

**AUSTRIA***(1999-2000)***I. Legislation*****Amendment to the Cartel Act***

1. On 1<sup>st</sup> January 2000 the latest amendment to the Austrian Cartel Act of 1988 came into effect. This amendment is to be understood as part of the ongoing process of a reform of the Austrian competition law system. The explanatory comments to the amendment line out that concerns not being dealt with in this amendment should be kept an eye on and be subject of a coming reform discussion.

2. In the following the most important points of the amendment are presented:

***1. Cartels***

3. The Austrian Cartel Act draws a distinction in its legal consequences if an agreement has as its object (Absichtskartelle) or only as its effect (Wirkungskartelle) the distortion of competition. In the first case the implementation of the cartel is prohibited prior to authorisation granted by the Cartel Court. A prohibited implementation of an agreement results in its voidness and may lead to levy of the enrichment. In the latter case the implementation of the agreement is permitted unless the Cartel Court prohibits the further implementation (abuse principle).

4. For concerted practices this distinction was not made so far, but the abuse principle applied irrespectively of the question if a concerted practice has as its object or effect the distortion of competition.

5. The amendment removed this unjustified preferential treatment of concerted practices and adjusted the rules to those regarding agreements.

***2. Market dominant undertakings***

6. The abstract definition of a market dominant undertaking has been reduced to three alternative facts :

- the undertaking is exposed to no or only insignificant competition;
- the undertaking has, in relation to the other competitors, a superior market position, taking particularly into consideration the financial strength, relations to other undertakings, access to the supply and sales markets as well as circumstances limiting market access for other undertakings;
- the undertaking has a superior market position in relation to its customers or suppliers; such particularly exists if these are dependent on the maintenance of the business relationship for the avoidance of severe business disadvantages.

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7. The respective article of the Competition Act then describes three situations, where there is the legal presumption of market dominance:

- a market share of above 30 percent;
- a market share of above five percent and facing competition by at most two other undertakings;
- a market share of above five percent and the undertaking belongs to the four largest competitors on this market, which hold collectively a market share of at least 80 percent.

In those situations the undertaking bears the burden of proof that it is not in a market dominant position.

8. To the non exhaustive list of abusive practices the sale below cost was added. It is also combined with a reversed burden of proof to the extent that the market dominant undertaking has to prove either the sale was not below cost or it was objectively justified. This provision is designed to protect especially small and medium sized enterprises from predatory pricing strategies more effectively.

### **3. *Merger Control***

9. The Austrian Cartel Act contained two sets of thresholds for the application of merger control rules; when the lower one was met it resulted in the duty of (sole) notification to the Cartel Court. Mergers falling under the higher thresholds needed the additional clearance by the Cartel Court. The first category was abolished by the amendment, the thresholds for the second category have been slightly increased and modified in order to better cover transactions with a relation to Austrian markets.

10. The current thresholds are:

- a combined world-wide turnover of all parties involved exceeding 4.2 billion ATS (EURO 305 mio),
- a combined domestic turnover of all parties involved exceeding 210 million ATS (EURO 15.26 mio) and
- at least two parties to the concentration with a world-wide turnover exceeding 28 million ATS (EURO 2.03 mio).

### **4. *Procedural matters***

11. Prior to the amendment proceedings before the Cartel Court could only be started upon application by a party entitled to this. In most fields these are the Official Parties (i.e. the Republic of Austria, the Federal Economic Chamber, the Federal Chamber of Labour, and the Presidential Conference of the Austrian Chambers of Agriculture) as well as associations that represent economic interests of undertakings, if these interests are affected and each undertaking whose legal or economic interests are affected. In concentration matters the right to file petitions for an „in-depth“ examination is limited to the Official Parties in order to protect the parties to the concentration from abusive applications by competitors.

12. As can be seen, the emphasis of this system lays on the Official Parties, on the one hand because they have unlimited locus standi, on the other hand because they have a petition right in all kinds of proceedings. Reality has shown that this concept remained theoretical to a certain extent as neither of the Official Parties can assess a case from a competition point of view only, but has to bear in mind other

interests or policies to be taken into account by the respective organisation. Because of those potential conflicts of interests the Official Parties in some cases did not make use of their application right.

13. To compensate this deficit the Cartel Court was conveyed upon the power to initiate proceedings ex-officio irrespective of an application.

