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(1998-1999)

### I. Changes in the regulatory environment

#### *Amendment to the Cartel Act*

1. In November 1998 negotiations about a new Austrian Cartel Act began. The options included a cartel office and a public prosecutor for cartel matters at the Ministry for Justice, while keeping the Austrian Cartel Court. As a final compromise was not found, it was decided to improve the established system of the Cartel Court. In July the Austrian Parliament agreed to this amendment of the Austrian Cartel Act.

2. The main point is that the Cartel Court itself can initiate proceedings as though it were one of the Official Parties. The thresholds for merger control now specify that the world-wide turnover of the companies involved exceeds 4,2 billion ATS (€ 305 Mio) and the turnover in Austria exceeds 210 Mio ATS (€ 15,26 Mio.) and the world-wide turnover of at least two companies exceeds each 28 Mio ATS (€ 2,03 Mio.). A decision of the Cartel Court had stated in 1998, that only the turnover in Austria was relevant for the calculation of the thresholds, thus reducing the scope of the Austrian merger control. This amendment specifies Austrian and world-wide thresholds. Sales below cost to supply were explicitly specified as an abuse of a dominant market position. According to the amendment dominant position is assumed when the market share exceeds 30 percent. Until now, only explicit cartels based on a treaty were forbidden before notification, but concerted practices were not. The amendment establishes that concerted practices, too, are prohibited before notification. Even the explanatory note, however, of the Ministry of Justice stated that further amendments will be needed. In the political discussion all parties were in favour of a more efficient cartel law enforcement, which will be subject of further discussions on cartel law amendments.

### II. Special sectors

#### *1. Electricity*

3. In the electricity sector the liberalisation acts implementing EC-Legislation (ELWOG) had immediately considerable effects, although the first step liberalises only the electricity supply for some 75 users of more than 40 GWh. Prices were cut for industrial users by a total of approximately 750 million ATS/year, and most electricity companies cut their consumer prices by 7 to 10 percent. Negotiations about a merger of the transmission operator "Verbund", which also owns several hydroelectric power plants with the electricity operators and distributors "EVN" and "Wienstrom" were not successful. As a result the "Verbund" bought a minority share in an electricity trading house of the Italian CIR group.

4. Last year the French company EdF (Electricité de France) had already acquired a minority share in the electricity producer of the Province of Styria, called STEWEAG. Several negotiations about mergers and co-operations are still going on, while electricity brokers are establishing themselves in the marketplace.

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### 2. *Telecommunication*

5. In November 1997 the Telekom-Control, the Austrian Telecommunications Regulatory Authority – which was implemented through the Telecommunications Act of August 1997 as an independent authority – started its operation. The regulator's main mission is to promote competition on a fair, transparent and non-discriminatory basis.

#### a) *Market entry*

6. The conditions for market entry are of central importance for the process of liberalisation. According to the Austrian Telecommunications Act anyone is authorised to provide telecommunications services in compliance with the legal settings. In general a telecommunications service provider only has to notify the provision of services to the regulatory authority. For a simple resale of telecommunication services no notification is required. A concession is needed for offering public mobile telephony services and other mobile services through a self operated mobile network, offering of public voice telephony services through a self-operated network and the public offering of leased lines through a self-operated network. A concession (for fixed voice telephony services and leased lines) will be granted within a period of six weeks if the applicant demonstrates the necessary technical competence and if there is no reason to assume that he will not provide the relevant services in accordance with the concession. During 1998 in about 64 percent of all applications a decision about the concession has been taken within a period of six weeks; in all cases delays were due to uncomplete applications. To cover the administrative costs related to the granting of a licence, the licensee has to pay 70.000 ATS (5.087 Euro) for a national licence resp. 50.000 ATS (3.634 Euro) for a regional licence. In 1998 a total of 50 licences were granted, 25 for the public offering of fixed voice telephony services and 25 for the public offering of leased lines.<sup>1</sup>

