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Annual Report on Competition Policy Developments in Austria

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1. Executive Summary

1. In July 2017, Austria's Federal Competition Authority celebrated its 15th birthday. Like previous years, 2017 was a very intensive year. The authority finally received an upgrade with more personnel and financial resources. Thirty-one case handlers, out of 40 employees in total, were active for the authority. The budget was also doubled to €4.8 million. Due to the increase in staff, it was necessary to establish two new departments. As a result the department for legal service (responsible for the legal agenda, legislative matters, investigations and advocacy, inter alia) and the department for litigation (responsible for representation before courts and authorities, litigation strategy and economics and quality management) were implemented.

2. With the budget increase, the outstanding update of information technology forensic equipment could at last be successfully implemented. This promotes a boost in the evaluation of infringements, and preliminary proceedings can now be handled more efficiently.

3. The next innovation was the implementation of a whistleblower system, which offers the opportunity for whistleblowers to remain anonymous if they want to report an infringement of competition law to the authority.

4. Another important topic is transparency. The authority published its guidance on dawn raids in October 2017. To improve legal certainty and transparency for companies and their employees, the guidance describes the whole process of conducting a dawn raid from beginning to end, listing the rights and obligations of authority staff as well as the rights and obligations of the company and its employees. As electronic data is a big factor nowadays, this document also explains how the authority collects such electronic data. It corresponds to the applicable law, the most recent court judgments, and national and European best practices.

5. In another record year for merger notifications, 439 national mergers and 446 EU mergers were notified. This was an increase of 12% compared to the year before. Five mergers' notifications contained misleading information, or the mergers were not notified to the Authority. As a result, these undertakings were fined €336,000 in total by the Cartel Court.

6. Concerning investigations, seven dawn raids were conducted in various industries. A new industry on which the authority is focusing is the construction sector. The first procedure was finalised in 2017. Six companies received fines of €686,000 in total due to price fixing, customer allocation and exchange of sensitive information in bid rigging procedures. Further proceedings are ongoing at the moment.

7. After the finalisation of a sector inquiry in the banking industry, a further sector inquiry in the healthcare market has been started. The aim is to identify distortion of competition and to publish recommendations how to eliminate detected distortions.

2. 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.

2.1. 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 2017 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/en/factual_information/annual_report/

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

Summary of activities

11. In the period under review (1 January - 31 December 2017) 33 new cartel cases were examined, leading to a substantial number of dawn raids. In addition, 21 new cases concerning the abuse of a dominant market position were examined. In several cases the Cartel Court has not rendered a decision yet.

Description of significant cases, including those with international implications

Agreements, recommendations and sector inquiries

Decisions in the Dry Construction Industry

12. BWB has been investigating the dry construction industry since October 2015. The Authority launched its investigation following a leniency application filed with BWB.

13. In March and April 2016, BWB raided the premises of eight companies. Based on the information derived from the leniency application and the dawn raids, the Authority analysed more than 400 construction projects for anti-competitive behaviour. It also submitted requests for information to public and private customers.

14. After the information presented had been fully analysed, it became clear that the companies had engaged in the following anti-competitive behaviour in relation to restricted public and private tender procedures:

- Horizontal price fixing and customer sharing
- Horizontal exchange of information about construction projects

15. The restricted tenders related to the drywall construction markets in Vienna, Lower Austria and Burgenland, and partly also in Styria, Upper Austria and Salzburg.

16. BWB filed an application with the Cartel Court for the imposition of a fine on six companies. One case was discontinued because of bankruptcy. Two companies were granted leniency.

17. Only six months passed between the initial investigations and the first BWB application with the Cartel Court. The entire process up until the Cartel Court's final decision took around two years. The Cartel Court imposed fines totalling € 686,000 on the companies concerned.

18. The Cartel Court decisions can be viewed at www.edikte.justiz.gv.at (in German).

Disposable gloves: No exclusive allocation provisions in joint venture agreements

19. At the request of BWB, the Cartel Court ruled in its partial decision of June 2016 that the exclusive allocation (territorial protection) of the European market for the distribution of jointly produced products (in particular latex examination gloves) in favour of Semperit, as laid down in the joint venture agreements between Semperit and the Sri Trang Group (Thailand), was in breach of both Article 101(1) TFEU and § 1 KartG. The affected market was the market for disposable gloves, particularly examination gloves made from natural and nitrile rubber.

20. In accordance with § 26 KartG, the Cartel Court prohibited Semperit from invoking the provisions of the agreement, thus complying with BWB's request of October 2015. Semperit filed an appeal against this partial decision to the Supreme Cartel Court.

