

Unclassified

English - Or. English

7 March 2023

**Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE**

Annual Report on Competition Policy Developments in Austria

-- 2021 --

This report is submitted by Austria to the Competition Committee FOR INFORMATION.

JT03513679

Table of contents

1. Executive Summary	3
2. Background.....	3
3. I. Enforcement of competition laws and policies	4
3.1. Action against anticompetitive practices, including agreements and abuses of dominant positions	4
3.1.1. Summary of activities	4
3.1.2. Description of significant cases, including those with international implications	4
3.1.3. Agreements, recommendations and sector inquiries	4
3.2. Mergers and acquisitions.....	8
3.2.1. Statistics on number, size and type of mergers notified and/or controlled under competition laws	8
3.2.2. Summary of significant cases	9
4. International co-operation.....	11
5. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies	12
6. Changes to competition laws and policies	13
6.1. Austrian Cartel and Competition Law Amendment Act 2021 (in German: Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021, KaWeRÄG 2021)	13
6.2. Material changes in cartel and abuse supervision.....	13
6.3. Changes in the area of merger control.....	14
6.4. Changes in procedural law	14
7. Resources in competition enforcement.....	15

Austria

1. Executive Summary

1. The year 2021 was another busy and very productive year.
2. A total of 653 national mergers were notified to the FCA. With the merger of Facebook (now Meta) and Giphy, a test case for digital markets was filed by the FCA with the Cartel Court for in-depth examination. In the eBay/Adevinta merger, the imposition of important remedies was achieved by the authority in order to preserve regional platforms such as Willhaben, among others. Particularly in these markets, special vigilance on the part of the competition authorities is required, as the course is being set for the future. Extensive investigations by the FCA led to an application for an in-depth review with the Cartel Court in the merger between Metro and AGM in the wholesale food business.
3. In cartel prosecution, investigations were successfully pursued in several cases, and record fines were obtained in court. The FCA carried out 21 dawn raids, and fines amounting to more than € 55 million became final on the basis of applications by the FCA to the Cartel Court.
4. A total of 8 leniency applications were filed with the FCA, and 78 whistleblowing reports submitted. These figures show that there is confidence on the part of companies and market participants in the FCA and its cooperation programmes. This is an essential element for successful prosecution of collusion.
5. In the context of the Health Sector Enquiry, the FCA published the third interim report on the supply of medicines from the perspective of competition – a market segment that is of paramount importance, especially in times of pandemic. The E-mobility Sector Enquiry was launched at the end of 2021. Here it is important to point out competitive deficits in good time in order to prevent negative market developments in these future markets.
6. In addition, the focus of the FCA was once more on advocacy. Again, standpoints on current topics were published, and opinions on various legislative projects presented. The Anti-Trust Law Moot Court, which was organised for the seventh time in a row, was held virtually. The students enthused with great commitment and knowledge.

2. Background

7. The authorities responsible for competition law enforcement in Austria are the independent Federal Competition Authority (Bundeswettbewerbsbehörde, "FCA"), the Federal Cartel Prosecutor, who reports directly to the Minister of Justice, ("FCP", jointly referred to as "the Official Parties") and the independent Cartel Court.
8. Mergers are notified with the FCA and investigated in phase I by FCA 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.

3. I. Enforcement of competition laws and policies

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

3.1.1. Summary of activities

9. In the period under review (1 January - 31 December 2021) 27 new cartel cases were examined, leading to several dawn raids. In addition, 11 new cases concerning the abuse of a dominant market position were examined. In several cases the Cartel Court has not rendered a decision yet.

3.1.2. Description of significant cases, including those with international implications

3.1.3. Agreements, recommendations and sector inquiries

Ongoing investigations in the construction sector

10. As already reported in last years' reports, BWB launched an investigation in the construction sector after tax inspectors had found a suspicious file in a Carinthian company. FCA's ongoing investigations into suspected anti-competitive behaviour in relation to construction tenders are extensive and cover a large number of differently sized construction projects. FCA is working closely with Central Public Prosecutor for Economic Crime and Corruption (WKStA) and the Federal Bureau of Anti-Corruption (BAK) to fully resolve the issue of anti-competitive practices in the construction sector.

