

AUSTRIA

(2002 – 2003)

Executive Summary

1. On July 1st, 2002 the Federal Competition Authority (*Bundswettbewerbsbehörde*) as well as the Public Prosecutor in Cartel Matters (*Bundeskartellanwalt*) commenced their activities. Although they are provided with limited resources, between July 1st, 2002 and June 30th, 2003 they have examined about 570 national and 560 European cases and carried out a substantial number of detailed investigations. However, especially in the light of the new tasks according to the Council Regulation (EC) No 1/2003 more staff is needed. To accommodate the situation the government has gradually increased the Federal Competition Authority's staff in the past and is prepared to do so in the near future.

I. Changes to competition laws and policies

I.1. Summary of new legal provisions of competition law and related legislation

2. As reported in the last OECD-report, a quite substantial reform of competition law came into force in 2002.

3. Meanwhile, discussions on a new reform have started in the light of the forthcoming changes in European competition law: As Council Regulation (EC) No 1/2003 foresees a decentralised implementation of Art. 81 und 82 of the Treaty by May 2004, discussions with the Cartel Court, the Public Prosecutor in Cartel Matters, the social partners and other relevant parties are held to update the Austrian Cartel Law in face of the new European setting.

4. Apart from these discussions, the Federal Competition Authority developed a form for the notification of mergers specifying the information to be given. It is not legally binding but gives guidance to the notifying parties as it particularizes the relevant paragraphs in the Cartel Act. It is therefore widely used in practice.

I.2. Special sectors

Telecommunication

5. In 2002 the telecommunication sector was influenced by the preparation of the new EU framework for electronic communications networks and services (Directive 2002/21/EC) which came into force on April 24th, 2002.

6. The Austrian Telecommunications Act 2003 (TKG 2003) became subsequently effective on August 20th, 2003. It transposes the above mentioned European regulatory framework. TKG 2003 intends to provide a coherent, reliable and flexible approach to the regulation of electronic communication networks and services in fast moving markets. The act provides a lighter regulatory touch where markets

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have become more competitive while ensuring that a minimum of services are available to all users at an affordable price and that the basic rights of consumers continue to be protected.

7. As determined in Article 14 Framework Directive 2002/21/EC, the new Telecommunications Act provides for a totally new method to regulate operators with significant market power (SMP). Thus, the regulatory authority will have to define all relevant telecommunications markets susceptible for ex-ante regulation and determine whether a particular market is deemed to be effective or if one or more operators are found to have significant market power.

8. If a relevant market is found to be effective, no specific ex-ante-obligations may be imposed on telecommunication operators on this relevant market. In case the market is not found to be competitive, the regulatory authority designates one or several operators as having significant market power while following the rules of general competition law under consideration of ex-ante regulatory aspects. In the new framework, the regulatory authority must not impose the whole set of specific SMP-obligations (such as non-discrimination, transparency) as in the ONP (Open Network Provisions)-framework. To the contrary, the regulatory authority - under consideration of the policy objectives and regulatory principles as laid down in Art. 8 Framework Directive - has to impose individual obligations only on condition that they appear appropriate to achieve effective competition on the respective relevant market.

9. Moreover, the new Telecommunications Act provides for more efficient sanctions in case of infringements of the Cartel Act by telecommunications operators. Upon application of the regulator the Cartel Court has to decide on skimming off excessive profits. The maximum amount can make up to 10 % of the respective telecommunication operator's annual turnover of the preceding year.

Market definition:

10. TKG 2003 stipulates that the regulatory authority has to take into account the "Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services" just as well as the "Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation". The guidelines discuss practical methods for delineating relevant markets and assessing SMP. The recommendation of relevant markets lists all markets in the electronic communications sector which are susceptible for ex-ante regulation according to the European Commission.

11. In comparison to the former Telecommunications Act, the relevant market is defined according to a combination of a product and a geographic dimension, which is basically the same method as applied in general competition law. Nevertheless, the TKG 2003 points out that when defining relevant markets the regulatory authority has to be aware of the peculiarities of the communications sector which result from its character of being a network industry and the ongoing need to apply sector specific ex-ante regulations.