21. The Supreme Cartel Court examined in detail the concept of collateral agreements within the scope of a joint venture. Semperit argued that the allocation of exclusive sales territories (sole distribution agreement) was accessory to the joint venture agreements and that this arrangement met all of the criteria of a permissible collateral agreement, namely objective necessity and proportionality.

22. Before deciding on whether this agreement constituted a collateral agreement, the Supreme Cartel Court dealt with how the relationship between the founders of this joint venture could be classified and how the relevant clauses could be characterised. The Court proceeded on the assumption that agreements establishing a joint venture were to be classified as horizontal agreements even if the founders were not competitors.

23. The establishment of a joint venture means that the founders start operating on the same market level. The Court also determined that the Sri Trang Group and Semperit had been (at least potential) competitors in Europe, the geographically relevant market, since 1 January 2015. Concerning the characterisation of the relevant clauses, the Court stated that the agreement did not constitute a sole distribution agreement but a "stipulation of sales areas between the founders of a production joint venture".

24. The Supreme Cartel Court also ruled that the stipulation of sales areas was neither necessary nor unavoidable in order to carry out a production joint venture. In assessing the objective necessity of the relevant clauses, the Court relied on the assessment criteria as used in European decisions on collateral agreements. Accordingly, the assessment of objective necessity was an abstract one, and differed from a consideration of the pro-competitive and anti-competitive effects of a given arrangement. The parties' subjective perception was of no further relevance in this case.

25. The Supreme Cartel Court decided in September 2017 to reject the appeal. The decision is final. The proceedings to determine the fine are still pending.

Online sale restrictions: Robopolis and Pioneer & Onkyo

26. In November 2017 the Cartel Court imposed a fine of € 208,200 on **Robopolis GmbH** due to anti-competitive vertical agreements on resale prices as well as territorial protection for resellers in relation to the iRobot brand of vacuuming robots during the period between October 2008 and November 2014. The Cartel Court ruled that the vertical price fixing and territorial protection arrangements constituted material infringements and wilful restrictions of competition, and negated the presence of grounds of justification within the meaning of Article 101(3) TFEU. Robopolis GmbH did not contest the ruling. The decision is final.

27. In November 2017 the Cartel Court also fined **Pioneer & Onkyo GmbH** € 120,000 for having entered into anti-competitive vertical agreements on the resale prices of Onkyo and TEAC home audio and visual equipment products (particularly receivers/amplifiers and record players) during the period between March 2011 and April 2017. The Cartel Court ruled that the vertical price fixing constituted material infringements and intended restrictions of competition, and negated the presence of grounds of justification within the meaning of Article 101(3) TFEU. Pioneer & Onkyo GmbH did not contest the ruling. The decision is final.

Report on a possible regulation of ATM fees

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

29. The report is based on discussions with institutions and stakeholders (Federal Ministry of Finance, Federal Ministry of Labour, Social Affairs, Health and Consumer Protection, Oesterreichische Nationalbank, Financial Market Authority, European Commission, Austrian Economic Chamber, Austrian Chamber of Labour etc.), information provided by banks and third-party providers (bank survey) and a survey among ATM card users (customer survey).

30. The objective of the report was to provide a market analysis and make sound recommendations, as the basis for a decision on a possible regulation of ATM fees.

31. The following areas were analysed during the preparation of the report:

- The Austrian debit card payment system
- Market definition
- Market participants and their market position
- ATM transactions and their costs
- Consumer behaviour of cardholders

32. In summary, the analysis yielded five key findings:

- 95% of bank customers use their ATM card to make cash withdrawals; 76% use it to make cashless payments. The number of cashless card payments has risen substantially over the past few years, with the number of ATM withdrawals having remained more or less the same.

- 43% of cardholders did not know what the charges for their current account were. Only one in five bank customers knows exactly what their account costs.
- A ban on ATM fees would not be expedient as banks can cover their costs in a variety of other ways.
- The number of third-party providers of ATMs (FirstData, Euronet) has risen during the last few years. A ban on ATM fees could lead to third-party providers exiting the market and the number of ATMs falling significantly.
- In conclusion, the promotion of competition in the current account segment by increasing transparency and reducing barriers to account switching, perhaps in combination with regulating the service fees between banks and ATM operators, would seem the most promising way both to increase the efficiency of the card payment system and to enable consumers to benefit appropriately from the resulting efficiency gains.

Sector inquiry in health care sector

33. BWB launched a sector inquiry into healthcare in 2017. From a competition perspective, the Austrian healthcare system is characterised by tight regulations.