11. Currently, a total of over 40 construction companies are suspected of having been involved in the infringement. They are alleged to have split orders among themselves for several decades and to have coordinated their bid prices in order to secure market shares, among other things.

12. Following initial applications for fines in October 2020 and April 2021, the FCA submitted a further application for a fine of € 45.37 million against two companies of the STRABAG Group ("STRABAG") in July 2021. STRABAG cooperated under the leniency programme and introduced a certified compliance system in conjunction with a new type of monitoring system to prevent future infringements of the prohibition of cartels. Against this background, the FCA had applied for a reduced fine. The fine requested by the FCA was imposed on STRABAG in October 2021 and was the highest cartel fine imposed on a company or group of companies up to that date.

13. The PORR Group ("Porr") likewise issued an acknowledgement at the end of September 2021 in the course of settlement talks with the FCA and the Federal Cartel Prosecutor. In this letter, Porr concedes its participation in the infringement and accepts a fine of € 62.35 million as appropriate. The application for a fine against Porr filed in April 2021 was supplemented at the Cartel Court in the sense of the acknowledgement. The decision became final in 2022.

14. The proceedings before the Cartel Court, which are based on the fine application from October 2020, are still pending. In addition, further statements of the allegations were sent to concerned companies in autumn 2021.

Ongoing investigations in waste-management

15. In March 2021, the FCA simultaneously carried out dawn raids at over 20 sites in the waste management sector. The investigation was assisted by the Federal Criminal Police Office and the state criminal police offices, and a total of more than 100 people were deployed. Companies in the federal states of Lower Austria, Carinthia, Upper Austria, Salzburg, Styria and Vienna were concerned.

16. The dawn raids were based on the suspicion that several companies in the waste management sector had violated law regulations under anti-trust law over a longer period of time. The suspicions include price fixing, market allocation, and collusion in tenders. The focus of the investigations is on waste logistics, more precisely the collection and transport of waste.

17. Investigations are currently under way, with the focus on evaluating the data seized during the dawn raids. The first applications to the Cartel Court are expected to be filed in the course of 2022.

Vertical price maintenance in the distribution of school bags: Imposition of a fine on Fond Of GmbH

18. At the request of the FCA, the Cartel Court imposed a fine of € 340,000 on the company Fond Of GmbH in July 2021. From 2012 to 2019, the company entered into agreements with retailers on the Austrian market on fixed and minimum sales prices for school bags or backpacks of the brands “satch” and “ergobag” and in individual cases for accessories for these products, as well as for backpacks and accessories of four other brands. In addition, traders were banned from selling online in this context in the period from January 2012 to August 2016.

19. The company cooperated with the FCA under the leniency programme and therefore applied for a reduced fine.

20. In 2019 and 2020, the FCA had investigated suspected vertical price fixing in the distribution of school bags and backpacks respectively, following consumer complaints, and had also conducted dawn raids in this context. Fond Of GmbH filed a leniency application during the very house search and subsequently cooperated extensively with the FCA in order to fully clarify the facts of the case. This also made it possible to investigate Austrian traders, one of whom also cooperated with the FCA under the leniency programme. The proceedings against these companies are still ongoing.

Commitments in proceeding concerning abuse of market power: Merck Sharp & Dohme GmbH –distribution of drugs containing the active substance temozolomide

21. In May 2020, the FCA filed an application with the Cartel Court for declaration of an abuse of a dominant market position through predatory pricing in the distribution of the drug Temodal® against Merck Sharp & Dohme GmbH, headquartered in Vienna. The drug Temodal with the active substance temozolomide is used in the treatment of Glioblastoma, ie. the most common brain tumour with adults.

22. To address the concerns of abuse of dominance, the company has offered commitments in March 2021 before the Cartel Court. In the FCA’s view, the commitments are suitable to address the concerns under anti-trust law.

