competitors), this merger did not lead to an increase of competition in the Austrian electricity market. Hence, the realisation of this merger must be reconsidered; some modification will be necessary.

35. In June 2005 Tiwag (Tiroler Wasserkraft AG) notified the establishment of a full-function joint venture by investing into MyElectric, a supply arm of the provincial electricity company Salzburg AG. This joint venture was cleared by the Cartel Court.

36. As already stated above, the latest business transactions suggest that investing into already existing companies is more profitable than setting up subsidiaries. RWE AG, Electricité de France and EnBW (Energie Baden-Württemberg AG) as well as E.ON Energie and Shell own shares of Austrian energy companies. Due to the Austrian law at least 51 % of the shares of electricity companies have to be publicly owned.

37. Announced by various energy companies and in part implemented, electricity and gas tariffs increased for the end users und industrial costumers in 2003 and 2004. The possibility of further price rises in subsequent years led to heated public discussion on the competitive situation on the Austrian electricity and gas market in the autumn of 2004. In September 2004 this situation prompted the Minister of Economics and Labour, Mr. M. Bartenstein, to suggest to the FCA to undertake a general investigation in close cooperation with Energie-Control GmbH (E-Control – the sector energy regulator). The FCA and E-Control took up this suggestion, and initiated a joint investigation of the Austrian electricity and gas industry (sector inquiries pursuant to Art 2 Competition Act).

38. Beside the market delineation the sector inquiries focus on the identification of market entry barriers, the determination of companies with market power and the special responsibilities of companies with market power. More details can be found in the interim reports published on the website of the FCA (www.bwb.gv.at) and E-Control (www.e-control.at).

39. Although the energy companies are forced by law to unbundle their network business from other businesses, market behaviour does not always reflect this obligation yet. By January 2006 separate network

¹ In contrast to the transaction as originally planned, Verbund had to undertake to divest its retail activities. This has since taken place.

² See para. 56 of the decision: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_092/l_09220040330en00910117.pdf

³ See paras. 103, 145 and 156 of the decision:
http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_092/l_09220040330en00910117.pdf/.

⁴ See Commission press release IP/05/11 of 7 January 2005 (“Commission’s report indicates that governments should do more to implement energy market opening measures”): <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/11&format=HTML&aged=0&language=en&guiLanguage=en/>.

companies have to be established facilitating an improvement of the competitive situation. All-inclusive pricing and the response to reductions in system charges are indicators of cross-subsidisation between the integrated companies' system operation and marketing business. The terms of supply contracts based on all-inclusive pricing have often been such that changes in system tariffs do not affect the overall price, meaning that cuts in system charges indirectly result in equal and offsetting increases in the energy price. Integrated companies were also regularly seen to be increasing their energy prices under agreements without all-inclusive pricing clauses almost simultaneously in response to past rounds of system charge reductions. Not just the timing but also the amount of the energy price increases that have accompanied reductions in system charges is questionable. Furthermore this behaviour sheds some light on the factual low intensity of competition.

40. An outcome of the sector inquiry is the fact that switching rates are low in all customer segments. Even in the group of large industrial customers switching rates are comparatively low (29 % in volume terms) although this is partly due to the behaviour of the local player which was often (ultimately) the lowest bidder in a tender. Interestingly, outside their grid area the local player offered electricity at higher price levels. Although a residential customer (3.500 kWh/a) is able to save up to € 70 per year and the switching process is straightforward and free of charge only a bit more than 2 % of the residential customers switched to another electricity supplier. The analysis of market barriers along the sector inquiry showed that the efforts – so called switching costs – made by customers who want to switch (e.g. comparing intransparent prices, searching for offers, transaction costs, etc.) can be increased by incumbent suppliers and constitute a significant market barrier to new entrants.

41. The sector inquiry has identified a number of questionable practices. Over the next few months the FCA in cooperation with E-Control will negotiate on a consensus based "competition stimulation package".

Railway

1) Discrimination in use of feeder lines – risks and costs of the last mile

42. Feeder lines are the backbone of the railway system (close behind big terminals). In this small environment many goods will be loaded and unloaded on cargo trains. Hence, all railway undertakings are obliged to allow non-discriminatory access to those. .

43. On the main tracks little competition starts growing in Austria (95% of all tracks are still owned by the Austrian Federal Railway, OEBB, Rail Cargo Austria). Problems appear in feeder lines with additional users (14% of all 1.200 feeder lines of Austria), due to different interests of using the same feeder line (harbour, industrial areas, etc.). The counterparts are the owner of the infrastructure, the private railway undertakings as well as the incumbent OEBB, who is mostly in charge of the whole service on the feeder line based on historical contracts. Moreover, OEBB achieved in negotiations with the owner exclusive rights in using the feeder line connected with a permission of access. Because feeder lines are non-public railways in Austria, private railway undertakings companies cannot use them without the permission of the owner (based on the Austrian law act). All influence is assigned to OEBB. The high costs of the non-public infrastructure is determined by the owner OEBB caused by old handlings contracts. Today there is no competition due to the high costs of the last mile. In the last months, an increasing number of private railway undertakings have filed complaints to the Austrian Rail Regulatory Body. The competitive problems are difficult to solve due to historical contracts between them and the incumbent, the OEBB. Currently, negotiations and meetings with the different counterparts are held in order to find a solution which aligns with national/EU the competition law.