34. When selecting the subject matter of this inquiry, BWB decided not to dedicate it to just one partial area of the healthcare system but to focus on several different aspects. Complaints submitted to BWB and notified healthcare-related mergers formed the basis for the inquiry, as they allowed conclusions to be made on the relevant competition issues. During 2017 the Authority distributed more than 50 requests for information and held numerous discussions with stakeholders.

35. Apart from processing and analysing the information gathered from the perspective of competition law, the BWB staff involved in the inquiry attended a whole range of events such as symposia and conferences in order to gain a better insight into the healthcare system and its particular features. In addition, the Authority has so far commissioned one expert to submit an economic opinion on one partial area.

36. The inquiry is currently focusing on the following subject areas:

- Pharmacies
- Patient transports
- Blood donations
- Social insurance for entrepreneurs
- Private hospitals
- Private additional health insurance

37. The aim of the inquiry is to analyse the healthcare system from a competition perspective, as it is currently rather devoid of competition, and to make proposals for the introduction of more competition. This is done without calling the system of solidarity into question. After completion of its inquiry, BWB will make the results available to the general public.

Code of conduct for supplier/buyer relationships in food retailing

38. In the past few years BWB has consistently received complaints about business practices related to the manufacture of own brands and to the terms and conditions in the food retail industry, which reflect the imbalance in the supply chain. The key issue here that makes it nearly impossible to take action is the fact that these practices are often difficult to pin down from an antitrust perspective and the companies affected are usually afraid of retaliation and therefore not prepared to give evidence in any potential court case.

39. The Competition Commission has looked into the issue in great detail, focusing its investigations on the food retail industry while not ruling out the possibility that other industries might be affected as well. After having completed those investigations it published a recommendation on 3 July 2017 proposing, among other things, a redesign of the Internet-based whistleblowing system (whistleblower hotline), which had been introduced following the KaWeRÄG 2017, such that it can also be used to report problematic business practices in supplier/buyer relationships. It also recommended publishing a code of conduct based on the example set by BWB's Guidance on Vertical Price Fixing, which can be used by market participants as a source of information.

40. The recommended use of the Internet-based whistleblowing system for reporting breaches of good business conduct would require an extension of the legal basis. Currently, § 11 para. 6 WettbG refers solely to reports of possible infringements of competition law within the meaning of § 37b KartG. This could be considered within the scope of an amendment of the Competition Act.

41. BWB has acted on the Competition Commission's recommendation to prepare a guidance and is working on a document about good business conduct, which deals not only with problematic practices in business relationships among food retailers and their suppliers but also with similar occurrences across all sectors. On 22 December 2017 the initiative was presented to stakeholders, who were invited to make suggestions. Experts and interest group representatives will continue to be involved in the preparations, ensuring that the guidance will be highly relevant and useful. A draft for public consultation should be published during the summer of 2018, and the final guidance will be presented after the responses received have been incorporated.

42. The importance and topical nature of this BWB initiative is reflected in the recent activities of the European Union in relation to unfair trading practices and also in the Austrian government's programme for 2017-2022, which includes measures to tackle unfair trading practices and promote relevant initiatives at a national and a European level in order to improve farmers' competitive position.

Funeral Services

43. BWB has been observing the funeral market for some time now and published its recommendations in 2011 on how price transparency could be improved for consumers, among other aspects. The funeral market was liberalised in 2002. However, the restrictions on competition in this market are not insignificant in number, distorting competition as a result. Since 2006 there have been 16 suspected cases of market dominance being abused. Accusations that a dominant position is being abused relate to 3.2% of the 500 or so funeral parlors operating in Austria.

44. One example of this abuse includes refusing access to chapels of rest. Local authorities frequently lease chapels of rest to undertakers, which are obliged to also grant

access to other funeral parlors. Any measures to prevent or hinder such access could be deemed abuse of a dominant market position pursuant to § 5 KartG, as these chapels of rest are classed as essential facilities, to which other companies also require access in order to perform their services. Preventing or hindering access, for example by means of excessively high prices, can result in competitors being forced out of the market. This results in less competition and thus higher prices, less choice and lower quality.

45. In the BWB's recommendations back in 2011, the Authority called for greater price and product transparency on undertakers' websites. The aim is to help consumers quickly and efficiently compare funeral services when they need them.

46. An evaluation of funeral parlors' websites showed that fewer than 1% gave price details online. Consequently, consumers have no means of selecting the best option without unnecessary delay. However, it is positive to note that a small number of funeral parlors stated that they were willing to include price lists on their websites in future. The City of Vienna and [City of Salzburg](#) undertakers have already responded to the BWB recommendations and added information on pricing to their online content.

47. BWB's recommendation that price transparency should be guaranteed on the websites continues to apply. Consideration is also being given to whether to include this recommendation in the Austrian Price Marking Act (PrAG), which would make the display of prices binding on all companies.