23. The FCA carried out an in-depth market investigation into the market for the oncological drug with the active ingredient temozolomide. It came to the conclusion that

the company has a dominant position due to a share of over 85% for the active substance temozolomide in the hospital sector. The company's predatory pricing ensured that hospitals would have no incentive to switch to generic versions of the drug, which would prevent successful market entries by generic manufacturers. According to the FCA, Merck Sharp & Dohme GmbH accepted losses by placing the drug below cost in the hospital sector in order to force other competitors out of the market. The follow-up prescription after hospital discharge took place in the private-practice sector, whereby the prescription drug is purchased in the pharmacy, thereby compensating for the losses incurred.

24. To end the proceeding, the company agreed on commitments with the FCA before the Cartel Court including amongst others the cessation of the predatory pricing strategy, transmitting cost calculations to the FCA and introducing compliance measures.

25. If the company should breach any of the commitments, the FCA can apply to the Cartel Court for a fine. The decision of the Cartel Court is final.

Distribution of new cars and operation of garage services: Decision of the Supreme Cartel Court on Büchl/Peugeot

26. Peugeot Austria Gesellschaft m.b.H. ("Peugeot") has a contractual relationship with the company Büchl GmbH ("Büchl") granting Büchl the non-exclusive right to sell Peugeot passenger cars up to 3.5 t and the associated equipment, provide service and repair services for these Peugeot products, and to ensure after-sales service.

27. In October 2018, Büchl filed an application with the Cartel Court against Peugeot for an end to the abuse of a dominant position in the area of the distribution of new cars as well as the operation of garage services. In May 2020, the Cartel Court ruled that Peugeot had abused its dominant position and Peugeot lodged an appeal against the decision before the Supreme Cartel Court.

28. In February 2021 the Supreme Cartel Court ruled on the appeal, upholding it almost in its entirety and confirming the main points of the Cartel Court's earlier decision. Only one partial aspect was referred back to the court of first instance in order to supplement the facts of the case. This part of the proceedings is still pending in court.

29. The final part of the decision required Peugeot to put an end to the abuse of its dominant position in certain, specified respects within three months, e.g. linking premium payments to customer satisfaction surveys, reducing margins by deliberating setting excessive sales targets, obliging to carry out statutory guarantee and warranty work under the respondent's terms and the like.

30. From the decision of the Supreme Cartel Court, the following conclusions can be drawn in general, although with particular significance for the area of motor vehicle distribution:

31. In relation to abusive contract terms, the Supreme Cartel Court agreed with the established case law, according to which they exist in the case of blatantly unfair terms or if they are obviously disproportionate to the costs of service provision. The Court also emphasises the need to weigh up the interests applying the principle of proportionality. The pursuit of legitimate objectives by unfair means is prohibited, as is excessive interference in the contractual partner's freedom of action. Excessive restraint also exists where such ties are solely or overwhelmingly in the unilateral interest of the dominant player.

32. In relation to the restriction of the freedom to set prices effected by forcing dealerships to take part in the manufacturer's price promotions, which the Cartel Court established, the Supreme Cartel Court considered the underlying facts of the case to be

insufficient to finally determine its abusive quality, and reversed this part of the decision while also referring it back for a supplementary assessment of the facts.

Austrian Olympic Committee: More advertising possibilities for athletes with non-Olympic advertising sponsors

33. The Austrian Olympic Committee (“AOC”), with the support of the FCA, has published new guidelines for advertising with non-Olympic partners. The new guidelines are intended to simplify procedures and facilitate promotional opportunities for athletes. This was an adaptation to current international legal developments. The FCA contributed its expertise in anti-trust law.

34. The international developments referred to started from the German Bundeskartellamt, which in a decision considered the application of Rule 40 of the Olympic Charter (OC) on advertising opportunities for non-Olympic sponsors to be too restrictive and obliged the German Olympic Sports Confederation (DOSB) to amend its directives. The IOC, at the instigation of DG Competition, has also revised the directives on commercial possibilities of participants as defined in Rule 40 of the OC in 2019.