#### b) *SMP-operators*

7. Another important element in the process of liberalisation was the determination of companies with significant market power (SMP). According to the ONP framework operators with SMP are exposed to more stringent ex-ante regulations in order to avoid abuse of their dominance. With the decision from 14.05.1998 the Telekom-Control- Kommission determined that the Telekom Austria (at this time Post und Telekom Austria AG - the incumbent fixed network operator) had SMP on the fixed voice telephony market, the leased line market and the interconnection market. Mobilkom, a subsidiary company of Telekom Austria which operates an analogue telephone network in the range of 900 MHz (TACS system) and a GSM network, was determined to have SMP in the mobile telephony- and the interconnection market. The determination was challenged by Mobilkom with the result, that the decision was repealed by the constitutional court for procedural reasons.

#### c) *Interconnection issues*

8. An important precondition for competition is the interconnection of networks, for which in turn the determination of operators with SMP is central, because operators with SMP in the voice telephony and the interconnection market have to interconnect for cost-oriented prices. In 1998 the regulator had to decide in fourteen cases on disputes between operators on interconnection issues. From the perspective of competition the decision on termination and transit of calls (dated 09.03.1998) and the decision on call origination (05.10.1998) were of particular importance. Based on *the forward looking long run average incremental cost* methodology (for an outline of the concept see [www.tkc.at](http://www.tkc.at)) the prices for terminating a call were fixed at 0,25 ATS/min (0,018 Euro) for single tandem termination and 0,33 ATS/min (0,024 Euro) for double tandem termination; the prices for single tandem transit are 0,053 ATS/min (0,0039 Euro)

and for double tandem transit are 0,104 ATS /min (0,0076 Euro). At the time the decision was made, the prices were within the European Commission's benchmarks. With this decision, based on the principle of reciprocity the new operators (and the existing mobile operators) were able to deliver calls to the incumbents fixed network for a much lower price compared to the one before. The second important decision mentioned above was related to the prices for call origination, which is together with the decision on call termination particular important for carriers with minor telecommunication networks. The prices for single tandem origination was set at 0,28 ATS/min (0,02 Euro) and at 0,55 ATS/min (0,04 Euro) for double tandem origination. Both decisions above are valid until the end of 1999; a decision on tariffs for local origination/termination and on the unbundling of the local loop was not taken during 1998.

9. While in the beginning of 1998 the effects of liberalisation were perceivable primarily for larger and/or business customers, with the decision on call origination the effects of liberalisation spread out to the broader public and competition gained remarkable momentum. Although not all operators which were licensed during 1998 were already operational at the end of the year, prices for telephone calls dropped significantly. Nevertheless the market share (in terms of revenues) of Telekom Austria on the total voice telephony market was still above 95 percent; the dominant operator's market share on the leased line market was slightly lower, but still above 90 percent.

d) *Mobile market*

10. In the mobile telephony market the year 1998 was characterised by three important trends: Firstly, the overall penetration rate rose significantly (95 percent), and at the end of the year penetration reached a level of about 28 percent. Secondly, in October 1998 when the third GSM operator One started its operation in the 1800 MHz range competition gained additional momentum and led to a situation, in which three operators (Mobilkom, max.mobil, One) with four networks competed for customers. Substantial price decreases, new tariff schemes and rapid responses to new offers from competitors were the result. Thirdly, the market was characterised by strong growth in the number of prepaid-customers. While in the beginning of 1998 only about 18 percent of customers belonged to this segment, the prepaid share on the total market doubled until the end of the year. At the end of 1998 the market shares (in terms of customer) of the three operators were: Mobilkom (analogous and digital network): about 64 percent, max.mobil about 35 percent and One about 1 percent. In December 1998 the regulator invited for a tender on a fourth GSM licence in the 1800 MHz range.