Whistleblowing system

48. The Cartel and Competition Law Amendment Act 2017 (KaWeRÄG 2017) marked an overhaul of Austrian competition law with the addition, pursuant to § 11b para. 6 WettbG, of an Internet-based whistleblowing system for BWB. This system can be used to report justified concerns about potential infringements of competition law in accordance with § 37b KartG 2005, anonymously if preferred.

49. This system, which has already been tried and tested internationally, gives potential whistleblowers a means of reporting their knowledge and evidence in relation to infringements of competition law to BWB online and anonymously. Anonymity is guaranteed by a sophisticated security system that makes it impossible to identify whistleblowers from their IP address in cases where they wish to maintain anonymity throughout the process.

50. BWB has looked intensively at which whistleblowing system would be the best fit for its needs. In March 2017 BWB applied to the Austrian Data Protection Authority for permission to implement its chosen whistleblowing system. This permission was granted in October 2017, and the system went live in February 2018. The system can be accessed via the BWB website, which also includes films introducing the anonymous system and user guides.

Guidance on dawn raids

51. In October 2017 BWB's Guidance on dawn raids was presented for the first time during a Competition Talk. BWB won the 2018 Best Soft Law award for this Guidance.

52. In the interests of legal security and transparency for the companies concerned and for their staff, the guidance describes how a dawn raid begins, how it proceeds and how it ends. The rights and obligations of BWB employees and of the company and its staff are also explained.

53. In issuing several guidance documents in the past, covering such areas as vertical price fixing, settlements and the leniency programme, BWB has demonstrated its commitment to openness and transparency. These principles ensure that rules are adhered to, and also mean that the public and businesses are able to foresee what action will be taken by state bodies.

54. The guidance can be downloaded from the BWB website www.bwb.gv.at in both German and English.

2.2. Mergers and acquisitions

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

55. Between 1 January and 31 December 2017 a total of 439 national concentrations were notified. In addition, nearly 450 mergers notified with the European Commission were dealt with.

56. In four cases the parties withdrew the notification of the merger in phase I.

57. In two 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. In one case parties withdrew their notification, in one case the Cartel Court cleared the merger only subject to remedies.

2.2.2. Summary of significant cases

ProSieben/ATV

58. In February 2017 BWB received a merger notification according to which ProSiebenSat.1 PULS 4 GmbH (Vienna) intended to acquire 100% of the shares in ATV Privat TV GmbH (Vienna) and 100% of the limited partner's interest in ATV Privat TV GmbH & Co KG (Vienna) thereby gaining sole control. The planned merger concerned free TV and TV advertising.

59. Together with the Austrian Communications Authority (KommAustria) and the FCP, BWB conducted extensive pre-notification talks with the merger parties and thoroughly examined any potential effects of the planned merger on competition in the markets concerned (the free-TV advertising market in particular) as well as its impact on the diversity of opinion and media in Austria.

60. One possibility to ensure diversity of opinion and media and to tackle competition issues is to agree on commitments.

61. During the pre-notification talks the parties agreed on a bundle of commitments, which was subjected to an extensive market test during phase I of the merger control procedure. Ten companies submitted written statements. BWB analysed the statements and incorporated some of the suggestions into the commitments where appropriate.

62. The commitments were ultimately deemed to be an appropriate way of preventing the merger parties from dominating the free-TV advertising market and of avoiding any constraints on diversity of opinion and media, which is why BWB, KommAustria and the Federal Cartel Prosecutor agreed that there was no need for further examination of the case before the Cartel Court. During the entire period adherence to the commitments will

be monitored by an independent trustee, who is obliged to report regularly to the official parties and KommAustria

Gewista/Ankünder

63. In April 2017 the Cartel Court authorised the merger of Gewista and Ankünder with conditions. The decision is now final.

64. As already mentioned in the last annual report, the merger notified in October 2016 concerned the increase of the stake held by the leading provider of outdoor advertising, Gewista-WerbeGesellschaft m.b.H., Vienna (Gewista), in the third-largest provider Ankünder GmbH, Graz/Styria (Ankünder) from 24.9% to 33.3%. In turn, Ankünder acquired 49% from Gewista in Megaboard and (indirectly) its business in the Tyrol and Vorarlberg, both previously having been wholly owned by Gewista, as well as expertise in digitisation, a field in which Gewista and particularly also its parent company JC Decaux are innovation leaders.