35. The new guidelines of the AOC now clarify for athletes of the Olympic Games the conditions under which advertising with non-Olympic partners is permitted, based on the revised guidelines of the IOC. Permissible advertising campaigns are such that are already on the market 90 days before the start of the Olympic period (so-called generic advertising).

36. The guidelines provide comprehensive information

- on advertising opportunities during the Olympic Games;
- on permissible social media messages (thank you/congratulatory messages);
- on procedural framework conditions.

Sector inquiry in health care sector: Third Interim Report of the Health Sector Enquiry on the Supply of Medicines from a Perspective of Competition Law

37. Since 2017, the FCA has been analysing the Austrian healthcare market as part of its sector inquiries, which examine the competitive conditions on certain submarkets.

38. The first interim report published by the FCA in May 2018 analyses possible restrictions of competition in the community pharmacy market in the areas of market entry, ownership and provisions operating a pharmacy. In October 2019, the FCA presented the second report, dedicated to health services in rural areas.

39. In May 2021, the third interim report was published. It examines medicines supply in Austria, with significant challenges having existed in this part of the market for some years now. The COVID pandemic has further highlighted how important the secure supply of medicines is in Austria.

40. The sector inquiry was conducted between March 2020 and December 2020. It is based on information obtained from market participants, academic literature, relevant publications and in-depth discussions with companies, interest groups, institutions engaged in the healthcare market, ministries and the health spokespersons of political parties.

41. The inquiry analysed the following topics in detail:

- Risk of drug shortages
- Drug costs in Austria

- Pricing of medicines
- Mergers in the pharmaceutical sector
- Ownership of public pharmacies

42. The topics took into account the Austrian and European legal framework as well as current developments in market conditions.

43. Drawing on the results of the sector inquiry, the AFCA compiled nine recommendations to create a more competition-friendly environment and thus to avoid medicine shortages. They include recommendations for an evaluation of the price components; traditional location policy measures and financial incentives permitted under European law; development of a transparent catalogue of criteria for essential medicinal products or active substances on which a special focus should be placed with regard to production in the European Union within the framework of a location policy incentive and the like.

44. The report can be found in English at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Branchenuntersuchung_Gesundheit_Arztmittelversorgung_EN.pdf.

Whistleblowing system

45. The FCA implemented a whistleblowing system in February 2018. With this system, it is possible to anonymously contact the FCA to report potential antitrust violations.

46. A total of 39 reports were submitted in 2018 and 45 in 2019. This number increased to 59 in 2020. In 2021, a total of 78 reports were submitted. These break down as follows:

- 27 notifications with suspected violations of the Cartel Act, which are still in an intensive examination phase;
- 47 reports that were terminated after verification without further action;
- 7 reports where investigations were initiated under the Austrian Act against Unfair Competition
- 2 reports were forwarded to the respective competent authority, Central Public Prosecutor for Economic Crime and Corruption (WKStA) or the locally competent financial police, after they had been checked;
- 3 reports without recognisable content that are not answered either (so-called joke mails).

3.2. Mergers and acquisitions

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

47. Between 1 January and 31 December 2021 a total of 653 national mergers were notified, 42 of these due to the new transaction value threshold. In addition, 452 mergers notified with the European Commission were dealt with.

48. In eight cases the parties withdrew the notification of the merger in phase I. In six cases the merger was cleared with remedies in phase I.

49. In two cases an application for in-depth investigations was filed by the FCA and the FCP leading automatically to phase II proceedings with the Cartel Court. They were cleared subject to remedies in 2022.

50. Fines were imposed in several proceedings on the prohibited implementation of a merger without notification.

3.2.2. Summary of significant cases

eBay Inc. / Adevinata ASA / eBay Classifieds Group

51. Adevinata ASA acquired the global online classifieds business of eBay Inc (eBay Classifieds Group, “eCG”). In return, eBay acquired a non-controlling minority stake in Adevinata. The minority interest comprises 44% of the financial shares and 33% of the voting shares.

