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2001 - 2002

**1. Executive Summary**

1. In 2002 the Austrian competition law was reformed substantially: An independent Federal Competition Authority (*Bundeswettbewerbsbehörde*) was established as well as a “Public Prosecutor in Cartel Matters” (*Bundeskartellanwalt*) was set up within the Federal Ministry of Justice. While only the Federal Competition Authority has broad investigative powers, both Competition Authority and Public Prosecutor in Cartel Matters are competent for the take-up of competition cases. The Cartel Court however remains the decision making body. The set-up of the Cartel Senates was altered in order to allow professional judges to overrule lay judges. Apart from institutional aspects, several changes were made to the content of the provisions, for instance concerning sanctions.

**2. Changes to competition laws and policies****2.1 Summary of new legal provisions of competition law and related legislation**

2. By 1<sup>st</sup> of July 2002, a quite substantial reform of competition law came into force. The emphasis of the reform clearly lies on the organisational structure of competition law enforcement, the introduction of new investigative powers for the authorities and a reform of the sanctions-system.

3. One of the major amendments is the creation of an independent **Federal Competition Authority** (*Bundeswettbewerbsbehörde*). As the word “independent” suggests, the Federal Competition Authority is independent in carrying out its tasks and is not bound by instructions of a minister or another institution.

4. Concerning the powers of the new authority, it is competent for the take-up and investigation of competition cases, while the Cartel Court remains to exist as the decision making body. To fulfil the task of investigating competition cases the new Competition Authority is vested with substantial powers including requests for information and in cases where there is reasonable suspicion of an infringement of competition law the Authority can obtain a search warrant from the Cartel Court. In addition, it is the responsible authority to assist the European Commission in investigations and to participate in European Commission’s proceedings. Furthermore, the Federal Competition Authority is authorised to undertake investigations of certain sectors of the economy when it can be assumed that competition in this sector is distorted. Last but not least, the 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.

**5. Other major changes** resulting from the recent reform of the Competition law include the following:

6. In addition to the Federal Competition Authority a “Public Prosecutor in Cartel Matters” (*Bundeskartellanwalt*) was set up within the Federal Ministry of Justice. Like the Federal Competition Authority he is an Official Party, but bound by instructions of the Federal Minister of Justice (like the Public Prosecutor in Criminal Matters). The Public Prosecutor in Cartel Matters concentrates on cases with

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a public interest aspect and may have recourse to the investigative powers of the Federal Competition Authority.

7. The influence of the social partners (i.e. the representatives of employers, employees and farmers) was reduced considerably: The Joint Committee on Cartel Matters, an advisory body assisting the Cartel Court and composed of nominees by the social partners, will be abolished on 31<sup>st</sup> December 2002. Furthermore the social partners are no longer Official Parties. The function of the latter to initiate proceedings and make applications to the Cartel Court are taken over completely by the Federal Competition Authority and the Public Prosecutor in Cartel Matters whereas the ex-officio power of the Cartel Court was abolished. At the same time the composition of the senates of the Cartel Court were changed, so the professional judges hold a majority over the expert lay judges, nominated by the social partners, in both instances.

8. Furthermore, a Competition Commission (*Wettbewerbskommission*) was set up to advise the Federal Competition Authority, mainly by giving expert opinions in selected national merger cases. The Federal Competition Authority however is not bound by the Commission's recommendations.

9. Apart from institutional aspects, several changes were made to the content of the provisions: For instance, more severe sanctions were fixed in the area of merger control: now it is possible to revoke clearance decisions based on incorrect or incomplete information provided by the parties or as a result of a breach of obligations.

10. Last but not least the sanctions system, based on criminal penalties, was changed. It was largely replaced by a system of monetary fines which can reach 10 % of the aggregate turnover of the undertakings concerned. However, apart from the unchanged offence of damage for severe anticompetitive agreements with proven damage a new provision for participating in submission cartels was introduced in the Criminal Code (Para 168 b StGB; see below part II.1).

## 2.2 *Special sectors*

### 2.2.1 *Telecommunication*

11. The Austrian Regulatory Authority for Telecommunications and Broadcasting (RTR) was established by new legislature on April 1, 2001 and merged with Telekom Control GmbH, which had been set up in 1997. As a "convergence regulator", RTR acts as the operative arm of the Austrian Communications Authority (responsible for broadcasting) as well as the Telekom Control Commission (responsible for telecommunications).

