

BWB



BUNDESWETTBEWERBSBEHÖRDE

Slovenian Competition Day

Ljubljana, 17 September 2015

Competition Law Enforcement in Austria

Dr. Theodor Thanner

Director General

Federal Austrian Competition Authority

Introduction

- **Structure of the Austrian Competition Law Enforcement System**
 - Dual system
 - Procedural guarantees
 - The Cartel Court's decision
- **The Austrian Competition Authority**
 - Facts
 - Activities
 - Investigative instruments
 - Procedure
- **Settlements in the Austrian System**

BWB



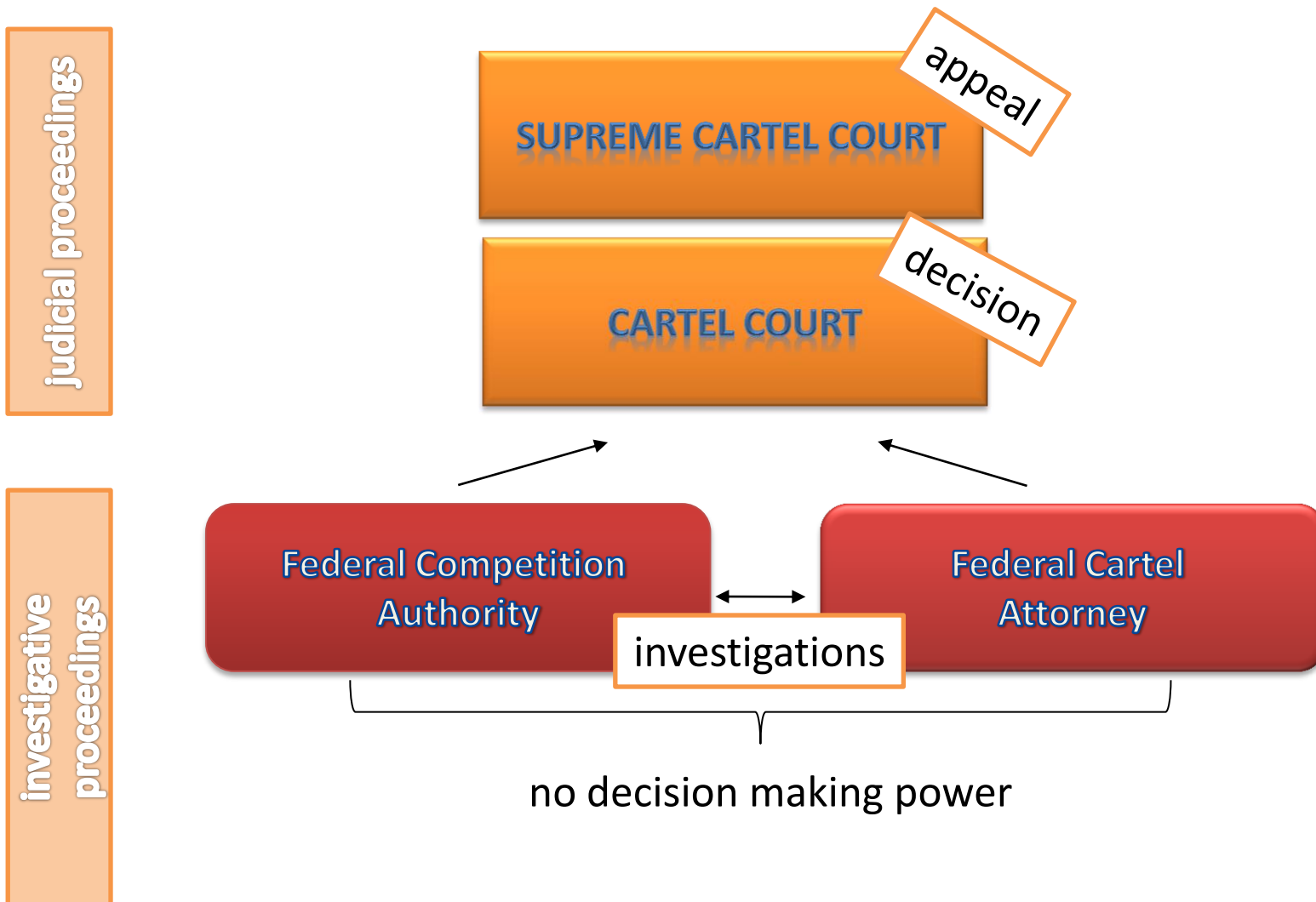
BUNDESWETTBEWERBSBEHÖRDE

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
→ 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