52. eBay operates the online marketplace www.ebay.at for the Austrian market, as well as the site www.ebay.de, which is also regularly visited by Austrian users. Adevinata holds a 50% stake in and exercises joint control over the Austrian online classifieds portal www.willhaben.at. Until June 2021, Adevinata was also represented on the Austrian market by the online classifieds portal www.shpock.at (operated by Finderly GmbH; “Shpock”). eCG includes, among others, the online classifieds portal www.ebay-kleinanzeigen.de.

53. In the course of the review of the merger by the FCA, data and internal documents of the companies involved were examined, and a large number of users of the Austrian online platforms concerned as well as numerous competitors of the merging parties were interviewed by the FCA. It was found that eBay and Willhaben in particular are close competitors for Austrian users, especially in the area of online sales by private individuals to other private individuals (consumer-to-consumer transactions; “C2C transactions”), and that the merger project affects an already concentrated market with few alternatives for users to meet the same needs. Hence there was a risk of non-coordinated effects on prices, quality and innovation to the detriment of Austrian users as a result of the transaction.

54. In view of the competition concerns raised by the FCA, the parties agreed on commitments to overcome the concerns.

55. The commitments require the parties to reduce eBay’s economic interest in Adevinata to 33% or less within 18 months, thereby reducing eBay’s effective interest in Willhaben to 16.5% or less. This limits incentives for reduced price, quality and innovation competition after performance of the transaction, and counteracts the non-coordinated effects of the transaction.

56. Furthermore, the commitments limit eBay’s ability to influence Willhaben and thus prevent eBay from influencing Adevinata’s market behaviour (in particular that of Willhaben) to the detriment of Austrian users.

57. A case report on this has been published on the FCA’s website: www.bwb.gv.at/fileadmin/user_upload/Downloads/PDFs/Z-5420_5421_Fallbericht_English.pdf

58. The text of the commitments in German can be found at: www.bwb.gv.at/fileadmin/user_upload/Downloads/Zusammenschlusse/Adevinta_eBay.pdf

Metro/AGM merger submitted to Cartel Court for review following market survey by FCA

59. In September 2021, the FCA received a notification of a merger pursuant to which METRO Cash & Carry Österreich GmbH (“Metro”), in agreement with REWE Group, intends to acquire sole control over C & C Abholgroßmärkte Gesellschaft m.b.H. (“AGM”), affecting nine AGM wholesale markets across Austria.

60. METRO serves the customer groups hospitality (hotels, restaurants, bars, cafes and caterers), traders (independent resellers such as small groceries, kiosks and filling stations), as well as professional service providers and organisations such as offices and institutions. AGM is in the wholesale food business and specialises in supplying hotels, and providing general and communal catering in the form of an integrated collection and delivery service at currently twelve locations in Austria.

61. The starting point for examination of the merger was the FCA’s position on Food Wholesalers published in 2011 and based on decision in the merger case Pfeiffer/Nussbaumer: Accordingly, the market is divided into the segments of “pick-up wholesale” (small customers) and “delivery wholesale” (large customers). Spatially, patches are delineated around the respective location, covering 30 km (road kilometres) for collection wholesalers and 100 km (road kilometres) for delivery wholesalers. The notifying parties submitted a product and geographic market definition that was fundamentally different in every respect.

62. In order to better define the market, the FCA conducted an extensive market survey. An innovative online market survey and evaluation tool was used, which enabled a large number of customers and competitors to be surveyed at the same time. Ten full-range competitors of Metro and AGM were surveyed, as well as around 1,200 customers, of which over 400 customers responded in full. In the market investigation and analysis, the FCA found no convincing reasons to depart from the position.