## II. Special sectors

### 1. Electricity

14. The national *Electricity-market Liberalisation Act* (EIWOG) implementing EC-Directive 96/92 initially intended a liberalisation in three steps. The first step became effective on February 19<sup>th</sup> 1999 concerning only eligible customers with an annual consumption of more than 40 GWh. By then the market was opened for 26.48 percent. On February 19<sup>th</sup> 2000 the liberalisation was extended to consumers with more than 20 GWh per year equalling a quota of 31.9 percent of the market.

15. These two stages of liberalisation already led to a total price decrease of about ATS 3.3 billion (EURO 240 mio) a year, of which ATS 1.2 billion (EURO 87 mio) fall to industrial customers. The rest of ATS 2.1 billion (EURO 153 mio) are for the benefit of small consumers such as households, even though they do not have direct access to the network yet. Price comparison among EU member states shows that Austrian electricity prices are in the midfield for households and in the top third for industrial customers.

16. At the moment the power generating companies show different degrees of liberalisation between five percent and 80 percent depending on the structure of their customers.

17. The third and provisionally last step was planned for February 19<sup>th</sup> 2003 in accordance with EC-Directive 96/92 and would have opened the market to a degree of 36.2 percent by giving access to users with a consumption exceeding 9 GWh per year.

18. The new Austrian government has declared as one of its aims a faster liberalisation of the energy markets than ordered by EC legislation. In the electricity sector it therefore introduced a bill (Energie liberalisierungsgesetz; „*Energy-markets Liberalisation Act*“) for an amendment of the existing Act to accelerate this process. This amendment passed parliament in July.

19. The fundamental point of this reform is that the electricity market will be completely (100 percent) liberalised by October 1<sup>st</sup> 2001, meaning that each and every consumer, private, commercial or industrial has free access to the net and thus freedom of choice of his supplier. The amended Liberalisation Act creates the technical and organisational conditions for the functioning of a free electricity market.

20. A basic requirement is the unbundling of generation and transmission/distribution of electricity. In case of vertically integrated electricity companies separate accounts have to be kept for the different activities to reach transparency in order to avoid price discrimination, cross subsidisation or other practices distorting competition. The operators of transmission/distribution networks receive a remuneration for the use of their infrastructure.

21. Other provisions comprise the administration of the system, the formation of balance-groups to achieve a statistical sum-up of over- and underconsumption, the provision of balancing-energy and the details of clearing and settlement between the market participants

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22. A new electricity regulation authority (*Elektrizitäts-Control GmbH* and *Elektrizitäts-Control Kommission*) will be created following the example of the telecom regulation authority. The authority is competent for fixing the remuneration for the use of networks and the approval of conditions for network access. Other tasks will comprise the settlement of disputes and the setting up of market rules. Within the scope of the authority's supervision function falls the control over market dominant undertakings especially regarding equal treatment of all market participants. The competence of the Cartel Court is not restricted.

### 2. *Gas*

23. The „*Energy-markets Liberalisation Act*“ mentioned above also contains provisions concerning the liberalisation of the natural gas market. The key objectives are the adaption of national laws to European Community legislation, especially the implementation of EC Directive 98/30 which requires to grant network access to gas-fired power generators, irrespective of their annual consumption level and other final customers consuming more than 25 million cubic metres of gas per year by August 10<sup>th</sup> 2000. Following the directive, the consumption threshold has to be lowered to 5 million m<sup>3</sup> in two further steps.

24. However the aim of the new Austrian legislation is to reach full liberalisation of the natural gas market in two phases. The first phase of liberalisation covers gas fired power generators and large customers in full accordance with EC Directive 98/30.

25. The second phase starting on October 1<sup>st</sup> 2002 goes far beyond the directions of EC-law and opens the market to all final consumers by obliging operators of transmission pipelines and distribution networks to grant access to this infrastructure.

26. Until then operators of distribution networks are entitled to grant access to all final consumers or certain categories of consumers voluntarily. In that case those consumers have the right of network access against all network operators.

27. Moreover the Act contains the provisions concerning unbundling of integrated natural gas companies. Separate accounts have to be kept for different activities within the gas business (vertical integration) as well as for other activities (horizontal integration).

28. During the first phase the Federal Minister for Economic Affairs and Labour remains the competent authority for regulation and supervision of the natural gas market. An independent regulation authority has to be created before the start of full liberalisation.

### 3. *Telecommunication*

#### a) *General remarks*

29. The successful liberalisation of Austria's telecommunications markets continued in 1999 and important decisions have been made by the regulatory authority Telekom-Control-Kommission supported by the Telekom-Control GmbH.