12. The focus of Austrian telecoms regulation currently lies on Network Access, Non-Discrimination, Universal Service and UMTS rollout.

13. Some of the decisions by Telekom Control Commission expired in 2001 and 2002 and had to be renewed. This was the case for network access (interconnection) to mobile networks, network access to fixed networks (interconnection) and access to the unbundled local loop. These decisions are in line with previous orders and furthermore contain numerous new provisions. The most critical issue was the recalculation of the tariffs charged for these services. All tariffs were fixed according to the same cost orientation methodology – the Forward Looking Long Run Average Incremental Cost (FL-LRAIC) approach, which is foreseen in the Austrian legislation. This approach aims at simulating market prices in a competitive situation not yet existing, by taking into account only the unavoidable costs directly and

indirectly attributable to the product - plus an extra charge for common and overhead costs - of an efficient company and network on the basis of current cost. Within the scope of the FL-LRAIC method the bottom-up model only serves for determination of the investments; other cost, mainly operating expenses and cost of capital (WACC) are considered separately.

14. Access to mobile networks: The regulatory authority decided on conditions for interconnection to the mobile networks of all four existing GSM-operators in Austria.

15. Access to the local loop: Concerning access to the local loop one of the main efforts was to secure the provision on a line sharing offer. The provision of this service makes it possible that two different operators provide their services on the same copper loop.

16. In order to secure compliance which non discriminatory behaviour the regulatory authority checked the cost accounting system of operators which were classified as significant market power operators (SMPO). Especially internal transfer rates and cost of service provision to subsidiaries were scrutinised. Some service packages of SMPOs had to be adopted or also to be offered to competitors.

17. In the field of Universal Service (countrywide provision of the voice telephony service) the Authority is currently checking the cost of the universal service provision. According to the Telecommunications Act the market parties will cover the approved costs.

18. Concerning the UMTS rollout the Authority checked the progress and issued guidelines on possible co-operation of UMTS operators. A policy paper was published which describes different forms of sharing mobile networks.

19. New Regulatory Framework: Under the Communications Review 1999 four new EC-directives for regulation of the communications market were published on April 24, 2002. The new legal framework takes into account the changed market situation after the opening of the markets. The package includes several regulatory instruments and some procedures which foster a harmonised approach across Europe. A draft of the new Austrian Communications Act which is based on the new framework is currently under consultation.

### 2.2.2 *Electricity and Natural Gas*

20.- Energy Control Ltd. was set up as reported last year. With the amendment of the Energy Liberalisation Act (2002) the scope of regulation by E-Control Ltd. was enlarged to the natural gas sector and some important tasks in the field of renewable energy. The amendment came into force in August 2002.

21. The system of gas market liberalisation follows the main principles of the electricity regime, i.e. rTPA (*regulierter Netzzugang*; regulated third party access), competitive balancing energy market, regulation of the grid code and of general terms of business in the network industry. Full liberalisation of the gas market will start with October 1<sup>st</sup> 2002.

22. The first experiences of the liberalised electricity market have been very positive. Although international and national wholesale prices rose by about 20% from 2000 to 2001, retail prices in the domestic sector remained constant or declined by up to 10 % in nominal terms. Industrial and commercial prices have even been reduced by 30 - 50%. Customer switching was mainly registered in the commercial and industrial sector (10 %), in the household sector only 1 % of all customers changed their supplier. This unequal development is mainly due to historically low prices for residential customers in Austria.

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23. An evaluation about macroeconomic effects of the liberalisation showed that prices were lower than in a base line scenario without liberalisation. This caused an increase in national income (0,2 %), in exports (0,4 %) and in investments (almost 0,2 %) compared with base line. The most interesting result of the study is that even in the short run since 1999 employment effects have already been positive for the whole economy, employment increases in other sectors more than outweighing reductions in the electricity sector.