2) Discrimination with locomotives and carriages

44. In the past year railway undertakings requested to buy used operating facilities from the OEBB. Those requests specially targeted used locomotives, which normally are sold or scrapped. The advantage of those machines is that they are already licensed in Austria, which can entail a very expensive and long lasting procedure to obtain. Hence, such locomotives are very interesting for private railway undertakings. However, it does happen that this equipment is sold to distant countries or is scrapped.

II. Enforcement of competition laws and policies

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

a) *Summary of activities*

45. In the period under review about 17 cartel cases, 36 cases concerning the abuse of a dominant market position, 38 vertical restraints and 11 non-binding recommendations were examined. In 2004 the Cartel Court received the following filings from the FCA and the FCP: 24 actions for fines, 9 actions for remedies against the abuse of market power, 9 actions for revocation of non-binding recommendations and 14 application for assessment whether a case is subject according to cartel act.

b) *Description of significant cases, including those with international implications*

ba) Agreements and recommendations

Lufthansa - Travel agencies

46. In autumn 2004 Lufthansa abolished its commissions formerly paid to travel agents while travel agents were free to ask for service charges from their (end) customers. Following a complaint by the Association of Travel Agencies, the FCA started investigations on the question whether this would constitute an abuse of a market dominant position. Like other national competition authorities did in similar cases, the FCA came to a negative result.

47. In November 2004, the Association of Travel Agencies complained to the Cartel Court. However, their complaint did not concentrate on the abuse of a market dominant position, but they argued that the envisaged distribution system constitutes an infringement of Art. 81 (retail sale price maintenance): as travel agencies are no longer considered "genuine" sales agent by Lufthansa they must not be obliged to sell at a certain price. As they can fix the service fee autonomously, the total final price (net price plus service fee) is not fixed by Lufthansa. However, the obligation of the travel agency to print the net price on the ticket (and to sell the ticket only under the conditions granted by Lufthansa) constitutes (at least) a minimum price.

48. In January 2005, the Cartel Court decided the case in favour of Lufthansa. The complaint by the Association of Travel Agencies was rejected. Its main conclusions:

- European law has to be applied as the distribution system is applied in several member countries.
- However, the system does not constitute a retail price maintenance infringing Art. 81 as the travel contract is concluded directly between the airline and the final customer. The travel agency is only executing a declaration of interest to buy a ticket on behalf of the final customer. The price for the travel contract between airline and customer is fixed by

Lufthansa. The price for the additional service contract between travel agency and customer is fixed by the travel agency.

- Furthermore, the travel agency is neither a genuine nor a non-genuine agent as it is not acting on behalf of the airline.

The Supreme Cartel Court upheld the decision of the Cartel Court.

Driving schools

49. Due to facts uttered by the Federal Chamber of Labour (concerning possible price-fixing agreements between driving schools of the town Graz the FCA conducted a large investigation.

50. The Federal Chamber of Labour forwarded the FCA information, extracted from a price test in May 2004 brought up that 11 of 12 driving schools demanded the same price, suggesting price-fixing agreements between driving schools in Graz (capital city of Styria). Thereupon, the FCA launched a large investigation into the pricing policy of the concerned companies. Managing directors, licensees of driving schools as well as witnesses were heard and questionnaires were sent to driving learners. Furthermore, requests for information were sent to driving schools in order to clarify the development of prices and the number of learners. After the initial investigation phase it became evident, that there were strong links in the ownership structure of several of the investigated companies. Hence, it became vital to verify whether different driving schools are economically dependent on each other and therefore have to be counted as one company.

51. As a result of the investigation, the allegations against the driving schools and the corresponding companies respectively were confirmed. Therefore, the FCA made an application for a fine at the Cartel Court on account for a cartel agreement. Up to now a few hearings were carried out in order to interview witnesses. The court proceeding will be continued in September 2005.

Dawn raids

52. In November 2004 there was an inspection by the European Commission in several Member States including Austria on the premises of manufacturers and importers of bathroom fittings. In Austria three undertakings and one association of undertakings were concerned by this inspection. 27 officials of the EC-Commission and the FCA searched for evidence on exchanging information on price increases before their actual implementation, on rebates and discounts and on business information. The FCA was also assisted by the criminal investigation department.