65. Both BWB and the FCP filed an application for further examination of the case before the Cartel Court. In BWB's view an examination was required to determine whether the planned merger would create or strengthen Gewista's position of dominance in the national outdoor advertising market (e.g. if Ankünder gives preference to Gewista when allocating/booking advertising space in Styria over other competitors; if Ankünder ceases to be an actual or potential competitor of Gewista; if Gewista gains a competitive edge in digitisation and the establishment of a national digital network; if Ankünder gives preference to Gewista when booking national advertising space etc.). Another issue to be examined was whether the merger would create or strengthen Ankünder's dominant position in the Styrian outdoor advertising market (e.g. if Gewista gives preference to Ankünder or increasingly books Ankünder over other competitors; because of being a leader or having more expertise in digitisation etc.).

66. Like BWB the Cartel Court continued to assume, based on an expert opinion it had commissioned, that the market for outdoor advertising was a separate market that needs to be distinguished from other advertising markets. It also ruled that the merger would result in a significant concentration in the markets concerned, which can no longer be considered uncritical.

67. In contrast to BWB, the Cartel Court proceeded on the assumption, however, that this increased concentration would not cause competition problems. The Court did not expect "classic" negative horizontal effects such as higher prices or reduced qualities since the high share of fixed costs and the balancing market power of media agencies in national advertising campaigns would counter the effect. It also did not expect negative vertical effects such as foreclosure of customers (if Ankünder and Gewista only booked with each other in future and no longer booked any competitors) as this either happens already, and is not being expected to change, or any change induced by the merger would be only marginal. In addition, the Court did not consider digitisation to be a transformative subject in the near future, with the result that it was not viewed as a decisive factor.

68. The only area in which the Cartel Court shared BWB's concerns was the issue of incentives for, and the possibility of, input foreclosure with regard to national campaigns. Enabling competitors to book sufficient advertising space for national campaigns on all types of media carriers (particularly City Lights and Poster Lights as they are owned

almost exclusively by Ankünder) in Graz and the province of Styria, at the usual quality and terms and in a non-discriminatory way, was therefore imposed as a condition.

69. The behavioural constraints offered by the merger parties were reviewed by an expert (appointed by the Cartel Court) at the companies concerned in various market tests and finally found sufficient to dispel any competition concerns. Adherence to the conditions will be monitored by a trustee who reports to the official parties.

Fressnapf/Tomy's Zoo

70. In July 2017 Fressnapf Handels GmbH (Salzburg) notified its acquisition of all of the shares in Tomy's Zoo GmbH (St. Pölten). The planned merger concerned pet food and pet supplies.

71. In August 2017 BWB filed an application for in-depth examination with the Cartel Court for the following reasons:

72. The Authority had concerns about the company's market definition. The notifying party argued, without being able to rely on common decision-making practice, that the relevant market would comprise the retailing of pet food, pet supplies and pets, and would have to be defined nationally.

73. BWB held that because the retail markets for pet food, pet supplies, and small pets are not interchangeable, they must be distinguished from each other and the markets regionally defined, as is done in food retailing.

74. The Fressnapf Group, with its 130 outlets, is the market leader in pet food and pet supplies and holds a proportionately strong market position. The only fully-fledged competitors of Fressnapf are Das Futterhaus (37 outlets), Tierkönig (3 outlets), which is new on the Austrian market, as well as some independent pet supply stores. If the 9 Tomy's Zoo stores were taken over, this imbalance would be further increased.

75. Market data shows that the Fressnapf Group dominates the market in all regional pet supplies retail markets as well as in four regional pet food retail markets with the thresholds (from 30% upwards) set in the Cartel Act for the assumption of market dominance having (mostly) been (clearly) exceeded. There were also additional concerns that Fressnapf held a position of market dominance compared with other providers and/or suppliers, as well as in the retail trade with small pets, which would have to be examined more closely in proceedings before the Cartel Court.

76. Illustrative Price Rise tests (IPR testing is a methodology to determine potential price rises in a merger scenario) have shown that if the Tomy's Zoo stores were taken over average price increases for pet supplies of up to 12.60% could be expected at those locations. Price increases of up to 40% in the special pet supplies segment could not be ruled out either.

77. The notifying party did not offer any viable remedies to eliminate the competition concerns, which is why BWG requested an examination. In September 2017 the notifying party withdrew its merger notification.

Container Terminal: Hafen Wien and ÖBB-Infrastruktur/Freudenau and Inzersdorf

78. In November 2016 Wiener Hafen und Lager Ausbau- und Vermögensverwaltungs, GmbH & Co KG (Hafen Wien) and ÖBB-Infrastruktur AG (ÖBB-Infrastruktur) notified BWB of the following planned acquisition:

79. Hafen Wien and ÖBB-Infrastruktur intended to create a joint venture to operate the container terminal in Freudenau, formerly operated by WienCont Containerterminal GmbH, and a recently constructed container terminal in Inzersdorf (both in Vienna), and to render related services. The planned merger therefore concerned container terminal and related services.

