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Study visit

Kazan, 4-8th April 2016

Competition Law Enforcement in Austria

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Case handler

**Federal Competition Authority
(BWB)**

Introduction

- I. Structure of the Austrian Competition Law Enforcement System**
 - Dual system - Procedural guarantees
 - The Cartel Court's decision
- II. The Austrian Competition Authority**
 - Facts and activities
 - Investigative instruments
 - Procedure
- III. Vertical restraints**
 - Vertical restraints (legal assessment)
 - Cases in the field of food industry
- IV. Cases in the field of cement & nonmetallic construction materials**
 - Insulation Cartel
 - Mergers

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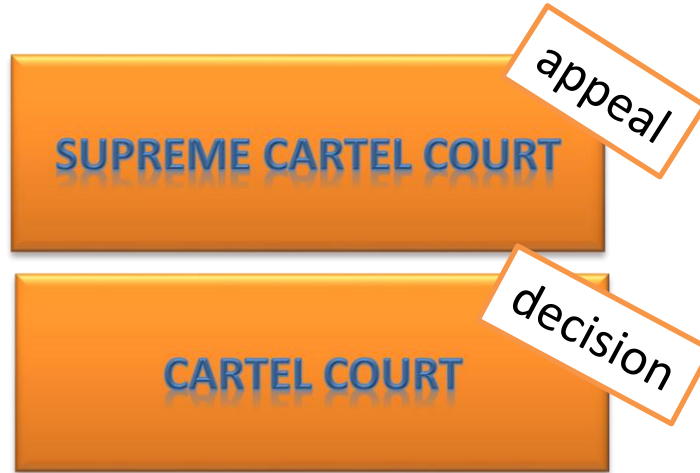
I. Structure of the Austrian System

Dual system I

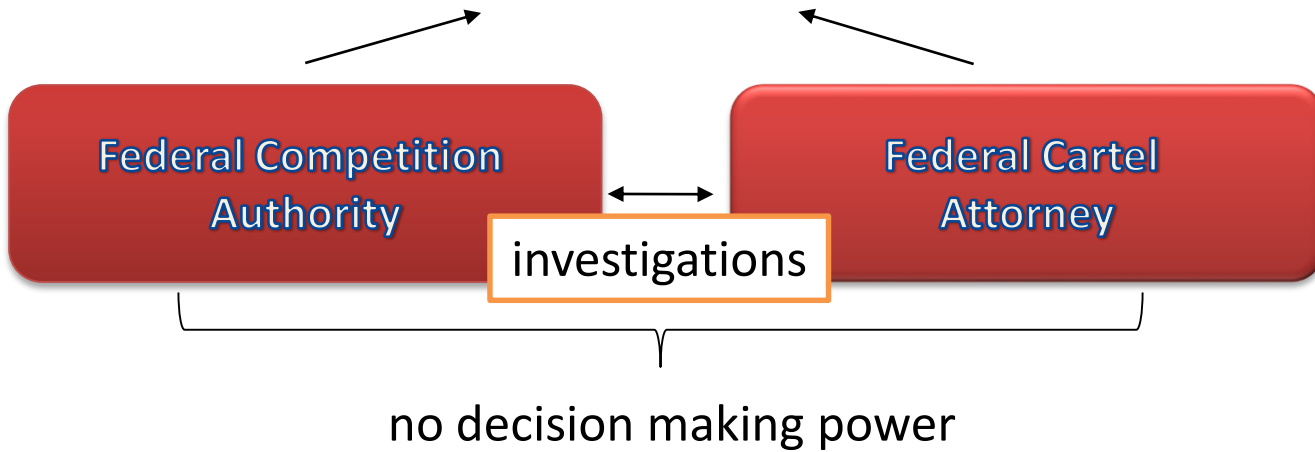
- Institutional **dichotomy** → **separation** between **investigative** and **decisional** powers
 - **Federal Competition Authority** (BWB) and **Federal Cartel Attorney** (FCA)
→ Investigative bodies
 - **Cartel Court** (and **Supreme Cartel Court**)
→ Decision-making bodies
- **Separation** of prosecutorial and decision-making functions **fully respects the European Convention on Human rights**