### III. Enforcement of competition laws and policies

#### 1. *Actions against anti-competitive practices, including agreements and abuses of dominant positions*

a) *Summary of activities*

11. As already mentioned in the previous annual reports, a combined notification and authorisation system is prevailing the Austrian antitrust legislation and practice. Even if the republic, as a legal party, has limited powers to carry out a modern competition policy approach, it has rarely used its potential powers to initiate investigations in possible anti-competitive practices. This might be due to the separation of competencies between the Federal Ministries of Justice and Economic Affairs.

12. Austria had a rather long tradition of considerable influence of the social partners in competition policy and antitrust enforcement. When Austria joined the EU, the autonomous scope for action within the

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field of competition policy was limited drastically. So new ways have to be found, the recent amendment of the Cartel Act 1988 being only the first step towards a more efficient competition law enforcement, more independent from political influences.

13. The Austrian civil courts have learned to apply national and EU-antitrust law more and more; but this development goes hand in hand with the state of knowledge of the lawyers, when and how to use antitrust law properly. There are no official statistics to outline this development, but drawn from the experiences of the lawyers, more and more allegations of abuse of a dominant position have been taken before the civil courts instead of the cartel court. The reason for this might be found in the fact that a civil court can also decide on a claim for damage.

14. Due to the civil law approach of Austrian antitrust law and the separation of competencies, international co-operation with other competition authorities is extremely impeded. This situation will presumably not change very fast, because further institutional reforms will be based on the existing regime.

### b) *Significant Cases*

#### ba) Horizontal Restraints

15. **BP Gas Austria GmbH Nfg. OHG et al.** The most important suppliers of liquid gas in Austria with a market share of nearly 100 percent intended to impose a fixed deposit on empty high pressure cylinders. The deposit will be returned to the customer when he returns the cylinder to a sales agent. The Joint Committee and the cartel court have authorised the agreement for three years, because no anti-competitive effects for non-Austrian suppliers could be detected and positive environmental effects were claimed.

#### bb) Abuse of a dominant position

16. **Verein für sauberen Wettbewerb versus "Ja!Natürlich"** The second largest Austrian retailer chain (Spar) accused its larger competitor Billa, a wholly owned subsidiary of the German REWE company, of dominating the Austrian wide supply-market of milk produced under restricted and controlled environmental conditions, so called bio-milk. By exclusively binding the most important Austrian producers, Billa tried to block its competitors from the free supply of this bio-product, necessary for a retailer. After detailed hearings with alternative producers of environmentally healthy dairy-products, the Joint Committee held that no real shortcomings of alternative possibilities of supply according to quality and quantity had come up. If the plaintiff had come up with a similar co-operation program, he would have found enough milk-supply capacity to compete with the market-leader. The Cartel Court has not taken a final decision so far.

17. **Antenne Wien et al. versus ORF et al.** Within the framework of the newly liberalised regional radio broadcasting market in Austria, some new market entrants agreed upon an advertising co-operation with the former monopolist ORF. The plaintiffs argued that this co-operation would impose tremendous burdens on the market entrance of the remaining private broadcasting companies, which build up Austrian wide advertising co-operations of their own. The Joint Committee held that most of the marketing problems were due to not sufficiently adjusted consumer programme definitions so that most consumers and potential addressees of advertisement refused to change their listening habits. The case is still pending.

## 2. Mergers and acquisitions

18. For the year 1998 we could again notice a very high number of mergers and acquisitions, although compared with 1997 it decreased a little. Most mergers took place in the sectors of building materials, food production and retailing. A great part of the transactions took place with participation of German enterprises, either as the land of origin or as object.