80. End of December 2016 BWB filed an application for in-depth examination with the Cartel Court due to serious concerns about the details provided by the merger parties in their merger application.

81. In a more in-depth examination of the case, the Cartel Court had to assess whether the concentration would create or strengthen a dominant position in the regional market for container terminal services. In particular, the Court had to consider the geographic market definition and the market shares given in the merger notification.

82. The court-appointed expert confirmed the official parties' concerns about the geographic scope of the market, which was defined very broadly in the merger notification, resulting in market shares that were much lower than realistically estimated, and therefore concluded that a market dominant position would arise. Likewise, synergy effects claimed by the merger parties were examined in a supplementary report, which stated that such effects would not justify clearance of the merger. As a consequence, the merger parties withdrew their application in May 2017.

83. In October 2017 all parties met for roundtable talks to discuss whether and how cooperation would be possible between the involved companies in future.

Aeronautics

84. Mid August 2017 the airline Air Berlin and its personally liable partner company Air Berlin PLC applied for the opening of insolvency proceedings in Germany.

85. The Federal Republic of Germany granted a bridging loan amounting to € 150 million to ensure that flight operations could be continued, which the European Commission approved after thorough consideration. At the end of the bidding deadline on 15 September 2017, BWB stepped up its discussions both with potential buyers and with the European Commission. On 25 September 2017 the insolvency administrator announced that it was negotiating with the airlines easyJet and Lufthansa on the takeover of the majority of shares in Air Berlin.

86. Subsequently, easyJet acquired 25 A320 aircraft leases and slots at Berlin Tegel airport. On 12 October 2017 Lufthansa agreed to take over the Air Berlin subsidiaries Niki and LGW. On 1 November 2017 insolvency proceedings were opened on the realisable assets of the Air Berlin companies. On 12 December 2017 the European Commission approved that part of the takeover planned by easyJet.

87. In the autumn of 2017, BWB analysed the impact that Lufthansa's takeover of the Air Berlin subsidiary Niki would have. The Austrian leisure air carrier Niki had been

performing well for a long time, with an economically sound basis, acting as a market-stabilising competitor for certain routes. There was now the risk of this being lost.

88. BWB's responsibility is to protect competition (price, quality and innovation competition) in the best possible manner and to prevent the creation of monopoly routes that push up prices; the Authority met this responsibility by involving a broad range of stakeholders in the process, all the while engaging in constant consultation with the European Commission.

89. After the market had reacted negatively to the news that Lufthansa intended to take over Niki, the German airline withdrew its offer on 13 December 2017. The competition authorities had had concerns about 80 of the routes to be taken over from Niki; Lufthansa would have had a monopoly on 50 of those routes after the takeover.

90. The European Competition Commissioner, Margrethe Vestager, warned of a considerable risk of higher fares and less consumer choice. Lufthansa withdrew its offer for Niki within the Commission's period of examination, which ended on 21 December 2017 with the acquisition by Lufthansa of LGW being approved.

91. After the Niki insolvency proceedings had been opened in Germany on 13 December 2017 and a best bidder been found in the British Airways parent company IAG, the Lower Austrian regional court of Korneuburg ruled that the main proceedings would have to be conducted or repeated in Austria, in line with the European Insolvency Regulation, given that Vienna was the venue of the competent supervisory authority. The company concerned was an Austrian company with an Austrian licence to operate.

92. On 23 January 2018 the right to take over Niki was awarded to Laudamotion GmbH after all competences had been clarified in the main proceedings. Laudamotion had been the best bidder and subsequently notified the merger to BWB. After thorough investigation BWG cleared the notified merger between Laudamotion and Niki on 23 February 2018.

Railcar leasing: VTG Rail Assets/CIT Rail Holdings

93. In September 2017 VTG Rail Assets GmbH (VTG) notified BWB of the planned acquisition of 100% of the shares in CIT Rail Holdings (Europe) S.A.S. (CIT RH) as a merger. VTG is engaged in railcar leasing, rail logistics and tank container logistics. CIT RH is the sole shareholder of the railcar leasing company Nacco S.A.S. with subsidiaries in Germany, Ireland, Luxembourg and the United Kingdom. The merger would mean an increase in market shares in the area of railcar leasing.