#### b) *Licences*

30. In the second year of the liberalisation 52 licences for providing fixed voice telephony and leased lines were issued, summing up to a total of 111 licences to 83 operators. The licence requires that the

activities of the operator must begin within nine months. This period seems to be too short because of organisational problems, lack of experienced staff or delayed interconnection agreements. The majority of the licence applications was decided within six weeks as prescribed by law. In some cases the process took longer because the operator was not able to deliver the required information in time.

31. A further licence for the provisioning of nation-wide mobile communications services was issued successfully on May 3<sup>rd</sup>, 1999: Tele.ring Telekom Service GmbH & Co KG auctioned 14,8 MHz of the 1800-MHz spectrum and the right as a fourth nation-wide mobile operator for 98 million Euro.

32. Based on an application of Mobilkom Austria AG and Max.mobil. Telekommunikation Service GmbH and after detailed analysis about the scarcity of frequencies (due to the high penetration rate) the Telekom-Control-Kommission allocated regional limited spectrum to them.

*c) Significant Market Power*

33. According to the EU Directives companies with significant market power are treated more strictly than other companies. This kind of asymmetric regulation is essential for the beginning of the liberalisation process when the incumbent has a dominant market position; due to EU recommendation the Austrian regulator determines the operators with significant market power in the four relevant markets. Telekom Austria AG as the former monopolist is dominant in the fixed voice telephony, leased lines and interconnection market. Mobilkom Austria AG, a subsidiary of Telekom Austria AG, is an operator with significant market power in the mobile telephony and interconnection market. Max.mobil. Telekommunikation Service GmbH has significant market power in the mobile market.

*d) Interconnection and network access*

34. The interconnection fees of fixed telephony network did not change during 1999: Terminating fee for single tandem remained at 0,0181 Euro per minute and for double tandem at 0,024 Euro per minute. These fees changed at the end of the year.

35. In its decision Z1/99 (available only in German at the homepage of the regulatory authority: [www.tkc.at](http://www.tkc.at)) Telekom-Control-Kommission decided about unbundling the local loop in Austria. It requires Telekom Austria AG, the incumbent, to offer the access to the „last mile“ to other operators. The operator has to pay a monthly fee of 12,35 Euro per subscriber to Telekom Austria AG (regardless of regional differences and services). The initial fee per customer is set at 54,50 Euro and collocation rooms can be rented by the new operator. These costs were calculated based on a bottom-up and top-down model. This important decision was set in the light of promoting the competition in the telecommunications infrastructure. The last mile as the bottleneck in the network was not regarded as a competitive market and substitutes for the last mile have been rare. Although the EU Directives did not prescribe unbundling local loop at that time the Telekom-Control-Kommission decided in this case because unbundling the local loop is crucial for the competition in the local part of the network.

36. In the mobile sector the decision Z8/99 regulates the interconnection fees of a mobile operator with significant market power on the interconnection market. The access to the network is regarded as an „essential facility“ where substantial substitution for a certain call is not given and the competitive pressure is not strong enough yet. Therefore the Telekom-Control-Kommission came to the conclusion that Mobilkom Austria AG has to reduce its termination fee at a cost-oriented level. This is the reason why the regulator reviewed the costs of Mobilkom Austria AG based on a top-down model approach. In consequence, the mobile termination fee has been fixed at 0,13 Euro per minute (flat) and is one of the lowest in the EU countries.

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37. In order to intensify the competition the condition for interconnection at local level (0,0102 Euro per minute) in the network of the incumbent has been set. The decision is vital for the further development of telecommunications infrastructure and especially CATV operators and infrastructure providers are interested in it.

### *e) Résumé*

38. In the second year of liberalisation many important decisions in telecommunications were made and a consistent framework for a prosperous development of this sector was created. These regulative activities result in higher benefits for consumers and business: The prices of telecommunications services in fixed voice telephony decreased at 15.5 percent on average. Austria's mobile tariffs belong to the cheapest in Europe as a one-minute call to other networks starts at 0,073 Euro. Due to increasing competition and vertical integration the tariff for leased lines and internet services have been decreased rapidly. Within two years the telecommunications market has changed from a monopoly to a competitive sector.

## **II. Enforcement of competition laws and policies**

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

#### *a) Summary of activities*

39. In the period under review three major developments occurred, which might be also significant for the future antitrust enforcement process in Austria:

40. As already set out in the last annual report, the Cartel Court has been vested with new competences since 01.01.2000. It has now the same powers to initiate proceedings as the Official Parties and can examine cases *ex officio*. The Cartel Court has to open proceedings against anti-competitive business behaviour in the public interest. Although the personal resources have not been increased significantly (an additional panel has been set up, amounting to now four panels in the first instance), the Cartel Court has already taken autonomous measures to fight possible infringements of the Cartel Act in the cable-tv industry (problem of cross-subsidisation from a possible quasi monopoly position in the cable-tv sector for investments and the operation of telecom services) and the pharmaceutical industry (price recommendations in newspapers). Also the Cartel Court ordered a sector study by the Joint Committee for Cartel Matters for the electricity industry.

