

„What's new in Competition Law and Policy Focus on inspections“

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Overview

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- II. Amendment Austrian Competition Law 2017**
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I. The Austrian Competition Authority (since 2002)

- Independent Monocratic Authority**

Director General Dr. Thanner (since 2007)
 Managing Director
 Deputy Managing Director
 Heads of Department
 Teams
 Casehandlers

- Judicial Model**

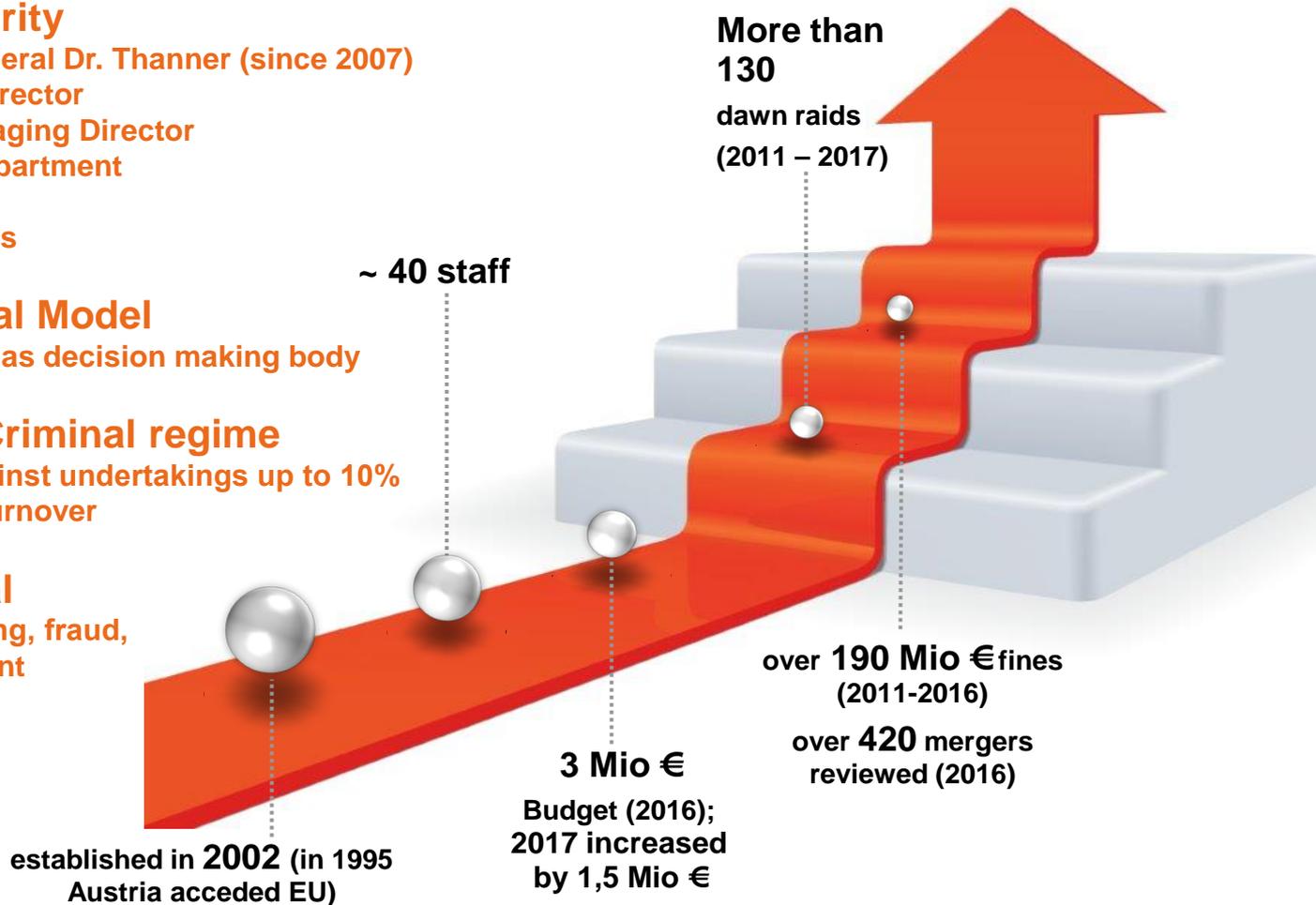
Cartel Court as decision making body

- Quasi Criminal regime**

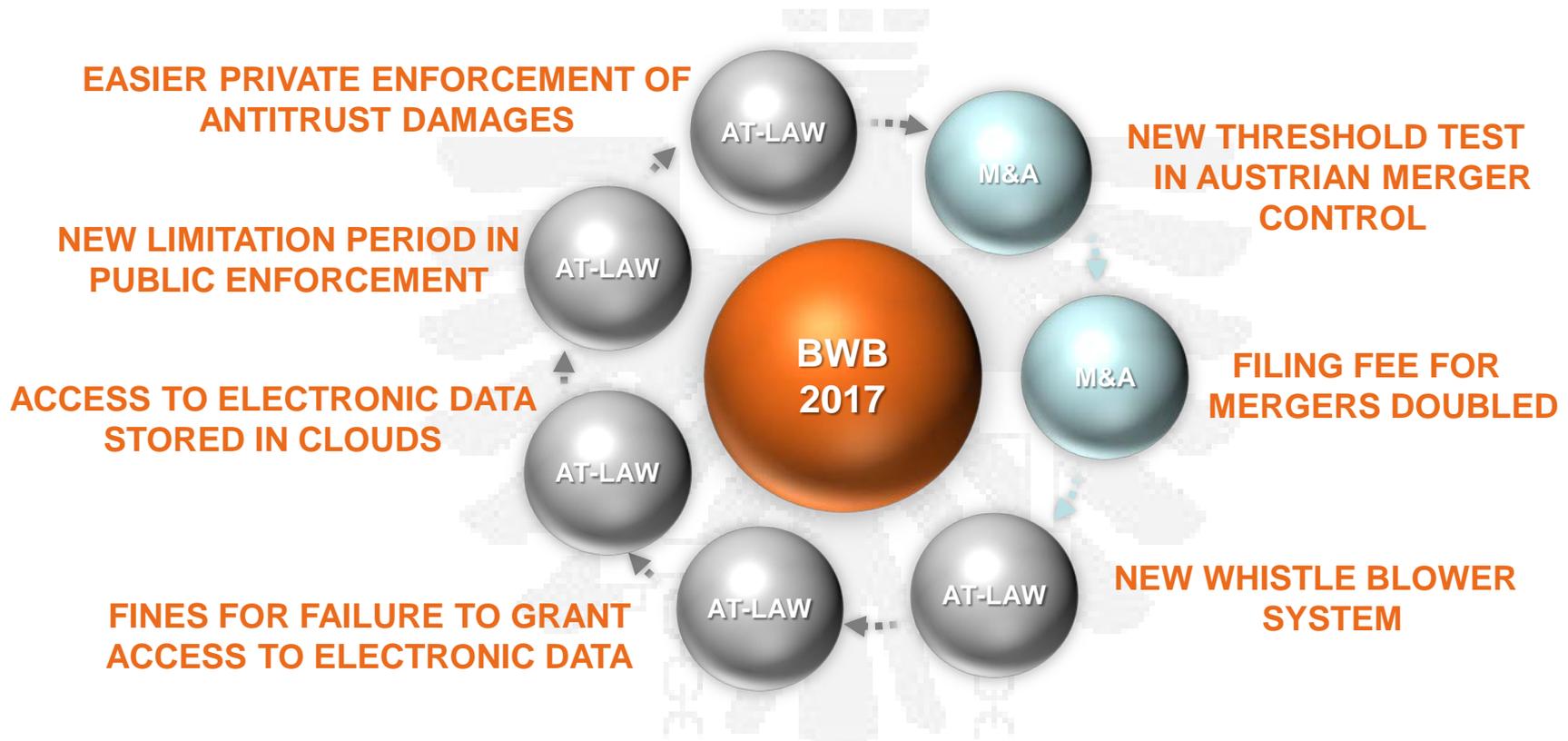
→ Fines against undertakings up to 10% worldwide turnover

- Criminal**

→ Bid Rigging, fraud, embezzlement



II. Amendment Austrian Competition Law 2017



II. Amendment Austrian Competition Law 2017

M & A

- **Threshold Test** in merger control, capturing transactions where the value of an undertaking is not (fully) based on the turnover the undertaking generates (digital companies):
 - Concentrations trigger a merger control filing requirement, if:
 - (1) the undertakings' combined worldwide turnover exceeds EUR 300 million,
 - (2) their Austrian turnover exceeds EUR 15 million,
 - (3) the value of the consideration for the transaction exceeds EUR 200 million and
 - (4) the target is active to a significant extent in Austria (business location or services are significantly used in Austria – website visits).
- **Filing Fee** for mergers is increased from EUR 1,500 to EUR 3,500.