### 3. Enforcement of competition laws and policies

#### 3.1 *Action against anticompetitive practices, including agreements and abuses of dominant positions*

##### 3.1.1 *Summary of activities*

24. In the period under review, the procedural measures of the enforcement authorities were largely influenced by the ongoing political discussion about the restructuring process concerning the Austrian enforcement system and the final introduction of the new legislation on July 1<sup>st</sup>. During the short preparatory period for setting up the new Federal Competition Authority and the Federal Prosecutor in Cartel Matters, the willingness of the Cartel Court in taking up cases on its own initiative declined substantially.

25. The provisions concerning the criminal liability of entrepreneurs and managers for anti-competitive behaviour and practices have finally proven ineffective due to the complexity of the necessary economic reasoning (e.g. in the Vienna Construction Cartel cases) and the difficulty to document the damage inflicted on the public procurer. Apart from the few construction cartel cases between 1998 and 2001, the public prosecutors and criminal courts gave no priority to the enforcement of these criminal rules. As the mentioned rules have been replaced now by a single and lean regulation within the Criminal Code (§ 168b STGB) concerning bid rigging and an extensively with EU law harmonised catalogue of fines, it is generally expected that this will contribute to a more effective enforcement of competition law. However, severe anticompetitive agreements which result in proven economic damage still constitute “fraud” and are therefore subject to criminal sanctions.

##### 3.1.2 *Description of significant cases, including those with international implications*

###### 3.1.2.1 Horizontal Restraints

26. **General Electric versus Philips Medizinische Systeme.** In this case the American supplier of medical equipment claimed an anti-competitive co-operation of two competitors (Philips, Siemens) in the course of a public procurement procedure by an state-hospital for obtaining a new magnetic resonance diagnosis system. The two competitors were allegedly capable of bidding separately with their respective products and restricted the competition by bidding jointly.

27. The Cartel Court and - upholding the judgement - the Cartel High Court found the Cartel Act not applicable to already finished (possible) infringements. In this case the delivery of the system had been completed and the guarantee-period had already expired, when the first instance presented its decision. Furthermore, according to the procedural rules, the Cartel Court is obliged to investigate the alleged infringements on its own. This obligation is limited in scope to the plaintiffs allegations, which has to be at

least asserted. This limitation will play a major role in the future collaboration between the Federal Competition Authority and the Cartel Court.

28. **Lombard Club (Austrian banking cartel).** During a long period of time the bank managers of the most important Austrian bank institutes met on a regular basis in order to discuss more or less market relevant matters, e.g. the development of interest rates for private savings. Although the defendants claimed that those gentleman's agreements never had any significant impact on the competitive behaviour of the banks, the EC Commission imposed a fine totalling 124,26 Mio € on the convicted companies. The defendants however filed an appeal. An additional criminal investigation in Austria has been triggered as well as a proceeding concerning damages will be initiated by a consumer organisation.

### 3.1.2.2 Abuse of a dominant position

29. **European Telecom International et al. versus Telekom Austria.** In this case alternative telephone companies accused the incumbent voice telephone provider for driving them out of the market by predatory pricing practices. Telekom Austria offered to its customers during three months a special off peak charge for local telephone calls by extending the impulse period for telephone calls in a way, that the average costs for a 15 minutes call would decrease to app. 0.58 cent per minute. The plaintiffs claimed that this average charge would exceed their variable costs – the interconnection fee.

30. The Joint Committee on Cartel matters suggested in its expert opinion to transfer the case to the sector regulator for closer investigations. This was rejected by the Cartel Court. Although the Cartel Court concluded, that Telekom Austria was still holding a dominant position in the market for traditional voice telephony, the complaint was rejected. The economic reasoning behind the decision based on the fact, that the incumbents marginal costs during off-peak time was close to zero and that the charges paid by the customers following their real telephone behaviour (average: 3 minutes 21 seconds per call) during the campaign did not fall below the prices per minute charged by Telekom's competitors.

31. **Daymler-Crysler Services et al. versus ASFINAG.** This case has been brought by a bidding consortium engaged in the public tender for the construction and operation of the future Austrian road toll system for trucks. After the Federal Public Procurement Control Authority rejected its competence in reviewing this largest public procurement measure so far in Austria, the Cartel Court also denied its jurisdiction twice. As the Cartel Court concluded that within the legal system the specialised procurement control authorities are the correct instances to look for legal protection in an ongoing public procurement process a clear conflict of negative jurisdiction arose. The economic damage for the Republic was limited as the consortium with the lowest price got the contract. According to the Austrian Federal Procurement Act, the tender which offers the best technical and economic solution shall be accepted by the public procurer.

