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## **Annual Report on Competition Policy Developments in Austria**

**21-23 June 2017**

*This report is submitted by Austria to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 21-23 June 2017.*

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## Executive Summary

1. 2016 was the year of completion and heading for new shores with more human resources. From 2011 to 2016 the Federal Competition Authority (Bundeswettbewerbsbehörde, BWB) conducted in total 109 dawn raids, approximately 50 dawn raids only in the food retail sector. Millions of data were found during inspections, which have been evaluated and packed into Court applications. In 2016 the last decision against a food retailer has been finalized on the basis of the incriminating material found during the above mentioned dawn raids leading to a fine of € 10.2 mio. Between 2012 and 2016, the BWB has thus concluded 27 cases against numerous producers and food retailers, amounting to overall fines of € 67.8 mio for resale price maintenance concerning, in particular, dairy products, brewery products and non-alcoholic beverages.
2. In the area of online sales the Austrian authority managed to continue its investigations and conclude further cases with high fines for RPM as well as other restrictions of online sales such as general bans of internet sales.
3. The investigations and legal proceedings were highly time-consuming and placed a burden on the staff/resources. As the Austrian BWB is one of the smallest authorities in the EU, the biggest challenge was to bundle these restricted resources efficiently. However the BWB completed this mission successfully. With the finalization of these investigations new priorities will be stipulated. As a result the BWB started two further sector inquiries in the health care sector and in the card payment market (banking sector) due to a discussion concerning a possible banning of ATM usage fees by legislation.
4. 2016 was characterized by a high number of merger notifications. Since the legislative amendment in 2006 the year 2016 showed a record with 420 national merger notifications and 327 EU merger notifications.
5. Besides the proven advocacy events such as the “Competition Talk”, where already 28 events were organized, the BWB tries steadily to encourage young cartel lawyers and enforcers of tomorrow for the working area in the field competition law. Thus the BWB organized for the second time a Competition Law Moot Court in 2016. Young students received the possibility to profile each other in a cartel case before a fictive court. The best speaker won a traineeship in the authority for 2017. By the way Austria is the first country with a Moot Court in the field of Competition Law in the EU.
6. However, one of the most important milestones has been reached as a very long-standing demand has been finally fulfilled. The authority received additional budget in order to employ about 7 more employees in 2017. This means that the ship’s crew as the protector of competition will be able to handle cartel cases, sector inquiries, and problematic mergers more efficiently.
7. To sum it up the Austrian BWB conducted in 2016 11 dawn raids, 6 leniency applications were filed, 2 sector inquiries have been started, the record of merger notification has been beaten, 1 Moot Court and 7 Competition Talks were organized, and last but not least the authority will receive an upload of 30 % more staff in 2017.

## Background

8. 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.

9. 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. Enforcement of competition laws and policies

10. 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 2016 can be viewed at <https://www.justiz.gv.at/web2013/html/default/8ab4a8a422985de30122a92c3e89637f.de.html>. The annual report of the BWB can be found at [https://www.bwb.gv.at/Documents/Taetigkeitsbericht%202016%20BWB\\_final.pdf](https://www.bwb.gv.at/Documents/Taetigkeitsbericht%202016%20BWB_final.pdf)

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

#### 1.1.1. Summary of activities

11. In the period under review (1 January - 31 December 2016) 36 new cartel cases were examined, leading to a substantial number of dawn raids. In addition, 22 new cases concerning the abuse of a dominant market position were examined. In several cases the Cartel Court has not rendered a decision yet.

#### 1.1.2. Description of significant cases, including those with international implications

##### *Agreements, recommendations and sector inquiries*

##### Food Retail Market

12. The BWB has concluded the last pending cartel proceedings concerning resale price maintenance in the food retail market in 2016. In October 2015, the Supreme Cartel Court had confirmed a fine imposed on a major food retailer for price maintenance concerning dairy products and increased the fine from € 3 Mio to € 30 Mio. Also, the Cartel Court imposed further fines of overall € 1.85 mio on two producers of non-alcoholic beverages (one of the fines was imposed following a settlement procedure and one following a contentious procedure at the Court). After the decision of the Supreme Cartel Court, the food retailer concerned concluded a settlement, under which an additional fine of € 10.2 mio was imposed for price maintenance concerning brewery products and non-alcoholic beverages as well as limited instances of resale price maintenance in two further product categories.

13. Between 2012 and 2016, the BWB has thus concluded 27 cases against numerous producers and food retailers, amounting to overall fines of € 67.8 mio for resale price maintenance concerning, in particular, dairy products, brewery products and non-alcoholic beverages. The wider investigation of the Austrian retail sector started after an investigation regarding a horizontal boycott according to which a number of major breweries agreed not to deliver draft beer to the cash and carry sector. This investigation led to the imposition of overall fines of € 1.1 mio on 3 major breweries.