63. If the FCA’s position is followed, the presumption of market dominance is fulfilled for all AGM locations with significant increases. Even if one were to assume that delivery and collection wholesalers form a common market, there would be five AGM sites with competitive concerns. Due to the high concentration in the Austrian food markets, there are also supra-regional concerns due to future gradual external market share increases (“salami tactics”) and the possible loss of regional diversity in the product range and local value creation through global purchasing strategies.

64. The critical feedback and competition concerns were sent to the notifying parties for comment. The notifying parties have not offered any measures to address the existing concerns of the FCA or the Federal Cartel Prosecutor. The FCA and the Federal Cartel Prosecutor have therefore each submitted an application for in-depth-review with the Cartel Court (phase II) end of September 2021. The Cartel Court approved the merger subject to structural remedies in 2022. They can be found in German at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Z-5650_-_Auflagen_-_01.pdf.

Facebook, Inc. / Giphy, Inc.: high fine for illegal merger and subsequent conditional clearance

65. Facebook, Inc. (company name meanwhile changed to Meta Platforms, Inc.) completed direct acquisition of sole control of Giphy, Inc. in May 2020 without notifying the merger in Austria.

66. Facebook operates services particularly in the area of social networking (Facebook, Instagram) and instant messaging services (WhatsApp, Messenger). Facebook’s services

are free of charge for non-commercial users. Monetisation is mainly through (personalised) advertising.

67. The US company Giphy is a digital platform that operates a library and search engine especially for GIFs and stickers (collectively “GIFs”). GIFs are a graphic format that can be used to create animations and short video sequences. GIFs from Giphy are often integrated into third-party services (such as WhatsApp or Instagram) via a programming interface. So far, this has been done free of charge for the third-party providers.

68. The investigations initiated by the FCA revealed that Facebook’s acquisition of Giphy should have been notified in Austria, as it met the criteria of the transaction value threshold (§ 9 (4) of the Austrian Cartel Act). The FCA therefore filed an application to the Cartel Court for the imposition of a fine on suspicion of a breach of the implementation ban. In July 2021, the Cartel Court imposed the fine of € 9.6 million requested by the FCA on the basis of a settlement with Facebook against Facebook for the prohibited implementation of the merger with Giphy.

69. Facebook finally notified its acquisition of Giphy retrospectively in July 2021. In the course of the competitive assessment, the FCA sought extensive information and received feedback from a wide range of market participants, including Giphy’s customers (API partners) or Facebook’s competitors in social media and online advertising, Giphy’s competitors in searchable GIF libraries, and Facebook’s customers for online advertising. In addition, a large number of internal documents were provided by the merger applicants, including numerous documents created during the preparation for the transaction.

70. Competition concerns investigated by the FCA were substantiated, necessitating an in-depth investigation with the Cartel Court. In the FCA’s view, this raises in particular the question of whether Facebook’s acquisition of Giphy strengthens a dominant position in social media and online advertising. The FCA was concerned, based on its investigation, that Facebook might

- restrict non-discriminatory access to Giphy for competing social media,
- obtain competitively sensitive information about competing online platforms through the interface to the GIPHY library integrated into numerous apps, and
- stifle potential competition with Giphy for advertising clients.

71. The FCA consequently filed an application for in-depth review with the Cartel Court in August 2021 (Phase II). The Cartel Court found that the merger would strengthen Meta’s dominant position in social media and online advertising and therefore made its approval of the merger subject to conditions. The FCA and FCP appealed against this decision to the Supreme Cartel Court asking for a review of various legal questions in 2022. In June 2022, the Supreme Cartel Court confirmed the Cartel Court’s conditional clearance, dismissing the appeal.

4. International co-operation

72. The FCA puts great emphasis on intensifying international co-operation with other (Non-)European competition authorities both on bilateral and European level. Due to the Covid pandemic exchanges mainly took place virtually.

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

73. The FCA 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.

74. The **guidelines** on the transaction value threshold in merger control in Austria and Germany published jointly with the German Federal Cartel Office in mid-2018 were adjusted in a few points. In this way, the changes in the Austrian Cartel Act and Austrian Act against Competition Restrictions in the area of turnover thresholds and the previous case law are to be taken into account. The current guide is available at the following link: https://www.bwb.gv.at/fileadmin/user_upload/Guidance_Transaction_Value_Thresholds_January_2022_final.pdf.