Dual system II

Judicial proceedings



Investigative proceedings



Dual system III

- **Inspections** can only be conducted on the **order of the Cartel Court** → BWB has to file an application to the Court
- BWB and FCA have the **exclusive right to file applications** to the Cartel Court → Cartel Court renders its decisions **only upon application** (≠ ex officio)
- BWB and FCA are **parties** in court proceedings → may **appeal** against the Cartel Court's decision
- BWB's application has **binding force** for the Cartel Court concerning the **maximum amount of the fine**

Dual system IV

Formal separation between investigation and decision making power – how does it work in practice?

- ***Elevator and Escalator cartel:*** BWB proposed a fine totaling €88 m Cartel Court imposed a fine of €75.4 m
- ***Industrial chemicals wholesale cartel:*** BWB proposed a fine of €1.9 m Cartel Court imposed a fine of €1,9 m
- ***Printing chemicals wholesale cartel:*** BWB proposed a fine of totaling €1.5 m Cartel Court imposed a fine of €1.5 m

Procedural guarantees

- **Written application** to the Cartel Court by BWB
- **Right to reply** to the BWB's initial court pleading
- **Access to file** during the proceedings before the Cartel Court ≠ no access to file during BWB's proceedings
- **Oral hearing** before the Cartel Court
- **Further proceedings** depend on the Cartel Court
- (Constitutional) **procedural guarantees** are met by Cartel Court as independent Court and the applicable procedural regulations

The Cartel Court's decision

- Cartel Court's **decision**
- **Appeal** to Cartel Supreme Court
 - Only the Cartel Court's **legal reasoning can be appealed**
 - Supreme Cartel Court has **full jurisdiction to review the fines** imposed by the Cartel Court

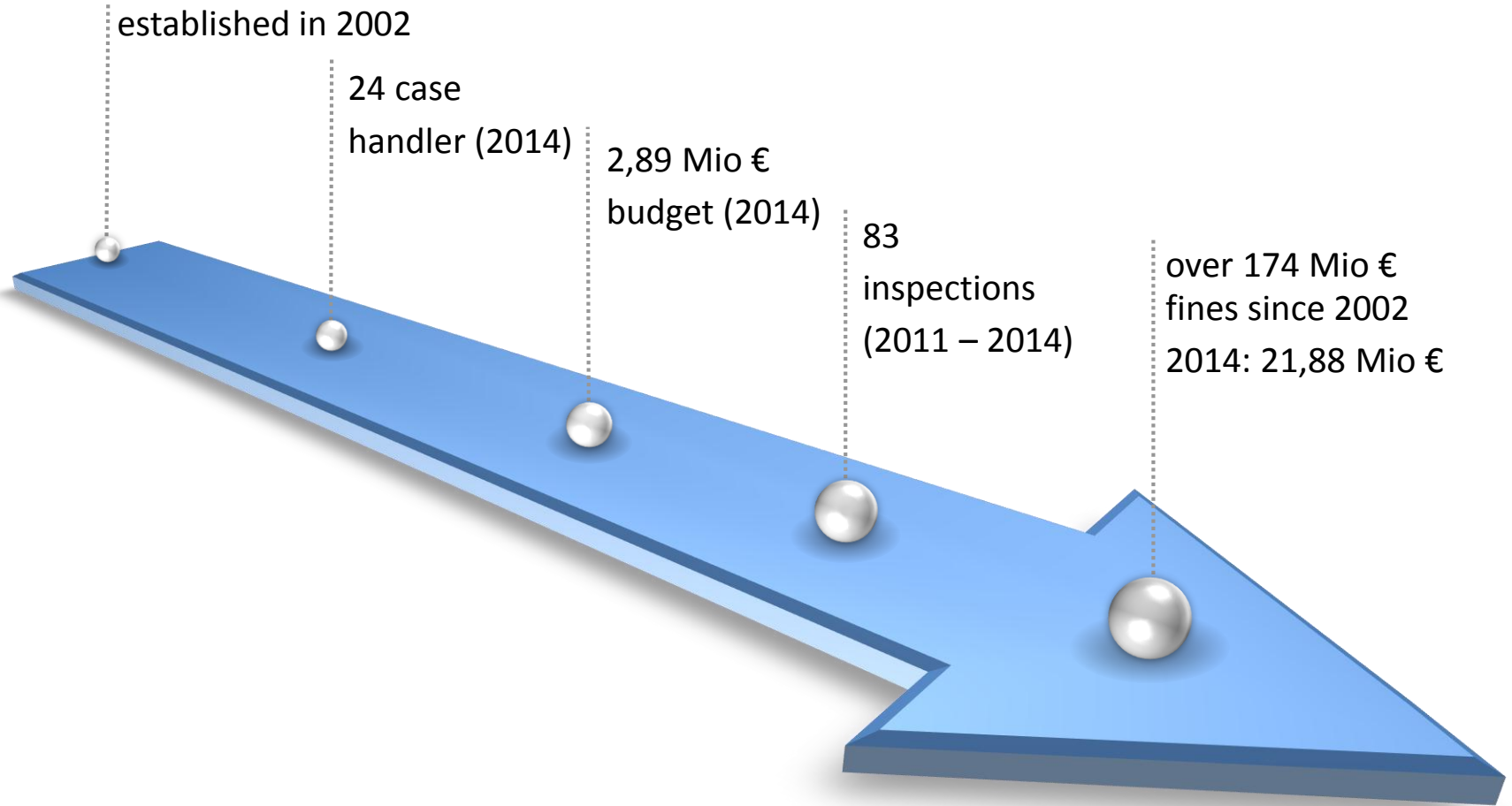
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II. The Austrian Competition Authority