#### Final decision in rail freight services upheld

14. The Cartel Court imposed fines on four enterprises in the area of rail freight service and logistic services in February 2015: € 184,000 on Rail Cargo Logistics Austria GmbH, € 318,000 on Schenker & Co AG, € 2 mio on PANALPINA Weltransport GmbH and € 3.5 mio on ETRANS A Speditionen AG. ETRANS A appealed the decision, but the Supreme Cartel Court dismissed the claim in May 2016. The decision is therefore binding.

15. The anticompetitive behaviour concerned agreements in the area of rail freight and logistic services in international traffic: In the framework of periodic tenders of an Austrian client for the transportation of steel pipes to former CIS states, the involved enterprises had agreed on the freezing (division) of quantities and coordination of tenders, handling of sections, prices and the split of achieved (equally agreed on) revenues between November 2005 and December 2010.

16. The proceedings were based on a leniency application by Kühne und Nagel International AG which was involved only to a minor extent and granted immunity. Rail Cargo Logistics - Austria GmbH, PANALPINA as well as Schenker & Co AG delivered extensive acknowledgements concerning their anticompetitive behaviour.

#### Online sale restrictions: DeLonghi and Makita

17. The Cartel Court imposed fines in different sectors for retail price maintenance:

18. In November 2016 the Cartel Court imposed € 650,000 on **De'Longhi-Kenwood** GmbH for vertical price fixing with several traders by fixing minimum prices between January 2006 and September 2015. The objective was to create a stable and linear minimum price level on the level of traders. This was achieved by monitoring the compliance with the minimum price several times per week. Staff of the company intervened personally by telephone or mail in case the minimum price was undercut. In addition, agreements were concluded with traders on restrictions on international trade and on a general ban of internet sales. The decision is binding.

19. In December 2016 the Cartel Court imposed a fine amounting to € 1.56 mio on **Makita** Werkzeug Gesellschaft mbH. Makita is the Austrian distribution company of Makita International Europe Limited and sells Makita's products, i.e. mainly electric tools like cordless screwdrivers, drilling machines etc. It had agreed with several traders on resale prices by fixing minimum prices between August 2002 and September 2015 and prohibited traders to deliver abroad between July 2008 and December 2014. These offences concentrated above all on promotions and advertising measures for the products offered by Makita. The decision is binding.

### Investigations in the construction sector

20. On the basis of a leniency application, the BWB launched an investigation in the dry construction sector. The BWB suspected that several undertakings agreed on prices and allocated contracts between themselves by way of bid rigging in form of bogus quotes called “cover quotes” and/or that undertakings exchanged competitive sensitive information. In March 2016, the BWB undertook dawn raids at premises of seven companies.

21. Since the case also falls within the scope of Austrian criminal law, the BWB closely cooperates with the Public Prosecutor's Office for White-Collar Crime and Corruption.

22. Based on current knowledge, over 200 tender proceedings (public and private) are affected. The investigation is still ongoing.

### No exclusive allocation provisions in joint venture agreements

23. By partial decision of June 2016, the Cartel Court ruled that the exclusive allocation of the European market for the distribution of jointly produced products (in particular latex examination gloves) to the benefit of Semperit, as contained in the respective joint venture agreements between Semperit and the Sri Trang Group (Thailand), infringes Article 101(1) TFEU as well as § 1 KartG 2005. Pursuant to § 26 KartG 2005, Semperit has been forbidden to rely upon the respective contractual provisions. Thus, BWB's application of 9 October 2015 was granted. The partial decision is not final.

### Position on contractual practices in the motor vehicle retail sector

24. In the past the BWB has repeatedly been informed by representatives of the motor vehicle retail sector of contractual practices imposed by importers or manufacturers, that are considered as unfair or unduly shifting financial or economic risk to retailers.

25. Main examples are the level of required investments in outlets, equipment, CI, etc, or the remuneration of services (eg warranties) and bonuses.

26. Following the submission of a catalogue of frequent practices the BWB gave an (abstract) statement on the possible legal assessment, particularly under the aspect of possible abuse of a dominant position, intended as a guideline for negotiations between dealers and manufacturers. This position paper has been published on the BWB's website in German at <https://www.bwb.gv.at/Documents/BWB%20Standpunkt%20KFZ-Vertrieb.pdf>.

27. The BWB therein comes to the conclusion that a dominant position of manufacturers vis a vis their retailers may exist and the assessment of certain clauses therefore depends on the result of a weighing of reciprocal, sometimes conflicting, interests. The BWB points out some situations that may indicate the abuse of a dominant position, because of an evident imbalance of rights and obligations.

### Report on a possible regulation of ATM fees

28. In anticipation of a possible regulation of ATM usage fees, the BWB has analyzed the Austrian debit card payment system in 2016 and published a report in February 2017.