II. Amendment Austrian Competition Law 2017

Antitrust Law

- **New Whistleblower System:** Implementation of a web-based tool to anonymously disclose information on potential competition law infringements.
- **Fines for failure to grant access to electronic data during dawn raids:** Sanctions can be imposed on undertakings, if in the course of a dawn raid, they fail to grant access to electronic data that is accessible from the premises concerned. The fines can amount to up to 5% of the average daily turnover for each day of delay.
- **Access to electronic data stored in clouds:** During dawn raids the federal competition authority (FCA) can take any data which is accessible from the premises, no matter where the data is stored.

II. Amendment Austrian Competition Law 2017

Antitrust Law

➤ New limitation period in Public Enforcement:

- ✓ Until 1st May 2017 application for fines has had to be submitted to the Cartel Court within 5 years from the end of anticompetitive behaviour without any possibility to interrupt this period.
- ✓ This period is suspended now in case the FCA informs at least one of the cartel members of an investigatory activity, e.g. a dawn raid or a request for information.
- ✓ Furthermore, an absolute limitation period of 10 years - not counting the time of procedures before courts - after the determination of the anticompetitive behaviour was introduced.

II. Amendment Austrian Competition Law 2017

Antitrust Law

➤ Easier Private Enforcement of antitrust damages

Implementation of the EU Damages Directive (2014/104/EU):

(1) Shift of the burden of proof in favour of the injured party;

(2) Limitation period of claims for damages: infringements will become time barred after five years; the new limitation period will only begin when the claimant knows or can be expected to know of the identity of the infringer, the relevant conduct, of the harm being caused by that conduct and of the fact that the conduct constitutes an infringement of competition law.

(3) Access to evidence (disclosure): civil courts are able to order, upon request of the claimant (or the defendant), the disclosure of evidence from anyone who has such evidence (possible with or after filing the claim). "Pre-trial discovery" is not admitted in Austria. Disclosure orders can also concern evidence in files of courts or authorities; leniency applications and settlement submissions are excluded.

II. Amendment Austrian Competition Law 2017

Access to electronic data

- The undertaking must grant access to electronic data if access is possible from its premises, as covered by the search warrant („**access principle**“), i.e. the law stipulates the rule already confirmed by the courts.
- The Austrian authority is now able to apply for **finer** in case undertakings, in the course of a dawn raid, fail to grant access to electronic data that is accessible from the premises concerned.
- The fines can amount to up to 5% of the average daily turnover for each day of delay.

III. Agenda 2017/2018

RUNNING TASKS

- **Sector Inquiry in the Health Care Market:** Securing fair competition and consumer protection (pharmaceuticals; e-health; cost reduction by combating monopolies)
- **Focus on Online- and Shared Economy:** (1) Online shopping vs. Geoblocking; (2) fair market access for services like Uber, AirBnB

STRENGTHENING THE AUSTRIAN COMPETITION AUTHORITY

- **Expansion of Digital Forensics and eDiscovery:** BWB is upgrading its systems and digital analytics possibilities -> for accessing data stored abroad (Cloud Storage), in close cooperation with the Federal Criminal Police Office (*in 2009 the Austrian Federal Criminal Police Office and the FCA signed a cooperation agreement*)
- **Establishment of an Internet-Based Information System;** “Whistleblower-Hotline”, strengthening the enforcement of cartel and antitrust law