94. The notifying party argued that the former state railways (e.g. German DB-Cargo, Czech ČD Cargo, Austrian Rail Cargo, Swiss SBB) should also be included as market participants in the market for railcar leasing. BWB asserted that former state railways would lease their wagons only to a limited extent to external companies that are not part of their groups. After BWB had subtracted the state railways' transport capacities from the company's calculations, it became clear that the threshold set in the Cartel Act for the assumption of market dominance (market shares in excess of 30%) would be greatly exceeded in the areas of dry bulk and tank wagon leasing if the intended merger were to go ahead. The company would thus be dominating the railcar leasing market.

95. Based on these concerns and because of unresolved questions about market definition, both the BWB and the FCP Prosecutor filed an application for further examination of the merger with the Cartel Court prior to the expiry of the four-week

examination period. In December 2017 the Cartel Court commissioned an expert to submit an opinion on how to define the (regional) scope of the market, as well as on the issue of whether the merger would create or increase a position of market dominance. The notifying party offered a range of conditions (advance sale of some 30% of the Nacco business to be acquired to third parties), which was examined as part of a supplementary opinion and found suitable to dispel competition concerns. Imposing adherence to the agreed conditions, the Cartel Court did not prohibit the merger in a ruling issued in March 2018.

3. International co-operation

96. 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 Serbia, Georgia and China 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 Germany.

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

97. 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.

98. The report on the possible regulation of ATM fees, the code of conduct for supplier/buyer relationships in food retailing 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.

99. 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 2017 more than 220 representatives from companies, lawyers and public offices were attending the events in which more than 15 experts of different special fields discussed hot topics. During the reporting period the competition talks tackled topics such as Uber – freedom versus regulation, economic policy and competition, current developments in Brussels, Brexit and competition, Competition, innovation and inclusive growth and the BWB Guidance on dawn raids.

100. Following a successful Moot Court in 2015 and 2016, the BWB again organized with the partner firm Dorda Brugger Jordis and ELSA (European Law Students' Association) the third BWB **Moot Court** in 2017. 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's case focused on competition law in the area of digital advertising and the disclosure of interoperability information in relation to location-based mobile games. 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 Vienna University of Economics and Business convinced the jury and were awarded as the best team. The best speaker was a student of the University of Graz.

101. 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.

5. Changes to competition laws and policies

5.1. Reform of Austrian Competition Law: Cartel and Competition Law Amendment Act

102. The amendments to competition law and to cartel law that entered into force in late April (WettbG) and 1 May 2017 (KartG) respectively resulted in some major changes, the most important of which are summarised below:

5.1.1. Actions for damages in the event of competition infringements

103. The amended law introduces provisions on actions for damages specific to the infringement of competition rules. The changes to the KartG and WettbG transpose Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions into Austrian law and are closely based on the text of the Directive itself. This relates in particular to culpability and presumption of loss, the passing-on defence, joint and several liability, settlement between parties with joint and several liability, limitation periods and disclosure rules.

104. However, as well as implementing the Directive, the new law also involves a series of changes in relation to public antitrust law enforcement.

5.1.2. New form of merger control: Guidance currently being prepared

105. The new provisions regarding thresholds in the area of merger control, introduced with effect from 1 November 2017, have brought merger control into line with structural change triggered by the latest technological developments and international competition. § 9 para. 4 KartG closes a loophole in the merger control system in order to meet the demands of an ever more dynamic economic world, and to cope with the challenges of advancing digitisation and the interlinking of the economy and society. The criterion of the transaction value of a merger is introduced as an additional, subsidiary threshold in the form of § 9 para. 4 KartG. This means that mergers involving the acquisition for a high price of companies or assets that are (still) generating low sales can be reviewed from the perspective of competition law.

106. The aim of this threshold is thus to identify those cases where there is an imbalance between previous sales and transaction price. A high purchase price for this

type of acquisition is frequently an indicator of innovative business ideas with significant market potential. By making an acquisition at an early stage in the development process, market leaders can fully integrate up-and-coming rivals or their assets into their own operations, modify the original activity of the acquired company or even bring the activity in question to a complete halt.

107. From a competition perspective, this type of acquisition may require a preventive review, particularly in terms of protecting innovation potential and competition on technology markets. Given the very close links between the Austrian and German economies and resulting significant number of proposed mergers requiring notification in both Germany and Austria, as well as the similar design of the new thresholds, it seems sensible to create a level playing field for the companies concerned at as early a stage as possible.

108. In the context of the close cooperation between Germany's Federal Cartel Office and BWB, a joint guide is currently being prepared for the first time. The aim is to provide users with a basic guide on interpreting the statutory rules.