12. Following § 36 TKG 2003, the regulatory authority published a draft measure on market definition for 16 telecommunications markets respectively the broadcast market for consultation. This draft measures can be downloaded at http://www.rtr.at/web.nsf/deutsch/Portfolio_Konsultationen.

Market analysis

13. As mentioned above TKG 2003 obliges the regulatory authority to carry out analyses of the relevant markets with the purpose to determine whether there is effective competition on a relevant market or not. If the regulatory authority comes to the conclusion that there is no effective competition, one or several operators are deemed to have significant market power.

14. According to § 35 (1) TKG 2003 “an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers”. § 35 (5) TKG 2003 introduces leveraging of market power and states that “where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking.” § 35 (1) TKG 2003 follows the definition that the case law of the European Court of Justice ascribes to the concept of a dominant position in Art. 82 EC-treaty. Consequently, in applying the new definition of significant market power the regulatory authority will have to ensure that their decisions are in accordance with the Commission’s practice and the relevant jurisprudence of the European Court of Justice.

Energy

15. As reported in the last annual report, the amendments to the Electricity and the Natural Gas Acts came largely into force in August 2002. These amendments enlarged the tasks of Energy Control Ltd. in the natural gas sector. The main goal of the amendment of the Natural Gas Act was the full liberalisation of the Austrian natural gas market by October 1st, 2002.

16. The Green Electricity Act which was adopted at the same time as the amendments to the Electricity and the Natural Gas Acts, came into force on January 1st, 2003. The goal was to further increase the already high share of Austrian electricity output generated from renewable energy sources. To reach this goal, the “green electricity” must be purchased by the eco-balance group which is obliged to pay an injection fee fixed by the Federal Minister of Economic Affairs and Labour for the electricity generated from the different renewable energy sources. In addition, the Act provides for a special reimbursement system for the costs of (defined) combined heat and power plants.

17. A special focus must be drawn on the new European Directives for the creation of an internal electricity and natural gas market. These Directives¹ which were adopted in June 2003 replaced the “old” Directives 96/92/EC (electricity) and 98/30/EC (natural gas). The key points of the new Directives are:

- the necessity of legal unbundling for transmission and distribution system operators;
- the introduction of further public service obligations and measures for customer protection; and
- the obligation to designate an independent regulatory authority.

18. The new Directives have to be widely implemented into national law until July 1st, 2004 (except the full liberalisation of the markets and the legal unbundling for distribution system operators which have to be implemented until July 1st, 2007). Therefore it will be necessary to amend the Austrian electricity laws again. These amendments should be adopted during the first months of 2004.

19. It should also be mentioned that the European Union also adopted a Regulation on conditions for access to the network for cross-border exchanges in the electricity market.²

¹ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ 2003, L 176, 37, as well as Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ 2003, L 176, 57.

II. Enforcement of competition laws and policies

II.1. Action against anticompetitive practices, including agreements and abuses of dominant positions

a) Summary of activities

20. In the period under review about 50 cartel cases, 60 cases concerning the abuse of a dominant market position, 40 vertical restraints and 70 non-binding recommendations were examined. In several cases the Cartel Court has not rendered a decision yet.

b) Description of significant cases, including those with international implications

ba) Agreements and recommendations

Co-operative Joint Venture of Austrian Bank-Groups for Handling of Payment Transactions ("Zahlungsverkehrsallianz")

21. Three major Austrian Bank-Groups (Bank Austria-Creditanstalt, Erste Bank/Sparkassen and Postsparkasse/Bawag) notified a (co-operative) Joint Venture (JV) for the combined handling of payment transactions of current accounts and corporate current accounts. The project covers the handling of all domestic and cross-border payment transactions - not included is the handling of other payment transactions (i.e. securities, assets, stocks etc.). The JV is strictly limited to the settlement of all payment transactions for its mother companies and will not be active in the following areas: IT and product development, treasury (for payment transactions), marketing and complaints, IT-maintenance, account keeping, product management and sales. The proposed JV covers approx. 55% of all Austrian transactions in the relevant market and will be operative as from summer 2004.

22. The notified agreement has been declared compatible under national law by the Cartel Court after severe negotiations between the applicants and the Federal Competition Authority and the Public Prosecutor in Cartel Matters.