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

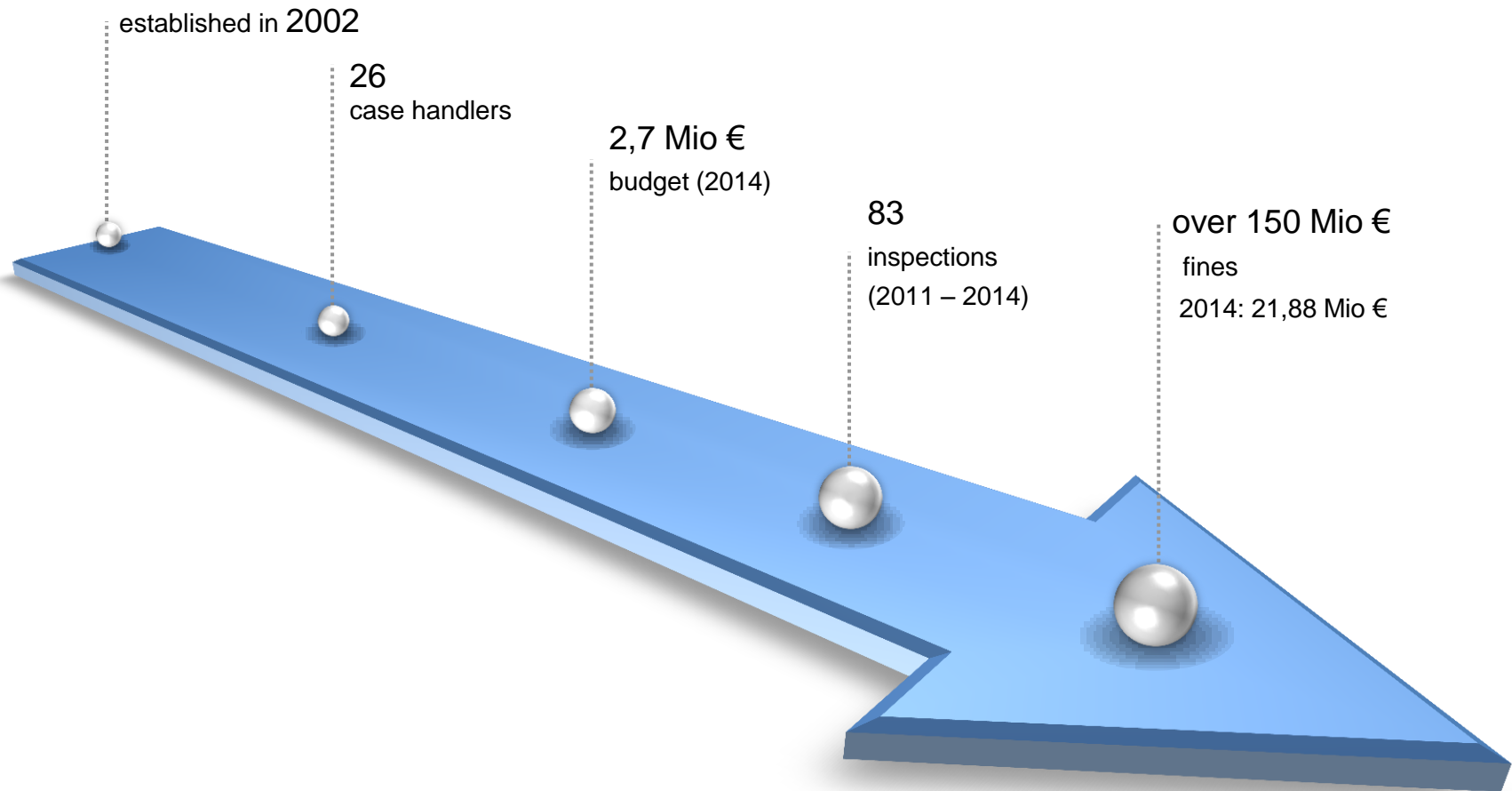
BWB



BUNDESWETTBEWERBSBEHÖRDE

II. The Austrian Competition Authority

Facts



Activities

2014	sum
National cases	
Merger notifications	323
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)	66
SUM national cases	534
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

- 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,...)

BWB



BUNDESWETTBEWERBSBEHÖRDE

III. Settlements

Settlements – a success story?

European Union:

- Introduced in 2008
- Up to 10% reduction
- Average duration of cases reduced by 2 years
- Fines in settlement cases are 42% of total fines since 2010

Settlements – a success story?

Austria:

- Became common over the last three years
- Over **53 Mio €** imposed in settlement procedures since 2013
- Over **twenty cases** settled in past two years in Austria
- Average duration **less than one year**
- Published **guidelines on settlements**

Main features EU/NCAAs

- **Reduction of fines** (average 5-20%)
- **Shorter procedures**
- **Decisions shorter**
- “Settlement-statement” (facts/fine/points of law?)
- (No) right to appeal
- In most MS CA renders settlement decision
- **Austria:** Cartel Court renders decision, public hearing, appeal possible

Definition

Definition of a settlement varies according to each jurisdiction; however some common points:

- Involves **cooperation** of undertakings concerned (Facts, legal assessment? Height of the fine?)
- Leads to **shorter proceedings**; possibly **shorter decisions**
- Involves a **reduction of the fine** (10-20%)

Pros and Cons

PROS

- Fast procedures
- **Fast correction of behavior** to the benefit of markets/consumers
- **Efficiency** (time and cost factor)
- Incentive for companies **to cooperate** outside leniency
- Reduces burden on judiciary/authority/settling party