Karting and Bike Regulations

53. In January 2004 a complaint against several organisers of national karting championships as well as the Austrian National Sporting Authority (i.e., Oberste Nationale Sportkommission, hereafter referred to as OSK) was lodged with the FCA. It was argued that by introducing a one branded tyre rule by various organisers (approved by the OSK) for national karting championships, competition between the suppliers of tyres, on the level of such championships, is being impeded.

54. Organisers of national karting events regularly adopt sporting rules (i.e., the rules under which participating drivers compete) and technical rules (i.e., the conditions equipment must satisfy to be admissible for the races) they consider necessary for national championships. These rules are thereafter approved by the OSK which controls and develops the sporting and touring aspects of motoring and governs motor sport at a national level.

55. After thorough investigation the FCA found that the organisers had allotted sponsorship agreements for the supply of tyres unilaterally, without any objective selection criterion. At the FCA's request, the organisers changed their practice and adopted an open procedure for calls for tender with objective conditions open for all tyre suppliers as from 1 January 2005. The selection is monitored and organised by the OSK. Additionally it was agreed with the OSK that this practice is to be applied also to national bike championships.

Recommended Fee Structure for Building Engineers (Honorarordnung der Baumeister HOB)

56. In June 2004, after extensive investigations, the FCP followed by the FCA took legal action against the recommended fee structure for building engineers. This fee structure was published as a so called "non-binding recommendation"⁵.

57. The FCP argued mainly that this fee structure was strictly above real market fees (which were by 50% lower in single cases) and did not reflect true cost structures and was therefore not "justified for the national economy"⁶ as outlined in the Cartel Act. Moreover the fee structure's wording "non-binding" did not appear.

58. The FCA argued on the grounds that this recommendation was contrary to Article 81 of the EC treaty:

- The fee structure-scale was a decision by an association of undertakings, which may affect trade between Member States and which intended the prevention, restriction or distortion of competition within the common market.
- The non-binding recommendation is qualified for restricting price-competition through fixed selling prices.
- Recommendations containing prices or price limits are forbidden; guidelines for calculations are allowed.

59. The Cartel Court itself carried out an in-depth investigation, whereby it found evidence that the price level of this non-binding price recommendation was about 10 to 30% higher than customary market prices. Moreover the price recommendation was commonly accepted by the building engineers as a valid basis for the calculation of their fees. The building engineers had the intention to charge the fee whenever the market permitted it.

60. In its decision of 14 April 2005 the Cartel Court came to the conclusion that the issuing of this non-binding recommendation was not economically justified especially because of the recommended fees above the typically charged fees. Moreover, it underlined that the recommendation constituted a "decision of an association of undertakings", whose objective (not effect) was to coordinate fees. The recommendation was (partly) respected voluntarily by its members and therefore limited competition. The Court came also to the conclusion that Article 81 EC is applicable, as all building contractors are addressed in the whole of Austria; foreign contractors are asked as well to make their offers along the lines of the non-binding recommendation.

61. This decision is an important landmark decision. For the first time the effect of a non-binding recommendation was examined in detail. It was clearly shown that this non-binding price recommendation

⁵ Non-binding Recommendations of Associations are measures of associations (mostly the Austrian Federal Economic Chamber) to help their members calculating prices. Most of these recommendations are titled "non-binding" but have a certain binding effect.

⁶ « volkswirtschaftlich gerechtfertigt » in the sense of para 23 of the Austrian Cartel Act

was not compatible with Art 81 EC, had the object of obtaining higher prices and thus restricting competition and was strictly against consumers' interest and that a non-binding recommendation constitutes a "decision of an association of undertakings".

62. The decision is still under appeal.

bb) Abuse of a dominant position

Redmail Logistik & Zustellservice vs. Österreichische Post AG

63. The Cartel Court approved the complaint of redmail, a national provider of logistics and delivery services, that the Österreichische Post AG (Austrian Post) has abused its market dominance on the market of delivery of daily, weekly and monthly magazines.

64. The Court decided in May 2005 that the delivery market consists of the day delivery (10am to 2pm) and the night delivery (until 6am) of newspapers and magazines to households. However, in the case of the delivery of weekly and monthly newspapers there is no distinction according to the time of the actual delivery (i.e. night or during the day). Moreover, it concluded that the delivery of daily newspapers belongs to the same relevant market then the delivery of weekly and monthly newspapers. The geographic market was defined as a national one, considering that the two parties offer national services and customers demand is national as well as. As stated in the Cartel Court decision the FCA handed in a profound statement which came to the same conclusion as the national expert paper. The Cartel Court followed and came to the same conclusions as the expert paper which was commissioned at a later stage.