29. The aim of the report is to provide recommendations on the basis of an objective market analysis concerning a possible regulation of ATM charges. In the interest of consumers, effective market regulation has to consider the impact on all market participants to ensure a framework that enables effective competition in the market.

30. *Background:* If debit card holders withdraw money from an ATM not operated by their issuing bank, the bank has to pay a so-called ‘service fee’ to the ATM operator. The service fee is used to cover the operators’ cost of setting up and refilling the ATM. Due to a change in the regulations by the card network operator Maestro in July 2016, ATM operators can now waive the service fee and instead charge the card holder on the basis of a direct agreement (‘surcharge’). Even before these surcharges were introduced, some banks announced that they would not refund the additional costs of their customers, because a surcharge is based on a contract between the card holder and the ATM operator. At the same time, some banks announced that they would introduce ATM withdrawal fees on the issuing side within the framework agreements for current accounts. The withdrawal fees would charge transactions at issuing banks own ATMs and/or transactions at ATMs not owned by the issuing banks. These announcements led to a wide public debate, which culminated in a discussion about the prohibition of “ATM fees”. Withdrawal fees as part of the current account agreement and surcharges were not always clearly distinguished.

31. *Investigation:* During the investigation, which has been ongoing since May 2016 numerous and intensive discussions were held with institutions and stakeholders (Federal Ministry of Finance, Federal Ministry of Labour, Social Affairs and Consumer Protection, the National Bank, the Financial Market Authority, the European Commission, Austrian Chamber of Labour, Austrian Chamber of Commerce etc.); a bank survey and a bank customer survey were carried out; a large amount of data (provided by banks and third party operators of ATMs) were analyzed.

32. In summary, the study revealed 5 significant results:

- 95% of the bank customers use the debit card for withdrawals; 76% use ATM debit cards for cashless payment transactions. The frequency of cashless payment transactions has increased significantly in recent years, while the number of ATM transactions have remained approximately the same.
- 43% of the surveyed debit card holders could not say how much they are paying for their current accounts . Only one in five respondents knows his or her costs accurately.
- From the customer's point of view, the legal prohibition of withdrawal charges is not effective, since banks would have numerous other options for introducing new fees for current accounts.
- In recent years, the number of third-party operated ATMs (First Data; Euronet) has increased. A prohibition of ATM surcharges might force operators to exit the market and/or to reduce the number of ATM locations.
- In summary, the promotion of competition in the current account business by increasing transparency and reducing switching barriers, perhaps in combination with regulating the service fees between banks and ATM operators, would be the most promising way both to increase the efficiency of the card payment system and to enable consumers to benefit appropriately from the generated efficiency gains.

33. An executive summary as well as the full report can be found in English at <https://www.en.bwb.gv.at/News/Seiten/Federal-Competition-Authority-publishes-report-on-regulation-of-ATM-fees.aspx>.

#### Sector inquiry in health care sector

34. Concerning the health care sector Austria faces the same challenges as a lot of other countries: The spending on health care is growing significantly from year to year. Thus, while trying to reduce costs on the one hand, providers, payers, governments, and other stakeholders are struggling with providing broad access to quality health services to an aging and growing population. Competition in health care markets benefits consumers, because it helps contain costs, improve quality, and encourage innovation. However, the Austrian health care sector is subject to wide-ranging regulations and thereby to restrictions to competition.

35. According to Section 2 of the Competition Act the BWB is entitled to investigate and combat suspected or impending distortions or restraints of competition through general investigation of industries, so long as circumstances provide grounds for suspecting that competition in the concerned industry has been restricted or distorted. The BWB's activities in 2016 have brought to light numerous of these suspicions in different areas of the health care sector. Therefore, in the year 2017 the BWB is conducting a sector inquiry of the health care sector. Its objective will be to analyze the current market situation and the intensity of competition including possible market distortion and competitive restraint in selected areas of the health care sector. A further important aim is to gain more transparency in this highly complex sector.

#### *1.1.3. Mergers and acquisitions*

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

36. Between 1 January and 31 December 2016 a total of 421 national concentrations were notified. In addition, nearly 320 mergers notified with the European Commission were dealt with.

37. In three cases the parties withdrew the notification of the merger in phase I. In one case the parties agreed on remedies in phase I, thereby avoiding a phase II proceeding.

38. In three cases an application for in-depth investigations was filed by one or both official parties leading automatically to phase II proceedings with the Cartel Court. The Cartel Court cleared one of these mergers only subject to remedies while two proceedings are still pending.

##### *Summary of significant cases*

#### Merger in the private hospital sector: Goldenes Kreuz/PremiQaMed

39. In July 2015 the PremiQaMed Holding GmbH (PremiQaMed) notified the acquisition of 75% of the shares of the private hospital Goldenes Kreuz Privatlinik BetriebsGmbH (Goldenes Kreuz). PremiQaMed is a 100% subsidiary of UNIQA, a private insurance company.