### 1997- 1998

Mining Industry	1	3
Building material, basic materials	21	24
Production, manufacture of basic metals	15	14
Chemical, pharmaceutical industry	7	8
Production, manufacture of plastics	9	14
Manufacture of machinery and equipment	19	19
Electrical, electronic industry	10	10
Manufacture of vehicles, supplying industry	6	6
Medical, precision and optical instruments	5	-
Manufacture, production of food	21	21
Manufacture of textiles, shoes	13	4
Manufacture of wood, products of wood	9	-
Manufacture of paper, paper products	18	5
Publishing, printing	9	10
Manufacture of sports goods	-	-
Construction	9	4
Wholesale	18	10
Retail	13	21
Hotels and restaurants	13	6
Tourism	5	5
Transport, carriers	7	4
Insurances	-	-
Banks	14	9
Financial services	3	4
Advertising	3	3
Software, computer services	8	9
Telecommunications	7	-
Sewage, refuse disposal, recycling	8	8
Other services	7	3
Advisory professions	-	3
Energy supply	-	3
Others	12	15
<b>Total</b>	<b>289</b>	<b>242</b>

*Ref.: Moschner, M., „Österreichs M & A-Markt, BankArchiv  
(Explanation: Due to technical problems the data bank we usually use does not work at the moment. Because of that these numbers can not be compared with those in the last competition report, they are based on a different system.)*

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### a) *Significant cases*

#### aa) Merger of Kika-Leiner Group/Michelfeit

19. Following the announcement of the acquisition of a 26 percent participating interest in Michelfeit Einrichtungshaus AG by Kika-Leiner (furniture and home furnishing stores), an application for review was filed by the Federal Chamber of Labour. The Joint Committee on Cartel Matters, which was mandated by the Cartel Court to produce an expert opinion, arrived at the following conclusion:

20. The review was based on the furniture retail market in a wider sense (including small furniture stores and specialised stores with limited product assortments) as the relevant market in material terms; after a thorough analysis of consumer behaviour, a limited focus on furniture stores with large sales surfaces only was discarded as being too narrow.

21. The buying behaviour of consumers concerning furniture was also analysed for the purpose of defining the relevant market in geographical terms. It was found that approx. 90 percent of the sales of a furniture store are accounted for by the geographical area within 35 km of the store location. Hence, consideration of the entire Austrian furniture retail market did not appear to be appropriate, as the Austrian Michelfeit stores to be taken over by the Kika-Leiner Group, whose stores are distributed all over Austria, are all located in the region around Vienna and Wiener Neustadt. Hence, this area was considered to be the geographically relevant market.

22. In the relevant market, as defined above in material and geographical terms, the leading Kika-Leiner Group holds a market share of about 23 percent; Michelfeit, the second-largest retailer in the market, holds a share of 13 percent. Thus, the merger of the two largest furniture retailers in the region would bring their market share up to 36 percent. From a dynamic point of view (considering the construction projects of the furniture retail sector to be completed by 2002), the common market share of the two companies will presumably be around 33 percent.

23. Thus, the merger would give the above-mentioned enterprises a considerable advantage over their main competitors in terms of market share (ratio of approx. 3 : 1).

24. As regards the procurement market, it was found that the Austrian furniture industry is largely dependent on deliveries to the merging enterprises.

25. The Joint Committee noted that the merger would result in a dominating position of the newly created entity in the relevant distribution market. In its recommendation to the Cartel Court it therefore proposed to reduce the accumulated sales of the merger applicants through the imposition of conditions intended to bring the market share after the merger down to approx. 30 percent.

26. The Cartel Court finally decided not to prohibit the merger, provided the conditions proposed in the expert opinion of the Joint Committee (disposal of one or several locations) are duly complied with.

#### ab) Vonwiller/Farina/MPG Mühlenproduktionsgesellschaft and Vonwiller/Rauch/Fritsch & Rauch Mühlen G Joint Ventures

27. The intended formation of two joint ventures concerns the Austrian mill industry, which has been experiencing profound changes of its legal and economic framework since Austria's accession to the European Union (discontinuation of milling quotas and official price control).