32. **gfw versus Österreichische Post AG.** A 50% subsidiary of the Dutch TNT Post Group N.V. complained against the incumbent post delivery service in Austria, Post AG, on the grounds of using its market power to impede the competing mail services. E.g. the delivery staff of Post AG has an exclusive access right to personal mail-boxes in urban areas, where only restricted access within the buildings is granted. The company uses this access right to deliver not only personalised mail but also non addressed info-mails (e.g. advertisements). The delivery of non addressed info-mails is excluded from Post AG's monopoly and gfw competes with Post AG in this specific market.

33. As it is the usual practice for companies like gfw to deliver its unpersonalised pieces of mail in a small plastic bag directly at the customers door, the Joint Committee on Cartel Matters could not find an unjustified anti-competitive practice in Post AG's behaviour. Even if it could have been proven that the

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delivery in the mailboxes would bring a minor competitive advantage, these boxes certainly do not constitute an essential facility within the interpretative range of the European Court of Justice's jurisdiction (EcoJ, C-7/97, "Oscar Bronner").

### 3.2 *Mergers and acquisitions*

#### 3.2.1 *Statistics on number, size and type of mergers notified and/or controlled under competition laws*

34. Between September 1<sup>st</sup> 2001 and August 31<sup>st</sup> 2002 a total of 297 concentrations was notified to the Cartel Court. In 20 cases an application for in depths investigations were filed by one or more of the Official Parties leading automatically to phase II proceedings. One case (Promatech/ Sulzer) was referred to the European Commission. In seven cases the Cartel Court decided that the transaction was not a notifiable concentration. In two cases proceedings were initiated whether a transaction was implemented without clearance by the Cartel Court.

35. After entering into force of the cartel act amendment and the competition act the number of applications to initiate phase II proceedings increased considerably. However, about half the number of these applications concern applications of in depth investigations linked to further requests of information. Latter would - according to a judgement of the Supreme Cartel Court - not lead to a halt or a prolongation of the statutory four weeks period for the Authority.

	Sept - Dec 2001	Jan - Jun 2002	Jul - Aug 2002	Total
Total of notified concentrations	100	145	52	297
Among those				
notified concentrations concerning the media sector	6	9	2	17
Phase II proceedings	4	3	12	19
Decision: not a notifiable concentration	4	2	1	7
Referral to the European Commission	0	1	0	1
Proceedings whether a concentration was unlawfully implemented without clearance	1	0	1	2

#### 3.2.2 *Summary of significant cases*

36. **OMV Erdgas/EVN et al.** This case which constitutes one of the most important ones of the newly established Federal Competition Authority, is still pending. In June this year OMV Erdgas, the Austrian importer and producer of natural gas, and some regional gas distributors, namely EVN (Lower Austria), WienGas (Vienna), Linz AG, BEGAS (Burgenland) and OÖ Ferngas (Upper Austria) notified the creation of a joint venture company for the distribution of gas to large-scale customers. Competition concerns arose not only because of the very strong market position of the joint venture itself, but also

because of the strong vertical integration caused by this concentration, giving the parties a dominant position on several markets in the gas sector (import/production, transport and distribution networks, storage facilities). Furthermore, some of the parties are active in the electricity sector as well. For those reasons the Federal Competition Authority as well as the Public Prosecutor in Cartel Matters and under a transitory legal regime the Federal Chamber of Labour filed applications for review.

37. As the Austrian gas market will be 100% liberalised from 1<sup>st</sup> October 2002, the definition of the geographic market and the expected effects of liberalisation are crucial. While the parties expect competition from foreign gas companies very soon after the opening of the market the Competition Authority and the Regulating Authority (*Elektrizitäts-Control GmbH*) in accordance with decisions of the European Commission and the German *Bundeskartellamt* took the view that the liberalisation process will take some more years during which the relevant markets would be national in scope. In this view the envisaged concentration is likely to slow down the liberalisation process and jeopardise its positive effects. On the other hand it has to be noted that none of the parties to the concentration has a size comparable to its potential competitors (e.g. Gaz de France, Ruhrgas, Eni/SNAM). Therefore the difficulty is to create a competitive player on a liberalised European market while enabling development of competition on the Austrian market.