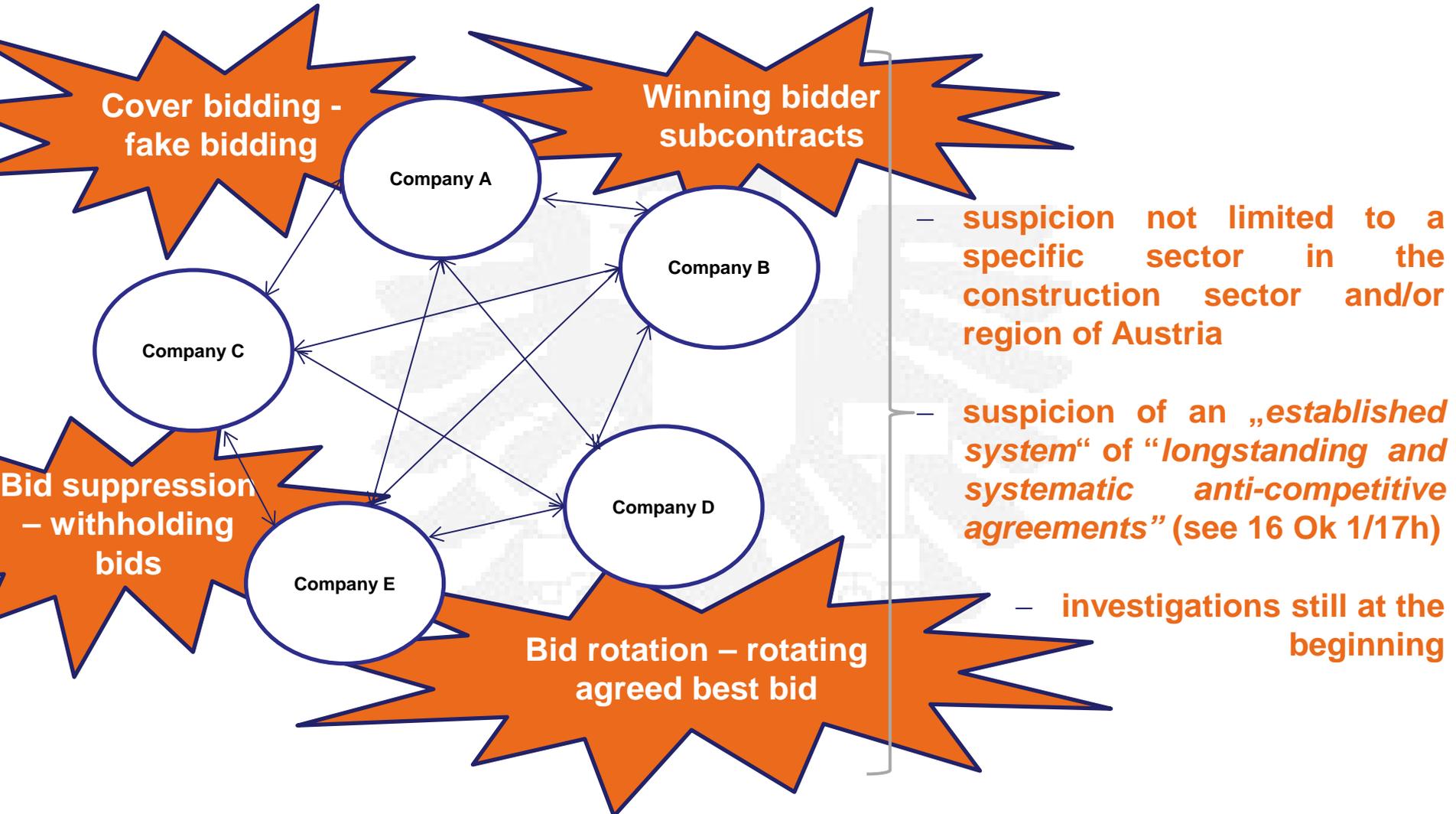
IV. Construction sector investigations

Construction Sector in general – key facts

- Financial police seized a folder with various construction projects in 2016
- Folder provided by the Federal Bureau of Anti-Corruption (*BAK*) to the Austrian FCA on the basis of administrative assistance (*Amtshilfe*)
- Dawn raids in spring 2017 by Federal Competition Authority
- Also independent dawn raids by the PPOC
- Suspicion not limited to a specific sector of construction
- Search warrant appealed to the Austrian Supreme Cartel Court by one undertaking
 - Lawfulness of the dawn raid confirmed (16 Ok 1/17h);
 - Austrian Supreme Cartel Court noted in its decision that the evidence submitted for the search warrant confirmed the “*severe suspicion*” of “*a longstanding and systematic anti-competitive agreements*”

IV. Construction sector investigations

Suspicion in the construction sector - Proceedings in investigative stage



V. The importance of inspections

- Companies suspected of cartel infringements will **rarely admit** their involvement or provide evidence in reply to requests for information or during interviews
- FCA faced difficulties **successfully pursuing cases** (with the exception of leniency cases) until it began extensively conducting inspections in 2011
- **135 dawn raids** and approximately **€ 200 Mio** in fines

V. The importance of inspections

Advantages of Inspections vs other investigative tools:

- provide the strongest evidence
- less risk of incorrect or misleading information
- enable the case handlers to examine documents in their **commercial context**
- inspections also increase the effectiveness of leniency programmes by increasing the risk of detection and incentives to apply for leniency
- FCA can conduct inquiries at the place of the company and can quickly initiate further steps: **Faster investigation!**

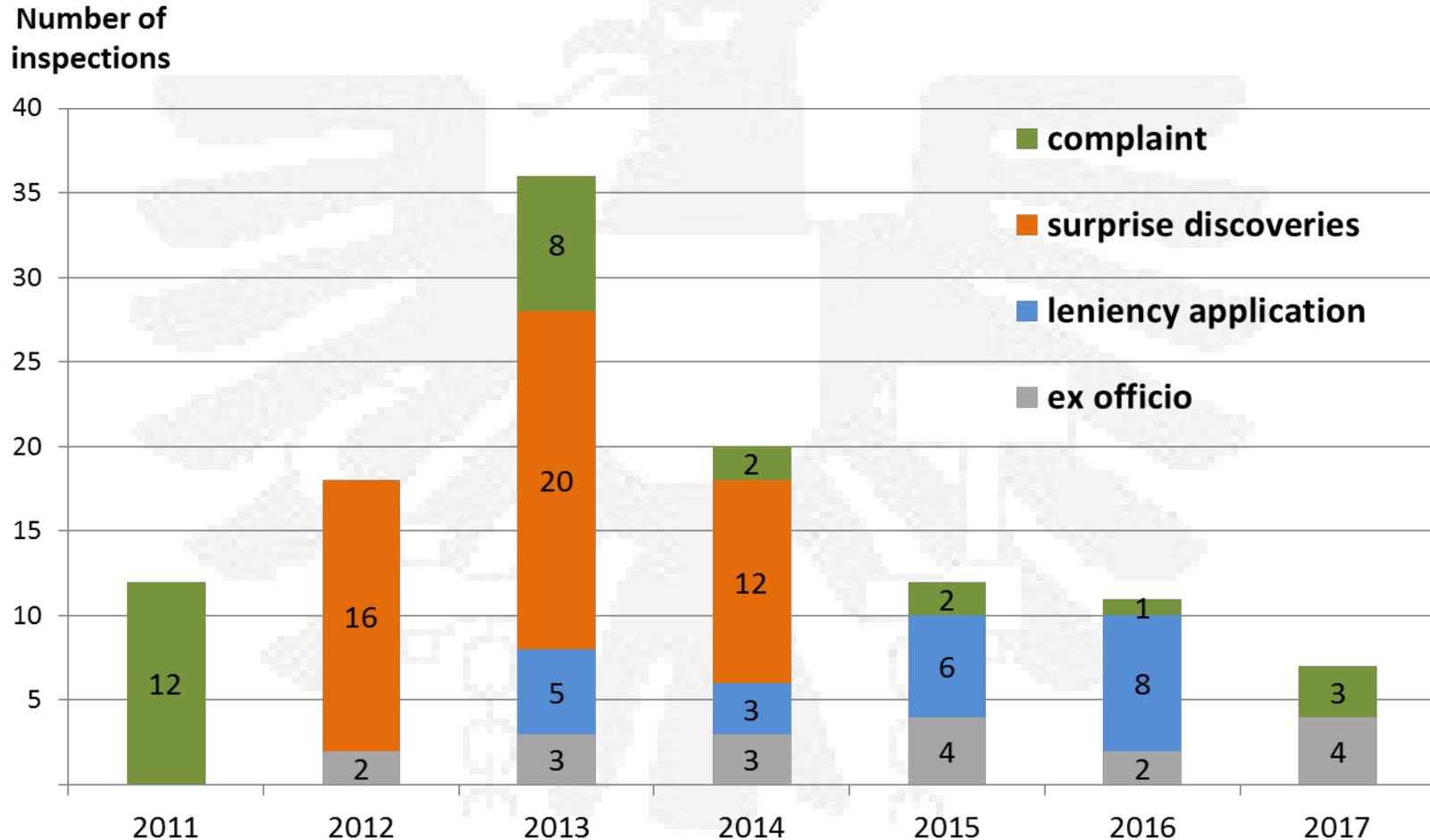
V. The importance of inspections

Austrian Food Sector Investigation: Success through Innovation

- In 2011, FCA received evidence of RPM with strong horizontal elements. Companies at first denied any wrongdoing.
- 30 inspections regarding RPM in Food Sector
- Fines in total of **€ 69 Mio** , including :
 - **REWE** (35% MS): **€ 20,8 Mio**
 - **SPAR** (30% MS): **€ 40,2 Mio**
 - Fines against small retailers amounting to **€ 1,2 Mio**
 - Fines against a number of suppliers amounting to **€ 6 Mio**