65. The abuse of the dominant position was constituted on the basis of five-year-transient-contracts with agreements on the amount of volumes to be submitted to the Österreichische Post AG. This constitutes a foreclosure effect on competitors, i.e. redmail, since the contract is binding the national demand on that particular relevant market until the end of 2006, hence creating barriers to entry and impeding the development of an effective competition. The Cartel Court ordered the suspension of the abuse. As the Österreichische Post appealed against the decision the case is still pending.

Kinobetriebs GmbH et al / Constantin Filmholding GmbH et al

66. In 2002 several cinema operators filed a claim under § 35 KartG with the aim of turning off alleged abuse of market power exercised by one of the largest Austrian film distributor and operator of the major chain of cinemas throughout Austria.

67. The defendant's market share as a film distributor in Austria varied from about 12% to 25% from 1997 to 2003. In 1997 a decision of the Supreme Cartel Court had acknowledged under § 35 KartG a film distributor's duty to contract with regard to film copies of first releases for new films. Decisive for this finding was the film distributor's monopoly position with regard to exclusive licensing of films in a particular geographic territory and the dependency of cinemas. Refusal to deal should in each case be subject to objective justification.

68. In the actual case the Cartel Court discerned different market segments in the market of first release films: the so called blockbuster market segment, the commercial market segment containing films started with 10 to 50 copies in Austria, and films started with less than 10 copies. Within the commercial segment (10-50 copies) the defendant has in recent years always released the largest number of films and has constantly held a share of 20 - 30% of market turnover. The assertion of market power was nevertheless based as well on qualitative reasoning: cinema operators are commercially dependant and the defendant's vertical integration renders competitive advantages that can't be controlled by other cinema operators.

69. The Cartel Court asserted that the defendant has offended his duty to contract without giving an objective justification. It continued that the defendant is obliged to give an objective justification of a refusal to deal in a way allowing verifying the ratio of the decision. While box-office results are an approved requirement in the decision on the distribution of films, it is not accepted to rely only on box-office results with the defendant's films. Abusive behaviour was constituted moreover by the defendant's practise of delaying the award of film copies to less than four weeks before the film start and the discrimination of extraneous cinemas with regard to supply with advertising materials and with regard to general film advertising.

70. The Cartel Court's decision has been affirmed by the Supreme Cartel Court in April 2005.

Sector inquiry on Buyer Power of Grocery Retail Companies

71. The FCA already reported last year that it started a sector inquiry on buyer power of grocery retail companies in Austria according § 2 Abs 1 Z 3 to the Competition Act, triggered off by several (anonymous) claims about certain business practises in the sector. Initially, around 40 market participants, mainly producers, were interviewed by the FCA. Subsequently - on the basis of this information - around 180 questionnaires were sent to producers of nine product markets and to the countries biggest grocery retailers in order to accomplish the sector study. So far the response rate was around 80%, however, around 30 companies, including main producers refused to answer certain questions concerning terms and conditions and other information, arguing that the requested data is confidential and that some of the questions put forward by the FCA in the questionnaire are not proportionate. The FCA filed an application with the Cartel Court to order the submission of the requested information. The Cartel Court issued such orders, but the High Court decided - upon remedies sought by most of the parties- that the right to be heard has been violated and referred the case back to the first instance. However, the High Court decided that the argument of business confidentiality is not valid in the case. The practical implication of this decision is that the Cartel Court will have to deal with the issue on whether the questions put forward in the questionnaire are necessary and proportionate in view of the purpose of the inquiry. Consequently, due to this further delay in receiving the relevant information necessary for a representative sector inquiry and the efforts connected with the proceedings, the FCA had to postpone the completion and publication of its report.

Electricity (as already exposed under para 12)

72. In Autumn 2004 the FCA (in close cooperation with Energie-Control GmbH (E-Control – the sector energy regulator) sent requests for information to about 700 medium and large customers as well as to a number of undertakings active in the electricity sector.

73. The most important results are the following:

- Local players still have a dominant position within their net area related to households, small commercial customers and agriculture.
- We can find similar results with regard to customer groups with a small consumption (max. 1 gWh).
- Regarding to customer groups with a consumption > 1 gWh the Austrian undertaking Energie Allianz has a dominant position.

74. In Austria, the structure of the electricity market is still dominated by nine local federal state companies. The most important alternatives suppliers (switch, Unsere Wasserkraft and MyElectric) are in

the property of established Austrian providers of electricity as well. As already mentioned before, foreign suppliers are hardly active in Austria. Although the electricity sector is completely liberalised in Austria there is still lack of competition.

75. The most important reasons for this are: low switching rates in the household customer market, by small commercial customers and by agricultural customers; high quota of high taxes, duties and net-tariffs; suspicion for internal subsidies of the companies as a result of insufficient unbundling; high concentration of companies in the electricity-sector.