38. To achieve this goal, possible obligations are being thought up at the moment in close co-operation with the Regulating Authority. Among the topics to be discussed are the following: non-discrimination of competitors in access to gas, networks and storage facilities; creation of available amounts of gas for new market entrants; complete separation of network operation and distribution; non-disclosure of information gained through the network operation; prevention of the possibility to influence the price of electricity; and transparency.

39. The Cartel Court has to decide on this case by 5<sup>th</sup> November 2002 but it is hoped to reach a solution before this deadline.

40. **Energie-Versorgung Niederösterreich AG/Wiener Stadtwerke Holding AG et al.** In July 2001, the Austrian energy suppliers Energie-Versorgung Niederösterreich AG (EVN), Wiener Stadtwerke Holding, Linz AG, Burgenländische Elektrizitätswirtschafts-Aktiengesellschaft (BEWAG) and Burgenländische Erdgasversorgungs-AG (BEGAS) notified the creation of the joint venture company Energie Allianz. Energie Allianz should care for the distribution of electricity and gas. In this way the electricity sector (mainly supply of power and trade in electricity) and the gas market (mainly supply and selling of gas) should be brought together.

41. Due to the Energy Liberalisation Act (2000), the customers and retailers had the possibility as of October 2001 to choose their supplier of energy independent of consumption and quantity of delivery. The main problem was seen in the domestic sector: The willingness of private customers to change electricity suppliers was low and the market entry for new competitors seemed to be made difficult, e.g. by high tariffs for electricity passage. In the gas market, Energie Allianz would have had a market dominant position by delivering more than 80 % of the domestic customers with gas. The merger was cleared subject to the following obligations: no discrimination of customers after a change of the supplier; separation of personnel in the fields of production, net and distribution; equal treatment of suppliers; and transparency in tariffing services.

42. **Spar/Maximarkt.** Spar, the second largest national food retail chain, envisaged to take over Maximarkt, a regionally important food retail chain. In accordance with the opinion of the Joint Committee on Cartel Matters, the Cartel Court noted that the concentration as well as the power in the supply market was high in general and that the merging companies held an important market share. However, it was found to be likely that discounters will continuously enlarge their assortment and thereby gain market

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shares from traditional food retailers. The merger was cleared subject to the following obligations: Maximarkt continues to exist operatively independent for the next years; the continued listing of present regional suppliers is guaranteed; and Spar must not buy other companies in the field of Austrian food retail trade until 2004.

43. **Kodak/Bilderland.** Kodak GmbH, a subsidiary of Eastman Kodak Company, USA, notified the acquisition of all the shares of Bilderland GmbH, a subsidiary of the Belgian Spector Photo Group NV. The transaction was part of the international one, by which the Kodak Group took over the Spector businesses of development and distribution of photos. The market most affected by the transaction was the market for the processing and development of films for colour prints for amateur customers.

44. Although the market concentration (the three biggest companies held more than 80 % market share) as well as the market power of the merging companies (above 30 %) were high, the merger was cleared without obligations. The reasoning behind this decision was the market power of the highly concentrated demand side, i.e. food, drugstore and consumer retail chains, which exert strong downward pressure on prices as well as the non-existence of any substantial market entry barriers.

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

45. As explained before, 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.

#### **5. Resources of competition authorities**

46. The new Competition Authority is based on former resources of the Competition Unit of the Federal Ministry for Economic Affairs and Labour, but has also employed additional staff. At the moment, - additional to the Director General and the Deputy Director General - nine lawyers, one economist, two other professionals, four persons as support staff, i.e. all together 18 persons, are 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.

47. The Prosecutor in Cartel Matters and his Deputy have recourse to the resources of the Ministry of Justice, where inter alia the Directorate for Consumer Protection is located.

48. As the decision making body the Cartel Court comprises five panels being composed of two professional judges and two lay judges. The Cartel Court was reinforced by three new judges dealing only or mainly with Cartel cases. Therefore, the Cartel Court employs currently seven professional judges who are supported by fourteen lay judges. Additionally, the Cartel Court relies on advisory opinions of independent economic experts of its own choice.