Facts



Activities

2014	sum
National cases	
Merger notifications	322
Other merger cases	27
Cartel cases	51
Cases of abuse of market dominant position	23
Cooperation of consumer authorities	44
Other cases (ORF-G etc)	65
SUM national cases	533
European cases	
Cartel and abuse of market dominant position (EU)	3
Mergers (EU)	317
SUM European cases	320
SUM cases	854

Instruments

- Request of information
- Submission of documents
- Questioning
- Inspections

→ **no hierarchical order** between these instruments
(Cartel Supreme Court)

- Amendments of regulations in 2002/2005/2013
- Leniency programme since 1/2006

Instruments:

Request of information

- Also directed to **third parties**
- **Open questions**, statistic information
- Number of questions and/or addressees can be **very high**
- Sent by letter or via mail
- Official form
- **Time limit** – can be extended
- **Incorrect statements** can be **fined** by the Cartel Court

Instruments: Questioning

- **Possibility of formal invitation** (topic and legal background) signed by Director General
- Notes: Date, place, involved persons, topic, process and subjects
- **Lawyers allowed**
- Suspected persons do not have to give information
- Notes have to be signed afterwards

Instruments: Inspections

- **BWB files an application** to the Cartel Court
 - reasonable suspicion
 - proportionate
- **Search warrant** by the Cartel Court → **executed** by BWB
- Searching **third parties** is possible
- **IT-based searching** gets more and more important (smartphones, laptops, external servers,...)

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III. Vertical restraints

Vertical restraints

- Vertical restrictions are currently under scrutiny in all MS and by the European Commission.
- Problem: **Resale Price Maintenance (RPM)**
- Article 4 EC Regulation: *the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;*

Vertical competition restraints (legal assessment)

Resale Price Maintenance (RPM) can also be achieved through indirect means:

- *fixing the maximum level of discount the distributor can grant from a prescribed price level*
- *making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level*
- *linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level*
- *Price monitoring system*

Further vertical (online) restrictions:

- *overall ban to sell goods on the Internet*
- *ban to sell goods on certain “low budget” internet platforms, such as amazon or ebay*
- *ban to sell goods cheaper on the internet than in the (own) offline store*