76. All in all it appears that intensity of competition is rather low and that mergers of the past have contributed to this situation. Over the next few months the FCA in cooperation with E-Control will negotiate on a consensus based "competition stimulation package". The answers of the sector inquiry also indicate a rise in the electricity prices and a widespread practice of suppliers to base their price calculation on forward-prices of the EEX (European Energy Exchange).

Gas

77. In spring 2005 the FCA started a sector inquiry in the gas market in close cooperation with E-Control. This inquiry is still in progress.

II.2 Mergers and acquisitions

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

78. Between July 1st, 2004 and June 30th, 2005 a total of 311 concentrations were notified to the Cartel Court. In 15 cases an application for a phase II proceeding was filed by one or more of the official parties (i.e. the FCA, FCP), enabling in-depth-investigations.

b) Summary of significant cases

Styria - ET Multimedia

79. At the beginning of 2005 Styria Medien AG (Styria) notified the acquisition of more than 50 % of ET Multimedia AG (ETM). Styria publishes amongst others the daily newspapers "Die Presse" and "Kleine Zeitung". ETM publishes mainly economic and women magazines, but has also a 50 % share in the economic daily newspaper "Wirtschaftsblatt".

80. While the FCA welcomed the merger on the magazine market, it had doubts on the market for nation-wide quality daily newspaper, especially with regard to a potential adverse effect on media pluralism. The FCA therefore filed an application for examination with the Cartel Court. In parallel the FCA negotiated with the notifying parties on possible remedies concerning the independence of the editorial offices and the prohibition of tariffs for a combination of the newspapers "Die Presse" and "Wirtschaftsblatt".

81. After intensive negotiations the merger was cleared in May 2005 subject to remedies. The most important ones are the following: The independence of the editorial office of "Wirtschaftsblatt" is guaranteed until June 2010. Furthermore, tariffs for combining job ads or common product and image campaigns in "Die Presse" and "Wirtschaftsblatt" are forbidden until June 2008. Only inserts with an editorial content which are attached to "Die Presse" and "Wirtschaftsblatt" are exempted from this prohibition insofar as the price must only amount to 70 % of the price paid with separate booking. In this way the fact is taken into account that readers who read both newspapers and who account to

approximately 30 % will not read an apparently identical insert twice and will therefore only be reached once by the add.

82. With these remedies requested by the FCA, the danger of putting the financial background of some newspapers and thereby media plurality at risk by very aggressive combination offers, is averted.

AUA - Airest

83. In March 2005 the Austrian Airlines Group (AUA) notified the acquisition of the remaining 65 % in Airest Restaurant und HotelbetriebsgesmbH (Airest). AUA is the national flag carrier; Airest is mainly active in airline-catering and the operation of airport restaurants.

84. The FCA focused on the question whether the market dominant position of Airest in airline catering (Airest holds between 40 and 99 % market share on regional airports and 70 % on the important airport of Vienna) is reinforced by the acquisition of AUA which is the main customer of airline catering services in Austria (about 75 % of all airline catering services are bought by AUA).

85. After filing an application for examination with the Cartel Court, further investigations of the FCA have shown however that a further reinforcement of the market dominant position of Airest by the merger is unlikely: AUA has already a stake in Airest - the danger of a privilege of Airest services therefore already exists. Furthermore, the managing director has always been nominated by AUA while the two other stake holders were only represented in the supervisory board. It is therefore not probable that the involvement of AUA in strategic decisions will be changed substantially. Finally, as AUA is under pressure in the airline market and will not any longer be obliged by other stakeholders to meet its catering needs with Airest, it will pass on the pressure to suppliers such as airline caterers.

86. Nevertheless, a framework had to be established to ensure an effective and fair competition in airline catering. The FCA and the notifying parties have therefore elaborated commitments which were put forth by a modification of the notification. They concern the obligation of AUA and its affiliates not to grant exclusivity to Airest. Furthermore, the current contract between Airest's competitor Do & Co and AUA's affiliate Lauda Air which will end in 2009 will be put up for tender and awarded to the best offer regarding quality and price.

87. Following the modification of the notification the FCA withdrew its application for examination with the Cartel Court and the merger was cleared.

Strabag/Mischek

88. In the acquisition of Mischek, a building company specialised in pre-fabricated residential building, by Strabag, the largest Austrian building company the FCP as well as the FCA made an application to the Cartel Courts for examination of the strengthening of market power of the notifying party. The Cartel Court ordered a national expert, who - based on a far reaching enquiry of the FCA - accomplished a tender study that dismissed the theory that both companies were direct competitors. He also stated that there was a distinct market for building (not refurbishment) of residential houses of 40 flats or more and that the geographic market included Vienna and its direct surroundings. However, there was no distinct market for pre-fabricated residential houses. Based on this market definition, the market share of the merging companies was about 35 to 40 %.