40. Since UNIQA is in dominant position in the primary market for health services in private hospitals, namely the market of private health insurance in Austria, the BWB had

concerns regarding a market foreclose in the secondary market of health services in private hospitals, especially with regard to direct billing contracts concluded between private hospitals and private insurance companies. After the acquisition, UNIQA would own three of five private hospitals in Vienna. For this reason, both the BWB and the FCP filed an application for in-depth investigation with the Cartel Court in August 2015.

41. As usual the Cartel Court employed an economic expert. On the basis of this economic expert report the Cartel Court cleared the merger with the following remedies in February 2016:

- commitment of non-discrimination by UNIQA towards the remaining private hospitals in Vienna
- obligation to contract for UNIQA towards the remaining private hospitals in Vienna concerning direct billing contracts
- guaranteed minimum payment by UNIQA towards the remaining private hospitals for the duration of five years

42. The FCP filed legal remedy against the Cartel Court's decision to the Supreme Cartel Court. The Supreme Cartel Court did not follow the appeal and therefore, cleared the merger with its decision in July 2016.

#### Merger in the Austrian gaming industry blocked

43. In December 2015, the privately-owned gaming technology and equipment corporation Novomatic AG (Novomatic) notified the acquisition of approximately 40% of the shares over the partly state-owned gaming corporation Casinos Austria AG (Casinos). While Novomatic is a producer of gaming slot machines and operates several gaming halls and sport betting cafés, Casinos operates the only 12 federally licensed casinos and holds the only one Video Lottery Terminal license allowed by the Austrian Gaming Act.

44. The BWB filed an application for an in-depth-review of the merger with the Cartel Court as it had strong concerns concerning the negative competition effects of the merger in the market. In his expert opinion the expert commissioned by the Cartel Court confirmed this view and found that the Austrian gaming market is strongly regulated but that the notified transaction would further either create or strengthen a dominant position in four local casino markets with markets shares varying between 68 and 100%. As no appropriate remedies could be found the Cartel Court blocked the merger in August 2016.

45. Novomatic appealed against this decision. In December 2016 the Supreme Cartel Court confirmed the decision of the Cartel Court and dismissed the appeal of Novomatic AG. Concerning the main question whether competition rules are applicable in a highly regulated market like the gaming market it stated that in accordance with European case law the application of competition rules is not excluded by the existence of regulatory rules. The Court also held that competition can be useful in this highly regulated market because it can improve supply and prevent the sector from drifting off into illegality.

#### Diebold / Wincor Nixdorf: financial self-service solutions

46. Diebold Inc., USA ("Diebold") notified the proposed acquisition of sole control of Wincor Nixdorf AG, Germany ("Wincor Nixdorf"; the combined entity post-merger being referred to as "Diebold Nixdorf"), to the BWB in February 2016.

47. The transaction related primarily to financial self-service solutions, comprising hardware, software and related services for customer-operated self-service machines for banks (referred to as "FSS-Solutions"). A preliminary assessment showed that the transaction would have caused a high concentration of market shares with regard to FSS-hardware.

48. As a consequence, the BWB launched a comprehensive market survey with the relevant stakeholders such as banks (as competitors), as well as other FSS-hardware producers and service operators (as competitors). The market survey showed that there was a strong interplay between the hardware, software and the maintenance service. This strong interplay in connection with the high market shares in FSS-hardware raised major competition concerns with regard to a potential foreclosure.

49. On this basis, the undertakings concerned offered commitments to enable the BWB (and the FCP) to refrain from making an application for an in-depth review (Phase II review) before the Austrian Cartel Court. They proposed (i) commitments to allow for interoperability of Diebold Nixdorf's FSS-Solutions and ATM multi-vendor software from other suppliers, (ii) commitment to allow for serviceability of Diebold Nixdorf's FSS-Solutions by customers and independent third party service providers in Austria, and (iii) commitments with regard to the support of the current portfolio of FSS-Solutions.

50. On this basis, the transaction was cleared in Phase I and the standstill obligation ceased with May 2016.

#### Europapier International AG: fine for false and misleading information

51. Upon application by both BWB and FCP in October 2016 the Cartel Court imposed a fine of € 750.000 on Europapier International AG for false and misleading information in the notification of a concentration.

52. Following bankruptcy of competitor PaperNet, Europapier intended to acquire the whole business assets comprising the business units (BU) paper wholesale and printing and advertising technology. Due to concerns expressed by the competition authorities, Europapier limited the notified transaction to the latter BU but subsequently pursued a strategy of acquiring individual further assets and key personnel of the paper wholesale BU.

53. Further investigations of the competition authorities revealed that a clear distinction between the assets of the two BUs were not possible as they had been previously used for the whole company.