23. The agreement is subject to the following commitments and conditions:

- approval of the JV for 3 ½ years only (after that date the applicants have to notify the agreement again);
- exclusive subscription rights for the parties for 3 years only;
- competitors may have access to the services of the JV on a non-exclusive and non-discriminatory basis only;
- as from its operative set up the JV has to provide cost efficiencies to consumers: the transaction period of 90% of all made transactions may not exceed
 - a) one working day in the case that a transaction is carried out between two accounts of the same bank or
 - b) two working days in the case that a transaction is carried out between two accounts of different banks;
- general obligation to pass on benefits gained through efficiencies to consumers;
- all steps of the implementation of the JV are subject to annual reports.

² Regulation (EC) 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, OJ 2003, L 176, 1.

Vertical Agreements in the Motor Vehicle Sector

24. Due to the entry into force of the new "Block Exemption Regulation 1400/2002 on the Application of Art. 81 (3) of the Treaty to Categories of Vertical Agreements and Concerted Practices in the Motor Vehicle Sector" and the end of the transitional period for existing agreements on September 30th, 2003, manufacturers/suppliers are currently adapting their dealer/service agreements to this new legal framework.

25. The Austrian Cartel Act contains an obligation to notify vertical agreements before implementation. Therefore the Federal Competition Authority is currently reviewing thoroughly all new agreements in this sector. Most of the agreements examined so far contained some provisions that at least potentially contradicted the block exemption regulation. The Federal Competition Authority has objected those provisions and has achieved further adaptations.

26. Since the practical implications of some agreements cannot be theoretically assessed it will become a very important task for the Federal Competition Authority to monitor the actual effects of those agreements once in force.

Non-binding recommendations ("Unverbindliche Verbandsempfehlungen")

27. Pursuant to the relevant decisions of the European Commission the Federal Competition Authority examined 73 non-binding recommendations issued by various associations within the Federal Economic Chamber addressed to their members. Due to more than 25 meetings held with representatives of the Federal Economic Chamber, most associations adjusted their recommendations in order to ensure compatibility with EU and Austrian provisions. As far as associations did not respond sufficiently to the Competition Authority's proposals respective motions have been filed to the Cartel Court. The Cartel Court has not rendered a decision yet in several cases.

28. In one case concerning carriers' charges, however, the opponent agreed already to change the non-binding recommendation and to submit a draft mid September. A decision is expected at the end of October.

29. Furthermore, the Federal Competition Authority discussed thoroughly non-binding recommendations for chartered builders. In this context price scales of architects would have to be examined, too. However, as the latter belong to a liberal profession they are not subject to the relevant provisions in the Austrian Cartel Act. A recent study for the European Commission, DG Competition on the "Economic impact of regulation in the field of liberal professions in different Member States" by the Institute for Advanced Studies revealed that Austria is the country with the highest rate of regulation. The European Commission and the Federal Competition Authority will therefore work together to strengthen competition in these professions.

30. Apart from these general investigations some proceedings have been initiated with the new notification of non-binding recommendations. The results of the most important cases can be summarized as follows:

31. Following an application of the Public Prosecutor in Cartel Matters the Cartel Court ordered the Styrian association of stove-fitters to revoke their non-binding recommendation on grounds of severe discrimination of final consumers and ignorance of some provisions of the consumer protection code.

32. In another case - again following an application of the Public Prosecutor in Cartel Matters - the Cartel Court ordered the association of printers to revoke their non-binding recommendation that had been issued before clearance of the Court. After long and intense negotiations between the association, the

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Public Prosecutor in Cartel Matters and the Federal Competition Authority a new recommendation has been issued that avoids mentioning fixed rates, addresses only small and medium sized companies, forces the addressees to use their own cost calculation while allowing them to compare their costs with the quartile of the most successful and the least successful company (according to an independent research institute that uses business indicators given by banks).