89. It was however not possible to prove that the merger lead to strengthening of market power, as the pre-fabricated construction method of the target does not constitute an important competitive advantage and the two companies are not the closest competitors. The Cartel Court approved the merger.

Microsoft/Sybari

90. The acquisition of the antivirus software vendor “Sybari” by Microsoft was notified to the Cartel Court. The parties submit the relevant market is the software market as a whole, without further segmentation. The FCA disagreed with this market definition and argued that the relevant product market is the market for antivirus software for business consumers. Because Sybari does not produce antivirus scan engines, but produces meta software, which coordinates several antivirus scan engines from different antivirus software vendors, the FCA assumed a further segmentation into single antivirus scan engines (SSE) and multi antivirus scan engines (MSE) with Sybari's worldwide market shares of about 90%. Hence, the FCA as well as the FCP decided to go into Phase II.

91. The FCP additionally stated that Microsoft already acquired several small companies in the security software market in Europe and the US (i.e. RAV antivirus software from GeCAD; anti-spyware software from Giant) which resulted in a horizontal overlap with Sybari's products.

92. In phase II the notifying parties provided information on the market for MSE, which showed that MSE - with proved higher quality - lies with four integrated single scan engines in the same price segment as the leading SSE vendors (which are not integrated in any MSE product). Regardless of the existence of a MSE submarket, this information indicated that the three leading SSE vendors raised the price of their SSE product above competition price and therefore MSE vendors (with four external single scan engines) are situated in the same price segment as SSE vendors (with their own one single scan engine). The merger would therefore induce more competition force on SSE vendors and additionally, because the sense of MSE is to integrate SSE from different antivirus software vendors, it is unlikely that Microsoft would close their interface to MS-Exchange and risk an insecure operating system. Thus the FCA withdrew their application.

93. The Court's economic expert confirmed that the acquisition of several small companies in the security software market lead to Microsoft's announced “One Care” antivirus- and system utility package solution for private customers and this package could play a significant role on the antivirus market in the future. Because Microsoft has not yet distributed the products from its recent acquisitions and Sybari's product targets only professional users compared to "One Care" on the market for home users, there exists no horizontal overlap concerning this merger. Thus the FCP withdrew his application.

Gewista - Soravia

94. This case concerned the cession of megaboards of Gewista-WerbegmbH (Gewista) to Werbeplakat Soravia GmbH & Co KG (WPS) while Gewista acquired joint control of WPS. As Gewista has already a market dominant position in the important outdoor advertising market in Vienna the FCA considered the reduction of control and influence possibilities of Gewista in WPS as essential.

95. The FCA as well as the FCP therefore filed an application for examination with the Cartel Court. After intensive discussions and a sound economic expert opinion the merger was cleared only subject to remedies. Through different measures the control and influence possibilities of Gewista in WPS were reduced substantially. Furthermore, bundle sales of advertising space of Gewista and WPS as well as discrimination between Gewista and other outdoor advertisers were prohibited. The opinion of the FCA that the relevant market comprises only outdoor advertising was substantiated by the expert opinion. The question whether this market can be subdivided further was left open.

Henry Schein Inc. II

96. In January 2005, Henry Schein Inc., New York, the largest provider of healthcare products and services to office-based practitioners in the combined North American and European markets, re-notified

the acquisition of Austrodent Handelsgesellschaft mbH, a leading full service distributor of dental consumables and equipment in Austria.

97. Henry Schein's first attempt to acquire Austrodent and to increase its market shares in the Austrian dental equipment sales and service arena failed since the Cartel Court as well as the FCA took the line that the acquisition of entire Austrodent would impede significant competition on the Austrian sales and service market for dental equipment as well as the market for dental consumables. Henry Schein eventually withdrew its notification including a waiver of claim in anticipation of an unfavourable outcome.

98. In order to meet the competition concerns expressed by the Cartel Court during the first proceedings Henry Schein limited its newly proposed acquisition to Austrodent's branch offices in Vienna, Linz, Graz and Innsbruck. As for the remaining Austrodent branch offices in Salzburg and Klagenfurt as well as for its subsidiary Müller Zahnwaren GmbH, Vienna, Henry Schein presented Sirona Dental Systems GmbH, Bensheim, Germany, as purchaser. Sirona is one of the leading manufacturers of dental integrated equipment and so far has not been engaged in the Austrian sales and service market for dental equipment as well as the market for dental consumables.

99. After an extensive analysis of the new notification and proposal, the FCA was concerned about Sirona's credible intention to enter the Austrian sales and service market for dental equipment and consumables. The concerns were particularly based on the fact that Henry Schein's relationship with Sirona significantly expanded in 2004 when Henry Schein became the largest distributor of dental products in Europe through its acquisition of Demedis, which has always been Sirona's largest customer outside of North America. Thus the FCA concluded that the transaction would likely have the same effects on the relevant markets as the acquisition originally notified, i.e., an increased ability and incentive of Henry Schein to eliminate actual and potential competitors leading consequently to higher prices for practitioners and consumers.