V. The importance of inspections

Dawn raids 2011-2017



VI. The legal framework for inspections

- The FCA can not order an inspection itself, it needs to file an **application to the Cartel Court**
- The Cartel Court assesses
 - reasonable suspicion
 - proportionality
- **No subsidiarity**: no need to use other investigative tools (e.g. witness statement) before requesting an inspection order. Confirmed in a landmark decision of the Supreme Court
- If satisfied, the Cartel Court issues an inspection decision, which is then executed by the FCA

VI. The legal framework for inspections

- FCA can search **Third parties**, if there is a reasonable suspicion that evidence can be found on their premises (e.g. customers of the company suspected of an infringement)
- FCA can also conduct investigations through administrative assistance (Art 22 Reg 1/2003) in **other EU countries**: This increases the “reach” of the authority and led to a number of fines
- FCA also **supports investigations** of “sister” authorities in Austria on a continuous basis
- The Supreme Court decided that information provided in the context of a leniency application may be used for such investigations in other countries **without the consent of the leniency applicant**

VI. The legal framework for inspections

Legal remedies

- Appeal against inspection decision to the Supreme Court
 - no suspensive effects
 - but if upheld, inspection is retroactively invalidated, FCA cannot use evidence seized (so far no inspection order has been quashed by the courts!)
- Appeal against „excessive measures“ to Federal Administrative Court
 - „excessive measures“ = grave and manifest disregard of the limits of the inspection decision
 - are not covered by the decision and constitute an administrative measure (excellent track record of the authority: so far no inspection has been held illegal!)

VI. The legal framework for inspections

Scope of the inspection

- FCA can seize all documents connected to the subject matter of the inspection, e.g. which relate to the **legal or commercial context** in which the infringement has to be examined
- Even if company does not consider a document connected to the subject matter of the inspection, it may not oppose the copying of the document
- All documents can be at least **scrolled through** – inspection is only considered an illegal “fishing expedition” if inspectors specifically look for documents outside the scope of the inspection decision

VI. The legal framework for inspections

Scope of the inspection

- Scope follows the scope of the Cartel Court's "*reasonable suspicion*" which is to be substantiated by the FCA
- FCA needs to present facts to Cartel Court which "plausibly and comprehensibly" suggest infringement(s) of e.g. Art 101 TFEU (particularly in factual and temporal terms)
- Inspections shall enable FCA to collect information relevant for **determining** more narrowly the **nature, extent and duration of the infringement** as well as the undertakings involved
- FCA may also search for information not yet known but necessary for determining the above circumstances
- **Not limited to a specific (known) tender**

VI. The legal framework for inspections

Scope of the inspection

- **Temporal scope:** no legal restrictions on daily working hours of BWB nor on overall duration of the inspection
- **Geographic scope:** All rooms at the premises targeted by the inspection order can be entered to check whether they are used by the company
- **Analysis of electronic data:** discretion of the FCA whether the analyze it on site or at agency

VII. Powers during an inspection

- Inspectors may **examine documents** and **create copies** of documents
- Inspectors may **request any information** required for inspecting the premises as well as explanations concerning facts or documents related to the subject matter of the inspection
- Inspectors may **seal rooms or containers** (cupboards, cabinets, boxes)