75. Furthermore, the cooperation between the FCA and **telecom regulator RTR** was intensified. In March 2021, a roundtable was held together with representatives of the telecom regulator RTR and representatives of the major mobile operators in Austria. The starting point for the round table was current market developments and complaints in the mobile communications sector, which were largely induced by the expiry of the so-called MVNO requirements to which Hutchison Drei Austria (H3A) committed itself for 10 years in the course of the merger of H3A and Orange in 2012. The commitments include access to H3A's mobile network for up to 15 MVNOs at fixed wholesale rates. After a period of proven price increases in mobile tariffs immediately after the merger, this requirement led to the market entry of new MVNOs and thus to a decline in the price level of mobile tariffs. In the course of 2020, the FCA received various complaints from MVNOs. The complaints concerned problems with price adjustments of wholesale services in existing contracts and access to 5G services in accordance with the contract. At the round table, representatives of RTR and the FCA discussed the significance of requirements imposed on the MVNO merger in 2012 as well as future developments in the mobile communications market with market participants. The problems described were also addressed, and possible solutions discussed. Representatives of the MNOs and MVNOs concerned agreed to continue bilateral negotiations and to submit activity reports to the authorities. After analysis of the submitted activity reports by RTR and the FCA, guidance was offered by the authorities in bilateral negotiations on still unresolved issues. Progress had been made in some areas. Both authorities are still actively working with the companies involved to find a solution to the problem areas that are still in dispute.

76. FCA organised the seventh **Competition Law Moot Court** in 2021, doing so in cooperation with the law firm DORDA and the European Law Students' Association (ELSA). Like last year, the event had to be held virtually. 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 facts of the case concerned the area of healthcare apps in connection with the COVID-19 pandemic. This dealt with issues related to market definition or abuse of a dominant position, the use of terms of use and the topic of data as essential facilities. The intention of the Moot Court is to increase awareness and interest for competition law with students. Eight teams each consisting of two or 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 FCA, the law firm Dorda Brugger Jordis and the European Court of Justice. The written submissions and oral proceedings were assessed on the basis of the participants' analysis of the case and legal situation, the arguments presented, public speaking skills and teamwork. The jury had the great role to determine the best team and

best speaker. The team from the University of Graz convinced the jury and were awarded as the best team. The best speaker was a student of the Vienna University of Economics and Business.

77. Besides numerous press contacts the FCA regularly releases information on important cases. The FCA 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.

6. Changes to competition laws and policies

6.1. Austrian Cartel and Competition Law Amendment Act 2021 (in German: Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021, KaWeRÄG 2021)

78. The Austrian Cartel and Competition Law Amendment Act 2021, promulgated on 9 September 2021, brought about some changes to the legal framework for the activities of the Federal Competition Authority. These serve predominantly to implement the “ECN+” Directive¹, but also go beyond this in some cases and concern other areas.

79. In its comprehensive statement, the FCA criticised that the requirements of the Directive regarding the independence and resources of the FCA had not been met. Thus, neither the long-standing grievance that the FCA’s regular budget is not even sufficient to cover foreseeable fixed costs has been remedied, nor has the FCA been granted autonomy in matters of personnel (service authority) and independent use of budget (budget-managing body). Moreover, the draft provided for a flagrant deterioration of the status quo with a virtually unrestricted supervisory right of the Federal Minister for Digital and Economic Affairs over the FCA. The draft also foresaw the restriction of the possibilities to comment on general competition policy issues beyond the enforcement in individual cases in the sense of exercising its competition advocacy function. Due to massive criticism from all sides in the review process these restrictions were mitigated.