54. In its decision the Cartel Court pointed out that asset deals can only be evaluated as a whole and therefore notifying parties are required to give a comprehensive description of the overall transaction at once. It is up to the competition authorities to establish which aspects are relevant for the analysis of a transaction. Thus a selective presentation, leaving out parts that for themselves may not be notifiable, does not fulfil notification requirements.

## 2. International co-operation

55. The BWB puts great emphasis on intensifying international co-operation with other (Non-)European competition authorities both on bilateral and European level. Consequently, several bilateral meetings took place in Austria and abroad. Amongst

others delegations from Brazil, Moldova, Russia, Serbia, Ukraine and the Eurasian Economic Commission were invited for study visits and bilateral exchanges to Vienna and a meeting with the competition authorities from Switzerland, Germany and Liechtenstein took place in Switzerland.

56. In the framework of the **UNCTAD MENA Programme** the BWB organised a three-day study visit in Vienna for French speaking countries of the programme, i.e. Morocco, Egypt and Algeria. The MENA programme (Competition and Consumer Protection Programme for the Middle East and North African region) is financed by UNCTAD. It started in 2015 and intends to support the competition and consumer protection agencies in its development in the next five years by fulfilling individually disclosed needs. During the study visit in Vienna in particular the economic analysis of cases but also the theoretical and practical details of leniency programmes and dawn raids were discussed.

57. The **Euro-Mediterranean Competition Forum (EMCF)** was created in 2012 on the initiative of the BWB and UNCTAD, supported by a coordination committee composed of the Competition Council of Morocco, BWB and UNCTAD. A workshop was hosted by the Competition Authority of Malta in January 2016 which was attended by numerous countries. Topics on the agenda included amongst others the assessment of effects of antitrust enforcement and best practice strategies for young competition agencies.

### 3. The role of competition authorities in the formulation and implementation of other policies

58. 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.

59. The report on the possible regulation of ATM fees, the position on contractual practices in the motor vehicle retail sector as well as the ongoing sector inquiry in the health care sector are examples to be mentioned. Further details on these positions can be found under point I.1.

60. A **brochure on competition law and compliance** was compiled together with the Austrian Economic Chambers and should serve as first information. The objective is to ease the identification and minimization of antitrust risks in companies. The brochure illustrates how to implement an efficient compliance-management system and gives an overview of areas with important antitrust risks such as horizontal cartels, resale price maintenance and the abuse of a market dominant position. In addition, light is shed on topics such as the adequate behaviour of staff during dawn raids by the BWB, how to handle information requests and questions arising with merger control proceedings. Last but not least consequences of antitrust infringements are reported on and recommendations how to reduce potential risks are given. The German brochure can be found at <https://www.bwb.gv.at/Documents/Brosch%C3%BCre%20-%20Kartellrecht%20und%20Compliance.pdf>.

61. Furthermore, in 2016 the BWB started to work on a **guidance document on dawn raids**. The document intends to improve legal certainty and transparency for concerned companies. The guidance will cover the current legal provisions, the recent jurisprudence as well as national and European best practices. Aligned with the most

common questions companies have in relation to dawn raids, it will describe the start, process and end of a dawn raid, the rights and obligations of BWB's staff as well as of the company and its staff. Due to the topicality of the issue the guidance will focus on the saving of electronic data by the BWB. To allow for the highest possible practical relevance consultations are planned with different stakeholders. A first one was held with the association of lawyers in summer 2016.

62. The BWB started to organise the so-called "**Competition Talks**" in October 2012. Since then the Lunch Debate Event is taking place every second month dealing with hot topics in competition matters. The debates are meant to attract companies' management and antitrust related practitioners in order to raise awareness of competition offenses. In 2016 more than 260 representatives from companies, lawyers and public offices were attending the events in which more than 20 experts of different special fields discussed hot topics. During the reporting period the competition talks tackled topics such as dawn raids, credit cards, media and competition, the Directive on Private Enforcement, current developments at the European Court of Justice, good governance and industry and competition.

63. Following a successful Moot Court in 2015, the BWB again organized with the partner firm Dorda Brugger Jordis and ELSA (European Law Students' Association) the second BWB **Moot Court** in 2016. Interested students from Austria had the opportunity to apply for the Moot Court where a fictitious application with the Cartel Court on an antitrust matter is worked on, this year the exclusive purchase obligation for a coffee dispenser and a category management system. The intention of the Moot Court is to increase awareness and interest for competition law with students. Eight teams each consisting of three people from different universities prepared oral and written pleadings for this competition. The teams were supported by law firms and professors. The jury consisted of persons from the BWB, the Cartel Court and the law firm Dorda Brugger Jordis. The review of the pleadings and the hearing took place according to specified criteria. Here, among other things, the facts and legal analysis, argumentation, rhetoric, teamwork and time management of the participants played an essential role. The jury had the great role to determine the best team and best speaker. The team from the Faculty of Law of the University in Innsbruck (Tirol) convinced the jury and were awarded as the best team. The best speaker was a student of the Faculty of Law of the University in Vienna.