VII. Powers during an inspection

Electronic data and forensic software

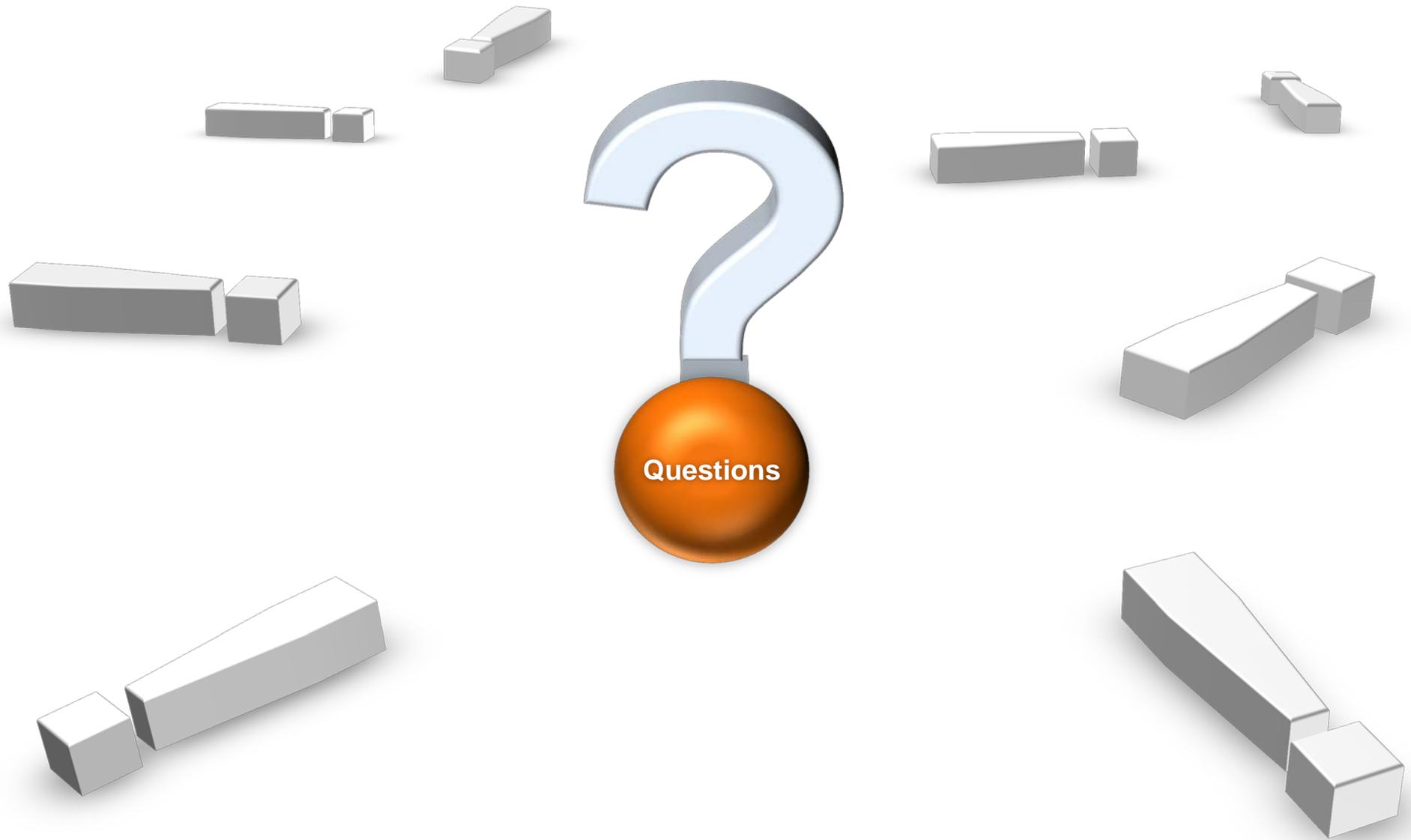
- The courts confirmed that the FCA may use **forensic software** to search and copy electronic data
- All electronic data **accessible from the searched** premises are considered to be within the scope of the inspection, wherever they might be stored physically, e.g. server abroad (“access principle”)
- Supreme Administrative Court clarified this point in a landmark decision (Austrian Supreme Administrative Court 22.4.2015, Case No 2014/04/0046).
- Obligation of the police to support FCA if there is need

VIII. Guidelines of the FCA

- FCA is the first authority in Austria to publish guidelines on its envisaged procedure
- The Guidelines describe the law and the case law in a language which can also be understood by non-lawyers
- Based on the experience of the FCA in more than 135 dawn raids
- Provides companies information on ways to ensure a smooth execution of the dawn raid
- Available in German as well as English

IX. Conclusion

- For the FCA, inspections have proven a **very valuable tool to detect and prosecute cartel infringements** and increase the effectiveness of cartel enforcement
- **Clear rules on the legal framework** of inspections and the powers during inspections mitigate conflicts with companies during inspections. The FCA published a handbook on dawn raids to increase legal certainty
- Inspections need to constantly **adapt to technological changes**, e.g. improved forensic software
- Courts decided in numerous pending cases for the authority and **confirmed the legality of the authority's approach**



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**Thank you for
your attention!**