28. On the one hand, the Austrian cereal milling operations of Vonwiller and Farina are to be transferred to and merged with the newly established MPG; the parent companies will each retain half of the participating interests in the joint venture. On the other hand, Vonwiller intends to close the milling operation of its Fritsch/Wels subsidiary and merge the operation with that of Rauch/Salzburg, the subsidiary of Rauch/Innsbruck.

29. On the basis of an application for review submitted by the Federal Chamber of Labour, the Cartel Court mandated the Joint Committee to produce an expert opinion.

30. As regards the milling industry in Austria, the Joint Committee noted that the sector has a small-scale structure and is characterised by considerable over-capacities and relatively high costs. In its review of the market, the Joint Committee based itself on the flour market, which can be broken down into three market segments: flour in bulk, bagged flour, and packaged flour for the food retail trade, i.e. for distribution to the consumer. Except for the bagged flour segment, the entire Austrian territory was deemed to be the relevant market in geographical terms.

31. After implementation of the joint venture project, the affiliated enterprises would have a total share of the Austrian cereal milling market of approx. 28 percent (including Rauch/Innsbruck almost 35 percent). In the packaged-flour market segment, the market share would be approx. 48 percent (including Rauch/Innsbruck approx. 58 percent).

32. As to the question of market domination, the packaged-flour segment had to be examined in greater detail. It was found, however, that the high market share has to be seen in light of the power of the retail trade on the demand side and the availability of products of non-Austrian origin. Nevertheless, the project under consideration would strengthen the market position of the enterprises involved in relation to their competitors through its streamlining effects.

33. In its review, the Joint Committee also had to deal with the question of the nature of the joint ventures and possible co-ordinating effects between the joint ventures and the parent companies. In this context, the Joint Committee noted that any possible future action in restraint of competition between MPG/Fritsch & Rauch and Rauch/Innsbruck can be kept under control by way of a notifiable cartel.

34. The question as to whether the project under consideration does meet the criteria of a merger at all has not yet been decided by the Cartel Court.

### **3. *Non-Binding Recommendations Issued by Associations***

35. For the time being about 95 recommendations issued by associations have been registered with the Austrian Cartel Court.

36. In 1998/99, two non-binding recommendations issued by associations were examined by the Joint Committee for their economic justification, after the Federal Chamber of Labour had submitted applications for prohibition.

37. The Schedule of Fees of Master Builders provides for class factors (multipliers to be applied to the basic time-based fee), which differ greatly from those provided for in the Fee Schedule of Civil Engineers. In the course of the proceedings, the issuing body, i.e. the Federal Association of the Construction Trades, agreed to meet the concerns expressed by the Federal Chamber of Labour when re-issuing the fee schedule in the autumn of 1999 by including clearer indications and lowering the class factors for services of minor difficulty and with a low assessment base.

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38. Moreover, the Joint Committee on Cartel Matters also examined the economic justification of the Schedule of Fees of the Association of Certified Experts for the Real-Estate Sector, which had applied for an increase by about 20 percent. In the course of the proceedings, the Association was able to prove that the increase was justified by considerations of business management.

39. The Federal Chamber of Labour also demanded the inclusion of a clear and unambiguous indication of their non-binding characters in several recommendations issued by associations. Subsequently, the price increases applied for by two associations were negotiated before the issue of the respective fee schedule.

### **4. Vertical Restraints**

40. Following applications for prohibition submitted by the Federal Chamber of Labour three vertical restraints on distribution were examined. The contracts contained a multitude of clauses infringing the competition rules, for example the question of whether a prohibition of employment in related sectors for employees of the franchisee for a three-year period is justified. Another controversial clause in the contract concerns a two-year prohibition to compete after expiry of the contract, whereas Art. 3.1.c. of the EU Block Exemption Regulation No. 4087/88 only provides for a one-year prohibition to compete.

## NOTE

1. A complete list of all licencees and on SMP- as well as interconnection decisions can be found on Telekom Control's homepage: [www.tkc.at](http://www.tkc.at). The decisions are available in German in full length.