64. The Russian Competition law underwent several important changes in the last years. In order to inform Austrian companies about the last changes, the Austrian Economic Chambers in cooperation with the BWB and the FAS organised a **workshop** in December 2016 in **Moscow**.

65. Besides numerous press contacts the BWB regularly releases information on important cases. The BWB publishes information on notifications, the application for the examination with the Cartel Court by an official party and the decision clearing a merger under certain remedies. The Cartel Court is obliged to publish information on decisions in other than merger cases.

## 4. Changes to competition laws and policies

### 4.1. Reform of Austrian Competition Law

66. After the substantial reform of the Austrian Competition Act and the Cartel Act (KaWeRÄG 2012 - entered into force on 1 March 2013) further reforms took place. The Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (directive on antitrust damages actions) was transposed into national law by **changes to the Competition Act and Cartel Act** [“Bundesgesetz, mit dem das Kartellgesetz 2005, das Wettbewerbsgesetz und das Bundesgesetz zur Verbesserung der Nahversorgung und der Wettbewerbsbedingungen geändert werden (Kartell- und Wettbewerbsrechts-Änderungsgesetz 2017 – **KaWeRÄG 2017**, BGBl. I Nr. 56/2017)” - entered into force on 25 April and 1 May 2017]. The aim is to facilitate private enforcement of claims for damages caused by competition law infringements.

67. Other topics are also covered by the KaWeRÄG 2017, like changes concerning the suspension of limitation periods, the National Competition Authority’s powers of inspection (concerning electronic data, saved e.g. on external servers or in a cloud), joint and several liability of several infringers of competition law, rules of burden of proof of passing-on, and measures to strengthen the transparency of decisions (integration of cartel law experts in the official expert list of the Ministry of Justice to increase the quality of evidence of expert witnesses; clarification that a shortened transcript of a judgement is not allowed for settlements).

68. Digital markets change rapidly and new business models emerge. Competition policy has to react to these new challenges. Therefore an additional threshold test in merger control is introduced by the KaWeRÄG 2017. If the value of a transaction is exceeding € 200 million, a merger control filing is required, if the participating companies had a worldwide turnover over € 300 million of sales revenues in the fiscal year before the merger, the participating companies had a national turnover over € 15 million of sales revenues in the fiscal year before the merger and the required company operates mainly in Austria.

### 4.2. Changes to the Federal Act Against Unfair Competition (UWG):

69. Markets on which services are provided by multi-sided platforms have to be examined carefully. E.g. **booking platforms** play an important role and offer many advantages for hotels as well as consumers. But there are also challenges for the competition policy. Best price clauses (which prohibit hotels to offer better conditions or better prices as offered on the portal website) restrict competition between the existing portals and competition between the hotels themselves. In order to promote fair competition and guarantee a clear legal framework there was a need in Austria for new legal provisions concerning the relationship between online reservation platforms and hotels. An **amendment to the Federal Act against Unfair Competition concerning the prohibition of best price (and best conditions) clauses** in contracts between providers of booking portals and hotels has been approved by the Austrian Parliament. The amendment intends to promote fair competition in a globalised world (Bundesgesetz, mit dem das Bundesgesetz gegen den unlauteren Wettbewerb 1984 - UWG und das Preisauszeichnungsgesetz geändert werden BGBl. I Nr. 99/2016).

## 5. Resources in competition enforcement

70. By end of 2016 - additional to the Director General and the Deputy Director General - 20 lawyers, 4 economists, one other professional, one IT forensic expert and 6 persons as support staff, i.e. all together 34 persons, were working at the BWB. More staff is still needed. Due to the approval of additional budget it will be possible to employ about 7 new persons in 2017. Each case handler is responsible for all cases (mergers and antitrust) in specific sectors.

71. 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.

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

## 6. Changes in special sectors: regulatory authorities

### 6.1. Broadcast

73. The term of the Austrian Communications Authority (KommAustria), i.e. the regulatory authority for electronic audio media and electronic audiovisual media in Austria, ended with 30 September 2016 and members were reappointed with 1 October 2016. Unchanged members are Michael Ogris as Chairman and Michael Truppe und Martina Hohensinn as members. The role of the Vice-Chairman will be exercised by the former member Susanne Lackner. As a new member was appointed Katharina Urbanek. In June 2016 Alfred Grinschgl, was reappointed for the duration of one year as CEO of RTR-GmbH, which provides operational support for the Austrian Communications Authority (KommAustria) and the Telekom-Control-Commission (TKK) in the fulfillment of their duties.

#### *6.1.1. Regulatory Issues concerning Digitisation*

74. With end of October 2016 the switch over from DVB-T to DVB-T2 started in the region of Vienna. With the switch over there will be nearly 50 programs (TV and radio) available via DVB-T2.