5.1.3. Change in limitation periods for infringements of antitrust law

109. The amended § 33 KartG stipulates that the limitation period is suspended as soon as at least one of the operators involved in a legal infringement is informed of a BWB action for the purpose of the investigation or proceedings in respect of the infringement (e.g. through a request for information). An absolute limitation period of ten years is also stipulated, along with the provision that the duration of any interim proceedings before courts should not be counted towards the period. The new version of § 33 KartG is worded more or less exactly the same as the European rules on European Commission proceedings, as detailed in Article 25(3) of Council Regulation (EC) No 1/2003 and is based on European best practices.

5.1.4. Second trial court "light": Options for appeals to the Supreme Court extended

110. Based on the newly inserted para. 3 under § 49, the appeal may also be based on the fact that the files give rise to considerable concerns about the accuracy of the key facts underlying the Cartel Court's decision. The wording is based on § 281 para. 1 subpara. 5a of the Code of Criminal Procedure (StPO). In the absence of any provision to the contrary in the KartG, the Cartel Court and the Supreme Cartel Court make their decisions on the basis of the KartG in uncontested proceedings or on the basis of the Code of Civil Procedure (ZPO) (§ 38 KartG). Both the ZPO and the Non-Contentious Proceedings Act (AußStrG) provide for inaccurate factual findings being used as comprehensive grounds for appeal.

5.1.5. Access principle and securing of electronic data

111. The importance of digital communication has an unavoidable impact on investigations. The access principle guarantees the effectiveness of access through dawn raids even in the digital age. The key factor is that electronic documents in the premises included in the search warrant can be inspected. It is therefore irrelevant whether such electronic documents are stored on the hard disk of one of the devices located in the searched premises or are stored off-site.

112. This is clarified further in § 11a para. 2 WettbG, according to which the owners of the companies and their representatives, and in the case of legal entities and partnerships with partial legal capacity the representatives according to law or the by-laws, are required to submit business documents and enable access to such documents that exist electronically. Upon request they must be submitted on an electronic data medium in a commonly used file format and permission must be granted to review the business documents and to produce copies or extracts from the documents.

113. Provisions are now in place for fines to be imposed in order to enforce the securing of electronic data. These may be imposed by the Cartel Court at BWB's request.

5.1.6. Public information

114. In accordance with § 2 para. 4 final sentence WettbG, BWB may provide information about any proceedings of public importance that it is leading, about investigations of economic sectors and about the implementation of competition monitoring subject to non-disclosure of commercial and trade secrets. The information must be provided with regard for the public interest in factual information and, through its timing and content, must uphold as far as possible the personal rights of the persons concerned, the principle of the presumption of innocence and the right to a fair trial. According to the explanations provided, this also means that BWB may issue information about its conduct and its assignments in relation to Cartel Court cases (main proceedings and appeals).

5.1.7. Leniency programmes

115. Essentially, the provisions on the use of leniency programmes have been summarised in a separate Article for greater transparency. § 11b para. 1 WettbG has been clarified to the extent that there is now no doubt that only a single company or single association of companies may be a principal witness for the purpose of immunity from fines. The law now also stipulates that BWB must file an application for findings against this single witness.

5.1.8. Anonymous whistleblowing system

116. BWB was also given the means of setting up an anonymous whistleblowing system to be used for the official reporting of justified concerns about potential breaches of competition law. (This has also been implemented, see point I.1.)

5.1.9. Improved transparency

117. In accordance with § 13 WettbG companies that are the subject of investigation must be informed by BWB "within an appropriate period of time" that no case is being referred to the Cartel Court at the given time based on the current circumstances. This means that BWB is obliged to provide information to companies that are being investigated that the investigation is being suspended.

118. With regard to the settlement procedure in § 38 KartG 2005, the provisions clarify that the preparation of a shortened decision (without reasons) is not permitted even in the case of concurring submissions from the parties and the waiver of an appeal in fine proceedings.

6. Resources in competition enforcement

119. By end of 2017 - additional to the Director General and the Deputy Director General - 23 lawyers, 5 economists, two other professional, one IT forensic expert and 7 persons as support staff, i.e. all together 40 persons, were working at the **BWB**. Each case handler is responsible for all cases (mergers and antitrust) in specific sectors. As the number of employees grew it became necessary to restructure BWB. Consequently, a legal service department and a litigation department were set up in August 2017.

120. The **Legal Service department** is responsible for fundamental legal issues, national questions of competition law (European and international cooperation projects); statements on legislative proposals; investigations, in accordance with § 11 para. 3 WettbG (leniency) and § 12 WettbG (dawn raids) in particular; prevention and knowledge management; reviewing whether mergers are subject to notification obligations.

121. The **Litigation department** is responsible for preparing for legal cases and representation before courts and authorities; economics and litigation strategy; issuing notices; quality management.

122. 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.

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