100. In March 2005 Henry Schein again withdrew its notification. At the same time Henry Schein (after intense negotiations with the FCA) notified a new proposal replacing Sirona with Pluradent Austria GmbH, Vienna, an (independent) Austrian distributor of dental, medical, and veterinary healthcare products, services and supplies. As opposed to Sirona, the FCA considered Pluradent as a credible competitor on the Austrian sales and service market for dental equipment and consumables. The newly proposed transaction was finally cleared.

II.3 Activities of the Federal Cartel Prosecutor (FCP)

101. While most cases were dealt with by the FCA alone or FCA and FCP jointly (see especially "Fee Structure for Building Engineers" para 64, "Strabag/Mischek" para 95, "Microsoft/Sybari" para 97, and "Lenzing fine" para 109, 122) the FCP concentrated on following main cases:

Lenzing AG / Tencel Holding Company Ltd.

102. As already mentioned in last year's OECD report the FCP filed an application of in-depth investigation in the merger procedure Lenzing/Tencel to the Cartel Court.

103. In 2001 the European Commission prohibited the indirect takeover of the sole control of the Lenzing AG by the CVC Capital Partner Group Ltd., because CVC controlled at that time already Acordis, the biggest competitor of Lenzing in Europe and exclusive competitor in the USA. In May, 2004 Lenzing AG notified to the Cartel Court the same merger in a different way, the indirect takeover of all shares in the British Tencel Holding Company Ltd. which is a part of the CVC group. Lenzing produces the cellulose fibres "Viscose" and "Lyocell", Tencel produces Lyocell under the brand "Tencel". Lyocell is - just as

viscose - a chemical fibre won of wood whose product features (durability with moisture, firmness, roughness) differ clearly from viscose and cotton.

104. The Austrian Cartel Court shared the doubts of the FCP, which were confirmed by an economic expert's opinion. Its conclusion was – in line with a decision of the European Commission of 2001 – that the relevant product market is Lyocell fibres where the merger would have led to a worldwide monopoly for Lyocell fibres. On the basis of these facts the merger was prohibited by the Cartel Court.

105. The merging parties appealed the decision. The Supreme Cartel Court upheld the decision.

106. This was the first prohibition of a merger since the considerable changes in the institutional setup since 2002 and the second clear cut prohibition of a merger since the introduction of a merger review in Austria. As the parties had accomplished the merger despite the merger control procedure and – at a certain state – a clear cut decision of the Cartel Court that prohibited the merger, the FCP joined the FCA's application for imposition of a fine for unlawful accomplishment of a merger (as exposed under point II.4). The Cartel Court followed this application and imposed a fine of 1.5 Million Euros (legally binding decision). The merging parties then notified a considerably modified merger, which amongst other obligations ensured future competition by granting a licence for key parts of the Tencel technology.

Non binding price recommendations of an association

107. The FCP partly supported by the FCA applied for fines in eight cases because of missing revocations of non-binding price recommendations. In two cases the circumstances could be clarified and the applications were withdrawn. In a total of four cases the Cartel Court imposed fines.

Furniture transports remunerations (Möbeltransportentgelte)

108. In 2002 furniture transports remunerations were notified as a non-binding recommendation by an association. The official party FCP took legal action and pointed out that the rate of price increase was disproportionately high compared with the inflation rate and that different items of the recommendation had nearly doubled the price of results of invitations to tender. Nevertheless, a general discount of 20% to the recommendation's fee was customary. The FCA commented amongst others the incompatibility of recommended rates with the EC competition law (Art 81 EC). After long negotiations, the association revoked this non-binding price recommendation and developed a spreadsheet table for calculation of actual individual costs. Indeed, this table contains general price elements like collective agreement wages, extra hour rates and tax rates. The calculation of the actual "overhead expenses" as well as the individual extent of depreciation of investments and the staff follows individually.

109. Immediately after the professional organisation withdrew the announcement of its non-binding price recommendation, the application for a revocation order of both office parties was also withdrawn. Hence, the procedure was closed.

Pharmaceutical commodity indexes (Warenverzeichnis I, II und III)

110. An indispensable tool for chemists are the so-called "Pharmaceutical commodity indexes I, II and III" (publishing info) of the druggist's publishing company which contain amongst others information about the manufacturer, range of commodity groups and price information. While the prices of the "pharmaceutical commodity index I" are regulated by law, the prices of the commodity indexes II (homeopathic medicament specialties) and in particular III (the First Aid, food, cosmetics and personal hygiene, other articles and veterinarian products) are calculated only on the basis of the manufacturer's specifications and the drugstore discounts. Also the products of the commodity indexes II and III are mostly paid by the consumer directly. Now after intensive negotiations a modified structure of the

commodity index III was implemented. On the one hand there will be a range of prices replaced the recommended prices instead of fixed retail prices, on the other hand the structure of the index is changed into "category of goods" and "product", so that the druggist can immediately compare products of alternative producers.