41. Secondly, more and more complaints of illegal business practices are filed to the public prosecutors. So far these complaints concern only the construction industry and single upstream industries (a possible price cartel between window suppliers in Austria is under review). The development of a more positive public attitude towards the possible gains for the consumers and society from market competition can be expected. This might lead to a stronger political and financial support of the enforcement authorities. The fight against collusive practices in the construction industry is supported by stricter rules for the control of public procurement. For instance enterprises proven of having taken part in bid rigging for a different tender are to be disclosed of any further public tendering as long as they do not take any convincing, confidence building measures.

42. Finally, the discussion on the further reform process towards a restructuring of the enforcement authorities is getting more concrete; so it is proposed to set up an independent competition authority with investigative powers. Still conflicting is the constitutional setting of the new authority, whether it should

have the position of an Official Party and prosecute infringements in the Cartel Court, or whether it gets the sole decision taking power as first instance. The elaboration of a legislative proposal will presumably take some more time.

*b) Significant cases*

Horizontal Restraints

Energieversorgung Niederösterreich/Wienstrom

43. The two former monopolistic electricity operators and distributors of Vienna and Lower Austria sought a declaratory decision by the Cartel Court, if their joint venture for customer care towards customers privileged under the liberalisation would constitute a cartel. The Cartel Court gave an affirmative decision, but ruled that this co-operation between the two independent companies does not pass the de-minimis thresholds of the Cartel Act.

Cartel Court vs. Herba Chemosan

44. In this case the Court forced the enterprise to declare its price information in public advertisements as non-binding recommendations.

Abuse of a dominant position

Mona Parfümerie vs. Estée Lauder Cosmetics

45. A retail chain for cosmetics sued a producer and supplier of cosmetic products, because the latter refused to supply the retailer with its products. The retailer assumed that the boycott was due to its low-price-policy. Estée Lauder argued that the retailer had repeatedly broken the vertical agreement by distributing products from the shadow markets. The Joint Committee gave its opinion that Estée Lauder's refusal to supply the retailer does not constitute a breach of the Cartel Act, the case is still pending.

Connect Austria v. Deutsche Telekom

46. The German Telekom registered a large number of brands for the European telecom market, among them the brand "T-one". Connect is the operator of the third mobile-phone network and uses the brand "One". Referring to its protected rights, the Telekom, which has a 50 percent share in the second largest mobile-phone network in Austria, tried to block the further use of the publicly well known brand by Connect. The Joint Committee saw the use of its brand rights in this case as an abuse of a dominant position by the Telekom. The case has not been finally decided yet.

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### 2. *Vertical restraints*

#### a) *General remarks*

47. The regulation by which the Federal Minister of Justice can declare that for certain specified categories of vertical no ground for prohibition exists, was adapted to the new EC Block exemption regulation (Commission Regulation EC No. 2790/1999 of 22<sup>nd</sup> December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and market practices), insofar as agreements complying with the provisions laid down in the BER cannot be prohibited by the Cartel Court.

#### b) *Significant cases*

##### Taxback GmbH vs. Global Refund Austria GmbH

48. The business of the company Global Refund Austria GmbH is to undertake the handling of value added tax (VAT) refund for tourists not residing within the European Union. The tax-refund form can be sent in by post or be handed in to „tax-refund points“ where the sum is paid in cash immediately. Global Refund has entered into contractual relations with credit institutes and banks located at Vienna International Airport for this reason.

49. The competing company Taxback considered those contracts as a significant barrier for market entry. The Cartel Court rejected the application for prohibition filed by Taxback GmbH vs. Global Refund Austria GmbH because it didn't regard the contracts between Global Refund and the banks at the airport, handling the tax refund, as vertical agreements due to the lack of a distribution system on different economic levels. The activity of the banks were only that of a person employed by the debtor in the performance of his obligation.

50. The Supreme Court as Higher Cartel Court following an appeal of the applicant stated that of course the relevant contracts had to be considered as vertical agreements, since the credit institutes were committed to not provide services of the same kind to other parties than Global Refund. This obligation forms a special kind of exclusive supply. The Higher Cartel Court thus declared a wide scope of application for the rules on vertical agreements.