75. In June 2016 a study concerning the „Introduction of digital radio in Austria“ was published. The study reflects the point of view of the Austrian broadcaster, essential success factors, the framework und chances and risks of alternative options to the terrestrial digitization of radio. It is published in German online at the following link: <https://www.rtr.at/de/inf/SchriftenreiheNr12016>

76. The DAB+ trial, which started in May 2015 was renewed till April 2017. Regarding DAB+ KommAustria also published in the first quarter of 2016 a call for expressions of interest in a transmission of radio in DAB+. The results of this consultation have been evaluated und published. As result of the evaluation KommAustria decided to hold a public tender for two DAB+-layers for one nationwide multiplex-platform and one for local, geographically not yet defined multiplex-platforms. The public tender will end in June 2017.

### ***6.1.2. Digital Dividend II***

77. The amendment of the national frequency plan (<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20008807>) was adopted in December 2016. Therefore the 700 MHz-band will be dedicated for mobile applications beginning with 1 July 2020. KommAustria started with the replanning of the DVB-T/DVB-T2 allocation in the 700 MHz-band

### ***6.1.3. Protection of minors in the VOD-service***

78. “Tatort” is the most popular TV crime series in German-speaking countries. It is broadcasted usually in the prime-time on Sunday in the programs of ARD, ORF and SRG. The episodes are also provided so far on demand without any measures of conditional access in the VOD-service of the public broadcaster ORF (<http://tvthek.orf.at/>). In its decision from April 2016 KommAustria ascertained that the ORF neglected with its offer the protection of minors. KommAustria concluded in the present case that four programs contained depictions of violence, which might seriously impair the physical, mental or moral development of minors (see for the decision in German: <https://www.rtr.at/de/m/KOA1126116003>).

### ***6.1.4. Other regulatory business***

79. In September 2016 the study “With every show I learn something!” was published. The study investigates educational services and contributions to lifelong learning, which 130 employees and approximately 3,000 volunteers as-well as pupils, students, trainees, interns, and others may acquire in community broadcasting in Austria, both through organized further training or informally. To this end the training programs offered in 2013 by 11 out of 17 community radio and TV stations were analysed, additional data were collected during 2013-2015 by initiating an online survey of all contributors to those stations, by interviewing 10 experts and by conducting an exploratory workshop and a focus group discussion.

80. Based on the results of this study proposals were developed, which are addressed on the one hand to policy makers and officials within relevant educational and political institutions, and on the other hand to all participants in community radio and TV. It is published in German online at the following link: <https://www.rtr.at/de/inf/SchriftenreiheNr22016>

## **6.2. Telecommunication**

### ***6.2.1. Market definition and analysis***

81. The market analysis activities of the Telekom-Control-Kommission as the sector-specific National Regulatory Authority in 2016 mainly focussed on two areas: regulation of call termination rates into EEA/non-EEA countries and initiation of specific proceedings on fixed call origination as well as wholesale and residential access markets.

### ***6.2.2. Regulation of call termination rates for calls origination in EEA/non-EEA countries***

82. As to call termination rates, the Telekom-Control-Kommission had decided in September 2015 to respond to complaints by stakeholders relating to the asymmetry of

international termination rates by taking action to exempt calls originating from non-EEA countries from strict EC pure LRIC termination rules and also exempt calls which originate from EEA countries who do not abide by the EC Recommendation on termination rates. To this aim, the Telekom-Control-Kommission envisaged to accordingly modify the corresponding charge control obligations in the respective market analysis decisions on call termination of September 2013, July 2014 and June 2015.

83. Following national public consultation and notification of respective draft measures to the European Commission who did not raise any objections, final decisions on the exemption of fixed and mobile calls originating from non-EEA countries from pure LRIC termination rules had been adopted in December 2015.

84. Following national public consultation, the Telekom-Control-Kommission adopted in February 2016 draft measures on termination of fixed and mobile calls originating from EEA countries not abiding by the TR Recommendation. The draft measures stipulated that the maximum termination rates for those calls should not exceed the reciprocal termination rates charged by the recipient operator in the respective EEA country. The Commission raised serious doubts and considered the draft measures not to comply with EU law. An expert opinion by a BEREC ad-hoc expert working group of May 2016 supported the Commission's view and considered its serious doubts as being justified. In a letter to the Telekom-Control-Kommission dated June 2016, the Commission pointed out that BNetzA had meanwhile launched a public consultation on the use of a pure BU-LRIC model with a view to introduce pure BU-LRIC based mobile termination rates as of Dec 1, 2016. By formal decision in July 2016, the Commission requested the Telekom-Control-Kommission to withdraw or amend the draft measures. Following further deliberations, the Telekom-Control-Kommission finally decided in January 2017 to withdraw the draft measures.