33. Moreover, the Public Prosecutor in Cartel Matters negotiated with the association of pharmacists to modify their internal product catalogue for non-prescribed products (“Warenverzeichnis III”). In order to encourage competition among different brands the new draft is now organised according to product categories and not according to brand names. Moreover, the draft indicates a bandwidth for recommended prices of 30%. The case is still pending.

bb) Abuse of a dominant position

Cordless telephone

34. The Austrian incumbent provider for telecom services over a fixed network marketed a locked version of a cordless phone which - according to an indication on its packing - could only be used within the network of this provider but not for call by call and carrier pre-selection. The locked version was about 50% cheaper than the regular version. As a consequence all alternative network providers acting as carrier network operators would have to accept a serious restriction of competition if such telephones - disabled for carrier network operations - were sold in larger quantities. Negotiations between the Austrian regulatory authority TCK (Telekom Control Kommission) and the incumbent provider in order to solve the case without a court’s ruling produced no results. Hence, the issue was brought before the Cartel Court by the TCK.

35. TCK requested the marketing of such cordless telephones to be forbidden as an abuse of the incumbent provider’s dominant position on the market for telecommunication over a fixed network. Thereafter the incumbent provider admitted that this particular cordless phone could actually be used for calls in all networks. The lock that had been implemented could be bypassed by pressing the “R”-key of the phone. However, the costumers had in no way been informed of this possibility. In close cooperation the TCK and the Federal Competition Authority argued that costumers who had purchased the aforementioned cordless phone had been misled by the wrong indication on the packing and were therefore thinking their phone could only be used within the network of the incumbent provider. Thus the incumbent provider had limited a group of costumers (those who had purchased the aforementioned phone) to its own network by giving misleading information about the actual features of their phones. In first instance the Cartel Court held that the provider abused its market dominance and prohibited the marketing of the described product. The final decision is still pending.

Payment cards

36. In the financial services market (payment cards) a proceeding against a major Austrian provider of payment cards and payment systems is currently pending before the Cartel Court. The case concerns the alleged abuse of a dominant position in the market for debit/charge cards and has been launched by a foreign provider for payment cards who intends to enter the Austrian market. Generally spoken the Austrian markets for payment cards (credit, debit or charge cards) are highly concentrated and barriers of entry are significantly high.

II.2. Mergers and acquisitions

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

37. Between July 1st, 2002 and June 30th, 2003 a total of 290 concentrations was notified to the Cartel Court. In 27 cases an application for in-depth-investigations were filed by one or more of the Official Parties leading automatically to phase II proceedings. In two cases proceedings were initiated in order to clarify whether a transaction was implemented without clearance by the Cartel Court.

38. In the beginning of the period under review, a number of applications for in-depth-investigations were linked to further requests for information to the merging parties. In two cases (FAG Kugelfischer Georg Schäfer AG / SNFA SA and Random House GmbH / Ullstein Heyne List GmbH & Co KG) the parties withdrew their notification during phase II and did not notify again.

39. In five cases the mergers were cleared only subject to remedies. These cases concern: the joint venture “Econgas” in the natural gas distribution sector, a merger in the market for starch (Agrana/Deuring), a merger between outdoor advertisers and two mergers between pharmacies and pharmaceutical wholesalers.

	July - Dec 2002	Jan – June 2003	Total
Total of notified concentrations	181	109	290
Among those			
notified concentrations concerning the media sector	10	10	20
Phase II proceedings	22	5	27
Notification withdrawn within phase II	1	1	2
Clearance subject to conditions and/or obligations	2	3	5
Proceedings whether a concentration was unlawfully implemented without clearance	2	0	2

b) Summary of significant cases

ÖBB-Bus/PostBus (Public transport sector)

40. The Federal Competition Authority as well as the Public Prosecutor in Cartel Matters examined the consequences of a merger between the Österreichische Bundesbahnen (ÖBB) and the Österreichische PostBus AG (PostBus). ÖBB offers public service in rail and road passenger transport, PostBus operates only in road passenger transport. Hence, the relevant market is the market for road passenger services. Directly or indirectly both enterprises are owned by the Republic of Austria.

41. In a first step the Cartel Court decided that - although both companies are owned at least indirectly by the State - this case does not fall under the provisions for intra-group transactions but

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constitutes a merger and has to be notified therefore. In the official proceeding then the Federal Competition Authority as well as the Public Prosecutor in Cartel Matters initiated a phase-II-proceeding.