51. The proceedings Taxback GmbH vs. Global Refund Austria GmbH are now being continued in first instance. Especially the question if the existing contracts are an unfair impediment for market access of third parties has to be dealt with.

##### Arcitec Florian KEG

52. The application for prohibition filed by the Federal Chamber of Labour against Arcitec Florian KEG was withdrawn because the company agreed to reduce the duration of a contractual prohibition of competition for highly qualified employees from three years to one year.

##### Job Hotline

53. Another application for prohibition concerned an inadmissible price-fixing clause contained in a franchise-contract. The clause in question was altered to a non binding price-recommendation.

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

54. In the period under review a total of 23 non binding recommendations issued by associations was notified to the Cartel Court, whereby in almost all cases through negotiations between the Official Parties and the notifying association the intended price increases were considerably reduced.

### 4. *Mergers and acquisitions*

#### a) *General remarks*

55. During the first six months of this year ninetyseven concentrations have been notified to the Cartel Court, which is still a high level although the total number is slightly lower than in the last year. This may be partly a result of the increased thresholds of the Cartel Act. A notable number of concentrations occurred in the sectors software, IT-services and energy supply. The latter has to be understood as reaction and preparation for the energy markets liberalisation to come.

#### b) *Significant cases*

##### Post/feibra

56. The Österreichische Post AG notified the acquisition of sole control over feibra GmbH. The activities of both undertakings overlap in the field of distribution of non-addressed advertising media (i.e. leaflets delivered to each household in a certain area). The Cartel Court called a hearing in this case but decided not to further pursue it ex-officio.

57. However, the exact definition of the relevant product market is a controversial issue in this case. The parties argue for a wide definition of the relevant product/service market including newspaper and magazine advertisements and supplements for the reasons of the same intended purpose and comparable prices of those media.

58. An inquiry among some of the largest customers of the parties revealed possible differences regarding costs, range, available space, the period the media remains at the customer and acceptance by consumers between the different kinds of advertisements. The preliminary conclusion of this inquiry was that a narrower market definition may be appropriate with leaflets constituting a separate product market, which possibly includes supplements. However, the combined market share of the parties would be notably high and likely to raise concerns as to the creation of a market dominant position.

59. Therefore the Republic of Austria filed an application for review of the notified transaction. The proceedings before the Cartel Court are still pending.

##### SPAR/Meinl

60. SPAR AG, Austria's second largest food-retailer chain, notified the acquisition of the 93 „Julius Meinl“ branches which remained after the concentration of REWE/Meinl in 1999. The transaction as notified would have further contributed to the already high degree of concentration in the food-retail sector especially in the eastern parts of Austria including the key-region of Vienna.

61. As the Cartel Court considered to initiate proceedings ex officio, it had to call a hearing with the parties to the concentration and the Official Parties in which possible concerns were addressed and discussed. Following this hearing the parties offered to divest a number of outlets in most affected areas.

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Thus no application for review was filed by the Official Parties and the Cartel Court did not start proceedings itself.

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

62. The Annual Report Austria 1998-1999 contained a summary about the pending proceedings in the aforementioned case. Meanwhile the Cartel Court declared the creation of MPG as a concentration through the establishment of a concentrative joint venture. With regard to the establishment of Fritsch & Rauch Mühlen G the Cartel Court declared the existence of a cartel.

63. In the following the Cartel Court obtained an expert opinion from the Joint Committee on Cartel Matters (Paritätischer Ausschuß für Kartellangelegenheiten) regarding the justification by the national economy of this cartel. After a positive opinion had been delivered by the Joint Committee (reduction of over-capacities, efficiency measures), the agreement was entered into the cartel register for a period of three years.

### Bau Holding/Strabag

64. The Joint Committee had to deal with an application for temporal revision (extension of the deadline) of the conditions (divestiture of a number of asphalt production plants) set up in the decision of the concentration of Bau Holding/Strabag. Due to exceptional circumstances (landslide, temporarily cutting of one of the plants from its resources) an extension of the deadline for compliance with the conditions was regarded as justified.

### Joint Venture Austrian Poster Company (APC), GEWISTA/NÖ Heimatwerbung

65. The notified establishment of the joint venture company APC with activities in the fields sale and spreading of advertising space, market surveys and marketing lead to an application for review respectively declaratory decision regarding the nature of the joint venture (co-operative/concentrative) filed by the Federal Chamber of Labour.

66. Shortly after the Cartel Court handed the matter to the Joint Committee for an expert opinion the notification was withdrawn.