### ***6.2.3. Proceedings concerning fixed call origination as well as wholesale and residential access markets***

85. New market analysis proceedings regarding all telecom markets potentially relevant for sector-specific regulation had been initiated in March 2015 to find out which market might be relevant for sector-specific regulation and whether one or more enterprises on this market might possess significant market power ("SMP") or whether effective competition prevails. In the absence of effective competition, appropriate remedies are to be imposed on the enterprise with significant market power. As a large number of market participants might be potentially concerned by the results, the initiation of the proceedings had to be publicly announced on the RTR website in line with the relevant legal provisions, and network operators as well as service providers had the opportunity to join as a party to the proceedings.

86. The following 12 months were characterized by extensive collection of market data from all stakeholders. Data were fed into expert opinions to define the relevant markets and analyse the economic situation on the various sector markets identified by departing from the Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation.

87. In February 2016, the Telekom-Control-Kommission opened specific market analysis proceedings with regard to the following markets:

- wholesale local access market (previously known as “market for access to physical infrastructures”)
- wholesale central access market (previously known as “wholesale broadband access market”)
- retail market for residential customers at a fixed location and
- retail market for non-residential customers at a fixed location.

88. In addition, the Telekom-Control-Kommission opened specific market analysis proceedings regarding the wholesale market for call origination from the fixed network in March 2016.

89. In all cases, the relevant expert opinions were made available to those market actors who had previously expressed their interest in being a party to the respective proceedings (approximately 20 participants for each market) and parties were invited to submit their views with regard to the analyses and proposed remedies for the individual markets and to attend oral hearings held by the Telekom-Control-Kommission in May 2016 (wholesale markets for local and central access) and June 2016 (wholesale market for call origination from the fixed network and retail markets for residential and for non-residential customers at a fixed location). The submission of a statement either in writing before the hearing or orally during the hearing was a prerequisite for the parties to remain party to the respective proceedings.

90. The developments of the wholesale local and central access markets were significantly influenced by the publication of a revised virtual unbundling reference offer by A1 following the conclusion of a commercial contract with T-Mobile in September 2016 encompassing Ethernet services, virtual unbundling and several maintenance and facility management services. Following its non-discrimination obligation on the wholesale access markets, A1 chose to include most of the enhanced features made available to T-Mobile – namely with regard to regional handover in virtual unbundling – in its Reference Offer for the use by other wholesale partners.

91. As far as the wholesale market for fixed network origination and retail markets for residential and for non-residential customers at a fixed location are concerned, the Telekom-Control-Kommission adopted draft measures in December 2016 which were published on the RTR website for public consultation until January 2017. These last mentioned proceedings were completed in May 2017.

#### ***6.2.4. Net neutrality***

92. With the entry into force of the Telecom Single Market Regulation 2015/2120 on 30 April 2016 and the adoption of the BEREC Net Neutrality Guidelines on 30 August 2016, additional transparency rules for certain QoS parameters of Internet access services were established which had to be implemented by service providers. In this context, corresponding service descriptions and contractual terms and conditions are subject to a compliance check by the Telekom-Control-Kommission.

#### ***6.2.5. Frequency allocation***

##### ***Spectrum Release Plan***

93. In order to create a certain amount of predictability and security for market actors with regard to upcoming frequency auctions, Telekom-Control-Kommission, Federal Ministry of Transport, Innovation and Technology and RTR-GmbH considered the

publication of a rough schedule of planned auctions to be appropriate. After coordination between Ministry, RTR-GmbH and Telekom-Control-Kommission, the public consultation of a Draft Spectrum Release Plan from March to May 2016, the integration of stakeholders' comments and further deliberations, the Telekom-Control-Kommission adopted the Spectrum Release Plan in its present form in December 2016.

#### *Launch of proceedings regarding 700/1,500/2,100 and 3,400/3,800 MHz bands*

94. Following several discussions and considering the Spectrum Release Plan, the Telekom-Control-Kommission decided to initiate proceedings with regard to the allocation of frequencies in the 2,100 MHz band which were later extended to the 700 and 1,500 MHz bands and instructed the RTR-GmbH to begin with the necessary preparatory work, namely the elaboration of options for appropriate coverage obligations. In addition, the Telekom-Control-Kommission decided to initiate proceedings with regard to the allocation of frequencies in the 3,400 and 3,800 MHz bands. In both cases, the Federal Ministry of Transport, Innovation and Technology was informed and asked to compile the respective technical conditions forming the framework for the tender document serving as a base of the subsequent auction.

#### *Coverage obligations*

95. Supported by the Telecommunication Authorities, the Telekom-Control-Kommission also conducted various inspections with regard to coverage obligations in the 450 and 800 MHz bands.

#### *Transfer of frequencies*

96. Finally, the Telekom-Control-Kommission discussed and later approved three applications for the transfer of frequencies in the 450 and 3,500 MHz bands.