CONS

- Decisions **less substantiated** → hampering impact on private enforcement
- Facts and legal points not treated in depth; **no jurisprudence** develops
- **Defense rights** cannot be exercised the same way
- **Less transparent** procedure

Take into consideration

- At which stage of the proceedings you enter into settlement talks?
- Which information should be made available to undertakings and when?
- How to deal with hybrid cases?
- Extent of cooperation which is required?

Austrian settlement guidelines

- All kind of procedures covered
- Open to **all undertakings**
- **Certain level of information** at BWB must be reached before entering into talks
- BWB gives information on preliminary assessment of facts/legal analysis and possible fine
- **Scope of reduction** (up to 20%)
- Settlement declaration: facts, legal points and fine
- Judicial review
- **Transparency**
- Available for download under www.bwb.gv.at

CFI Judgment in Case T-456/10 Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission

- **The Commission is not bound** by the fining range indicated as part of the settlement procedure
- The difference between the amount proposed as part of a settlement and the final amount may be explained by the fact that the Commission applied, as part of the settlement proposal, reductions that it was not required to apply as part of the standard procedure

Settlements Conclusion

Challenges:

- **Hybrid cases**
- **Confidentiality**
- **Rights of defence vs efficiency**
- Interplay with **damages procedures**
- Find a balance between ensuring the **effective application** of the competition laws and **ensuring fair and transparent procedures**

Thank you for your attention!

Dr. Theodor Thanner

Director General

Federal Austrian Competition Authority

Follow us on twitter: www.twitter.com/BWB_WETTBEWERB