111. After these negotiated amendments were implemented, the official parties (FCP and FCA) withdrew their applications for prohibition.

Lengthening or authorisation of registered cartels

112. On March 1st 2004, the EC Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition entered into force. One of the essential corner points of this legal act is the "legal exemption ": Consequently it requires no own "exemption act" of the European Commission or a member-state competition authority any more.

113. By the end of 2004, 17 cartels were notified to the Cartel Court and registered in the Austrian Cartel Register. Because the permission expires at the latest after five years, in two cases the concerned parties sought for renewal of the period of validity as a result of time expiry. They were rejected by the Cartel Court with reference to Regulation EC No. 1/2003 as applications for authorisation of a cartel, a "cooperation arrangement" and a "system partner arrangement" (in two cases legally, a procedure is still pending).

114. The FCP has taken part in all these procedures dealing with the relationship of national Cartel Law and EC Competition Law in detail.

II.4. Fines

Lenzing

115. On 7 June 2005, the Cartel Court imposed a fine totalling € 1.5 million on Lenzing AG for consummating a notifiable concentration without prior authorisation of the Cartel Court. Lenzing, headquartered in Lenzing, Austria is one of the world's leading producers of man-made fibres. Lenzing is active in the manufacture and supply of, among other things, lyocell fibres, which are made from wood pulp and characterised by high wearing comfort and moisture management.

116. On 4 May 2004, Lenzing took over the entire Tencel group of companies including Tencel. Tencel Holding Limited was originally part of the international financial group CVC. Tencel is also engaged in the production of lyocell fibres and has production sites in Alabama, USA and Grimsby, UK.

117. After alerts from third parties the transaction was notified to the Cartel Court on 21 May 2004. The concentration was examined by the Cartel Court and prohibited in a legal decision (as exposed under point II.3). A substantially modified concentration was finally cleared in 5 April 2005 subject to conditions and obligations. However, Lenzing despite lacking the Cartel Court's authorisation had closed the merger already on 4 May and since then implemented the concentration prior to Cartel Court's clearance. Sec. 42a (4) Cartel Act prohibits the implementation of concentrations subject to notification before the Cartel Court clears the merger. Thus the Federal Competition Authority as well as the Federal Cartel Prosecutor brought a suit against Lenzing for the imposition of fines pursuant to Sec. 142 Cartel Act. The Cartel Court held that Lenzing infringed Sec. 42a (4) Cartel Act and imposed a fine on Lenzing. The fine has been the highest ever imposed for violation of competition law so far in Austria. As Lenzing did not appeal, the Cartel Court's decision is legally binding.

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

118. The FCA comments on issues of general economic policy from a competition point of view and communicates 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 participates in several international symposiums, seminars and workgroups and reporting on their experiences. Furthermore, the FCA comments on national legislation impacting on competition law, such as the national Packaging Regulation (Verpackungsverordnung) and the Waste Management Act (Abfallwirtschaftsgesetz).

IV. Resources of competition authorities

119. Between July 1st, 2004 and June 30th, 2005 the FCA increased its staff by one lawyer, two economists and one support staff. By then - additional to the Director General and the Deputy Director General - eleven lawyers, five economists, one other professional and seven persons as support staff, i.e. all together 26 persons, were working at the FCA. More staff is still needed. Each case handler treats all cases (mergers and anti trust) in different sectors under the responsibility of the Director General; there are no experts for specific sectors.

120. The FCP and his Deputy are supported by the registry of the Cartel Court in administrative matters.

121. 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 five 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.

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

V. Outlook

123. The FCA expects to conclude its sector inquiries (electricity, gas, buyer power of grocery retail companies) within the next months, depending on the proceedings which are currently in front of the Cartel Court as well as depending on the final outcome of the inquiry and the negotiations with electricity and gas companies. In the case of the buyer power in the grocery retail market inquiry the Cartel Court has to decide whether the questions put forward in the questionnaire are necessary and proportionate in view of the purpose of the inquiry and whether the right of the FCA getting the information needed to fulfil its duties is legitimate. The FCA will take appropriate measures to ensure the competitiveness of the markets concerned.

124. Moreover, it should be noted that with the reformed Austrian Cartel Act, which enters into force on 1.1.2006, the FCA will have to handle additional organisational tasks, e.g. the handling of the notifications, which so far was dealt with by the Cartel Court.