80. The final provisions make clear that the Minister for Digital and Economic Affairs only has the right to inform himself about all matters of the management of the FCA if this does not jeopardise ongoing investigations or otherwise conflict with the independence of the FCA and that inquiries concerning ongoing or forthcoming dawn raids are not covered by this right to information. The budgetary situation could finally be improved as of 2023 due to again intensive negotiations in 2022.

6.2. Material changes in cartel and abuse supervision

81. In § 2 (1) of the Austrian Cartel Act, a “sustainability exemption” from the prohibition of cartels was introduced, whereby the required appropriate participation of consumers is presumed if the profit resulting from the improvement of the production or distribution of goods or the promotion of economic or technical progress makes a significant contribution to an ecologically sustainable or climate-neutral economy.

82. The concept of relative market dominance was strengthened by transfer to a separate paragraph (§ 4a of the Austrian Cartel Act) and extended to the area of

¹ Directive (EU) 2019/1 on strengthening Member States’ competition authorities with a view to enhancing the effectiveness of competition enforcement and ensuring the proper functioning of the internal market, Official Journal No. L 11, 14 January 2019 p.3

intermediary services on multi-sided digital markets to the establishment of a business relationship.

83. With the newly inserted § 28a of the Austrian Cartel Act, market dominance on digital multilateral markets can be ascertained in a separate declaratory procedure – independent of concrete abusive conduct.

6.3. Changes in the area of merger control

84. Unlike other provisions of the KaWeRÄG 2021, changes in the area of merger control came into force only after 31 December 2021. These concern:

1. the introduction of a second domestic turnover threshold (§ 9 (1) 2 of the Austrian Cartel Act),
2. the extension of the material standard of review to include the so-called SIEC criterion (“Significant Impediment of Effective Competition”, § 12 (1) 2 of the Austrian Cartel Act),
3. the extension of the grounds for justification for mergers (§ 12 (2) of the Austrian Cartel Act); and
4. the increase of the application fee to € 6,000 (§ 10a (1) of the Austrian Competition Act).

6.4. Changes in procedural law

85. The scope of addressees of requests for information by the FCA (§ 11a (1) of the Austrian Competition Act) was expanded to include other persons or entities.

86. In § 29 of the Austrian Cartel Act, procedural violations such as non-compliance with a cease-and-desist order or an interim injunction ((1) 2 lit a), failure to tolerate a dawn raid, or damage to/detachment of a seal affixed by the FCA in the process (lit c) were added to the offences subject to fines.

87. In the imposition of fines, the liability of parent companies as well as legal and economic successors is also explicitly provided for (§ 29 (2) and (3) of the Austrian Cartel Act).

88. Furthermore, failure to tolerate a house search may in future also be punished by the imposition of a penalty payment (§ 35 (1) lit d of the Austrian Cartel Act).

89. In the case of violations concerning the provision of information that are punishable by a decision of the FCA (§ 11a (5) of the Austrian Competition Act), the company or association of companies is now responsible and the penalties are based on the company’s turnover. It is also the responsibility of the company to ensure that the company representatives summoned by means of a notice appear before the authority.

90. The existing leniency programme will be partly transferred into an ordinance pursuant to § 11b (4) of the Austrian Competition Act, which will in particular comprise the formal content requirements for leniency applications, markers and summary applications as well as the individual aspects of the cooperation obligation.

91. §§ 35a to 35e of the Austrian Cartel Act as well as § 14 (3) and § 14a of the Austrian Competition Act and an ordinance of the Federal Ministry of Digital and Economic Affairs implement the provisions of the Directive on Extended Administrative Assistance (esp. service and enforcement) within the ECN.

7. Resources in competition enforcement

92. By end of 2021 - additional to the Director General and the Deputy Director General - 21 lawyers, 8 economists, one other professional, two IT forensic experts and 7 persons as support staff, i.e. all together 41 persons, were working at the FCA. Each case handler is responsible for all cases (mergers and antitrust) in specific sectors. In addition, a legal service department and a litigation department were set up in 2017. In September 2021, three new units were set up, covering the areas of budget, IT forensics and information.

93. 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.

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