Austrian vertical food retailer cases

- In 2011 BWB found evidence during other investigations of RPM in combination with strong horizontal elements
- 25 inspections regarding RPM in Food Sector since 2011
- Sanctions against 5 food retailers, including:
 - **REWE** (35% MS): € 20,8 Mio (numerous products)
 - **SPAR** (30% MS): € 3 Mio (1st instance decision), € 30 Mio (2nd instance decision); 1 case pending (beer), 1 case to be submitted shortly, further cases to be brought once Authority has access to evidence
 - 3 further small retailers: overall € 528.750 (numerous products)

Austrian vertical food retailer cases

- Sanctions against 13 suppliers, including:
 - Berglandmilch: € 1,125 Mio (dairy)
 - Niederösterreichische Molkereien: € 583.200 (dairy)
 - Kärntner Milch: € 375.000 (dairy)
 - Emmi: € 210.000 (dairy)
 - Stiegl: € 196.875 (beer)
 - Vereinigte Kärntner Brauereien: € 195.000 (beer)
 - Vorarlberger Mühlen: € 58.500 (flour)
- Ongoing investigations and pending cases for further retailers and suppliers

Austrian vertical food retailer cases

- "Classical" **written RPM clauses** in annual agreements and correspondence on promotional sales
- Retailers requiring to ensure that **identical or similar contemporaneous resale price increases** are implemented by competing retailers (**conditional** for increase of purchase price)
- Suppliers **communicating in advance** time and extent of resale price increases of other retailers
- Suppliers **monitoring and reporting** to retailers on competitor's price increases
- **Retailers exercising pressure** on suppliers failing to implement identical or similar resale prices with competing retailers

Austrian notice on vertical price fixing

Why?

- EU Guidelines/regulation not much understood or known
- Knowledge of and understanding of these very little among SMEs
- Additional guidance needed
- Advocacy

Notice published in **August 2014** after almost a year of consultations with stakeholders, European Commission and other NCAs

Structure:

1. Legal introduction
2. Which cases the BWB would most likely investigate
3. Which cases the BWB would generally consider non problematic
4. Practical examples

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IV. Cases in the field of cement industry and nonmetallic construction materials

Cases (I)

Cartel Case

- **Insulation Cartel**
 - Affected market
 - EPS (Expanded polystyrene) market
 - One product: Insulation materials for roofs
 - Anticompetitive behaviour & vertical agreements between retailers and suppliers
 - Information exchange with regards to price increases & prices
 - Direct contacts between competitors
 - Illegal resale price maintenance
 - Several dawn raids & witness questioning

Cases (II)

- FCA applied for fine at Cartel Court
- Total of fines: **€ 1,37 Mio.**
- Involved companies
 - Hornbach (€ 100.000)
 - Bauhaus (€ 100.000)
 - Steinbacher (€ 600.000)
 - BauMaxAG (€ 90.000)
 - swisspor Österreich GmbH & Co KG (€ 290.000)
 - Austrotherm GmbH (€ 187.500)

Cases (III)

Merger case

- **Südbayerisches Portland-Zementwerk (SPZ) and Gmundner Zement Produktions- und Handels GmbH (GZ)**
 - Notification of merger in 2006
 - Planned acquisition of sole control of SPZ over GZ
 - Several questions concerning market definition
 - BWB asked for in-depth review at Cartel Court
 - Tighter market definition of BWB than applicant
 - High market concentration of 45% of SPZ & 1 competitor with 40%

Cases (IV)

- Cartel Court: No interdiction of merger
- Clearance without remedies
- Relevant product market
 - market for Portland cement
 - downstream market for ready-mix concrete
- Geographical product market
 - radius of 150 km distance
- Expert opinion
 - no negative effects, also with wider market definition

Outlook

Focus of the BWB for 2016

- Online sector
- Food retail sector
- Standpoint on dawn raids
- Implementation of the Private Enforcement Directive into national law

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Thank you for your attention!

Philipp Maunz

Case handler

Federal Competition Authority

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