42. Competition in the market for road passenger transport is influenced by a public licence-system which protects the licence holder and leads to a restraint of competition. Moreover, prices are fixed in - legally required - traffic associations. In order to assess the effect of the merger the Federal Competition Authority required about 60 undertakings and organisations to provide all necessary information. The results of its investigations confirmed that the public licence system results in high barriers to market entry and low competition in the market in general. As a consequence the Federal Competition Authority as well as the Public Prosecutor in Cartel Matters recommended legal measures to relax the licence system, to force public tenders and to partly sell licences to private persons in order to open the market.

43. In its final decision the Cartel Court found - in accordance with an expert opinion - that no dominant position would be created by the merger and therefore cleared the merger without remedies.

Saria Holding/Medicur Holding/Dr. Heinrich Schuster Werbung (Outdoor advertising)

44. This case concerned the merger of the second and the third largest outdoor advertiser in Austria. Although in total they held together only about the same market share as the biggest outdoor advertiser, they were highly dominant in some states (Bundesländer) with 42 to 73 % market share. However, the market for outdoor advertising was found to be mainly a national market since more than 86 % of total expenses for outdoor advertising were spent for supra-regional campaigns. Moreover, the market was characterised as "buyer market" due to the strong position of media agencies which finally decide on the media-mix.

45. After intensive investigations of the Federal Competition Authority the merger was cleared only subject to remedies. The most important ones are the following:

- by December 31st, 2004 advertising space counting for 10 % of the market share in Lower Austria, Burgenland and Carinthia have to be sold to independent third parties. The quality of the advertising space (measured according to the PWÖ(Plaktwertung Österreich)-ranking) has to be considered when calculating the percentage. The implementation of this obligation is subject to bi-annual reports;
- until December 31st, 2005 the concerned parties must not merge with other companies operative in the field of outdoor advertising;

Pharmacies/Pharmaceutical wholesalers

46. The Federal Competition Authority and the Public Prosecutor in Cartel Matters dealt with two cases of pharmaceutical wholesalers acquiring holdings in pharmacies. It was suspected that the wholesalers could extend their market share due to participations in pharmacies.

47. Both cases were cleared. As a general guideline the Cartel Court decided that pharmaceutical wholesalers' holdings in pharmacies are permitted as long as the individual wholesaler does not hold more than 3 % of the pharmacies' market by direct and indirect participation. Due to the lack of information about the real influence of wholesalers on the pharmacies the economic expert accepted a 3 % market share on the pharmacies' market by the wholesalers as compatible with the cartel act and not critical from the competition point of view.

Fröschl/Asphalt & Beton (Asphalt mixing plants)

48. This pending case concerns the proposed creation of a joint venture (JV) for the production of asphalt. Concerns as to the creation or strengthening of a dominant position were raised with the Federal Competition Authority as well as the Public Prosecutor in Cartel Matters because both parent companies of the JV or their connected undertakings have been active in the same product market and already hold high market shares in the relevant regional market. Furthermore they also have strong positions in the downstream market for the construction of roads thus raising issues of possible collusion and market foreclosure effects. At the moment an expert's opinion on those questions is being prepared.

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

49. The Federal Competition Authority 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. In this regard, the Federal Competition Authority commented for instance on the new Communication Law, the Post Act (Postgesetz), and the Law of the Land Salzburg concerning the tax for use of public properties in the electricity sector ("Salzburger Landesgesetz, mit dem das Gebrauchsabgabegesetz geändert wird").

IV. Resources of competition authorities

50. Between July 1st, 2002 and June 30th, 2003 the Federal Competition Authority could increase its staff by one economist and one support staff. By then - additional to the Director General and the Deputy Director General - nine lawyers, two economists, one other professional and five persons as support staff, i.e. all together 19 persons, were working at the Federal Competition Authority. More staff shall be employed in the future. Each person is responsible for specific sectors and treats all cases (mergers, abuse of dominant position etc.) which fall within these sectors.

51. The Public Prosecutor in Cartel Matters and his Deputy are supported by the registry of the Cartel Court in administrative matters.

52. 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 six professional judges who are supported by fifteen lay judges. Additionally, the Cartel Court relies on advisory opinions of independent economic experts of its own choice.