

# ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN AUSTRIA 2011 - 2012

## **Executive Summary**

In 2011 - 2012 the Federal Competition Authority (Bundeswettbewerbsbehörde, BWB) could further intensify its efforts to tackle hard core cartels and push enforcement. In the period under review (1 July 2011 - 30 June 2012) again a substantial number of new cartel cases were investigated, leading to a remarkable number of dawn raids. About 30 dawn raids were carried out, many of them in the food retail market. Some of the cases were already brought before the Cartel Court. Another focus of BWB's work remained to be the liquid fuel market. Last but not least, the BWB continued to put emphasis on intensifying international co-operation not only within Europe but also outside the European Community.

## **Background**

The authorities responsible for competition law enforcement in Austria are the Bundeswettbewerbsbehörde (Federal Competition Authority, BWB), the Federal Cartel Prosecutor ("FCP", jointly referred to as "the Official Parties") and the Cartel Court.

Mergers are notified with the BWB and investigated in phase I by BWB and FCP. In merger proceedings the Official Parties have the exclusive right to initiate proceedings for an in-depth review of merger cases (phase II) before the Cartel Court, which is the sole decision making body. Also in antitrust proceedings, the Official Parties have no decision-making power but are empowered to take up and investigate cases which they can bring before the Cartel Court (as can individuals and other statutory parties). Parties can however offer remedies to the Official Parties to either convince them not to open a proceeding with the Cartel Court or to withdraw their application with the Cartel Court. These remedies are binding upon the parties and non-compliance is subject to fines. Decisions by the Cartel Court may be appealed against before the Supreme Cartel Court.

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

While most cases were dealt with by the Federal Competition Authority BWB (BWB) and the Federal Cartel Prosecutor (FCP) jointly, some were followed only by the BWB or the FCP. The annual report of the FCP for the year 2011 can be viewed at <http://www.justiz.gv.at/internet/html/default/8ab4a8a422985de30122a92c3e89637f.de.html><sup>1</sup> The annual report of the BWB can be found at <http://www.bwb.gv.at/Fachinformationen/Taetigkeitsberichte/Seiten/default.aspx>.

### ***I.1. Action against anticompetitive practices, including agreements and abuses of dominant positions***

#### *a) Summary of activities*

In the period under review (1 July 2011 - 30 June 2012) 34 new cartel cases were examined, leading to a substantial number of dawn raids. About 30 dawn raids were carried out, many of them in the food retail market. In addition, 26 new cases concerning the abuse of a dominant market position were examined. In several cases the Cartel Court has not rendered a decision yet.

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<sup>1</sup> <http://www.justiz.gv.at/internet/file/8ab4a8a422985de30122a92c3e89637f.de.0/bkanw2011.pdf>

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

*ba) Agreements, recommendations and sector inquiries*

*Cartel investigation of the freight forwarding sector: ECJ ruling requested*

In February 2010, the BWB filed an application for the imposition of fines against all members of the trade association for freight forwarding and logistics ("Zentralverband für Spedition und Logistik") for regulating the tariffs for domestic freight forward services concerning general cargo. The BWB contended that the circulation of tariffs among the members of the association is liable to prompt them to align their tariffs, irrespective of their costs. Also, the BWB applied to the Cartel Court to impose a fine against a subsidiary of the state-owned Austrian-based railway company ÖBB for exchanging commercially sensitive information with the association with a view to align its tariffs for general cargo with those of the association. The Cartel Court dismissed the application of the BWB and on appeal of the BWB and the FCP Austria's Supreme Court has now asked the European Court of Justice (ECJ) to clarify the following points via a preliminary ruling (C-681/11):

*1. May breaches of Article 101 TFEU committed by an undertaking be penalised by means of a fine in the case where the undertaking erred with regard to the lawfulness of its conduct and that error is unobjectionable?*

*If Question 1 is answered in the negative:*

*1a. Is an error with regard to the lawfulness of conduct unobjectionable in the case where the undertaking acts in accordance with advice given by a legal adviser experienced in matters of competition law and the erroneous nature of the advice was neither obvious nor capable of being identified through the scrutiny which the undertaking could be expected to exercise?*

*1b. Is an error with regard to the lawfulness of conduct unobjectionable in the case where the undertaking has expectations as to the correctness of a decision taken by a national competition authority which examined the conduct under review solely on the basis of national competition law and found it to be permissible?*

*2. Are the national competition authorities competent to declare that an undertaking participated in a cartel which infringes European Union competition law in a case where no fine is to be imposed on the undertaking on the ground that it has requested to be heard as a cooperative witness?*

The case is still pending.

*Printing Chemicals Cartel: Third-party access to file*

Following leniency applications in April 2009, the BWB had applied for the imposition of fines against several undertakings active on the market for printing chemicals for sharing customers, fixing prices and exchanging commercially sensitive information. The Cartel Court ruled in favour of the BWB's pleadings in March 2010 and imposed total fines of € 1 519 000. This decision was upheld by the Supreme Cartel Court in October 2010. In a follow up procedure a third party is now seeking access to the court file with a view to preparing civil actions for damages.

In this follow-up procedure the Austrian Cartel Court decided in October 2011 to stay proceedings and seek the European Court of Justice (ECJ)'s guidance by way of a request for a preliminary ruling.

In the wake of the ECJ's Pfleiderer ruling (C-360/09) the Cartel Court had doubts as to the compatibility of the Austrian legislation governing third-party access to file in cartel proceedings

with European Union law. The ECJ has ruled that it is for national courts, on the basis of their national laws, to determine the conditions under which access to file must be permitted or refused by weighing the interests protected by EU law (i.e. right to claim damages vs. effectiveness of enforcement of competition law). In its reasoning the ECJ furthermore pointed out that national rules must not be less favourable than those governing similar domestic claims.

Subject to Article 39/2 of the Austrian Cartel Act, third-parties may only obtain access to the file with the prior consent of all parties to the respective proceedings. This does not only apply to parts of the file containing leniency applications but to all documents. According to the declared will of the Austrian legislator, this specific provision (which is stricter than the corresponding provisions in civil and penal procedures where a legitimate interest of third-parties may outweigh the parties' and/or the public interest) shall promote the disclosure of infringements of competition law whereas the interest of third parties in facilitating claims for damages has to stand back.

This provision does not leave any room for weighing conflicting interests on a case by case basis as indicated by the ECJ. While Art 39/2 is not less favourable with regard to leniency documents as compared to other documents from a cartel-file and does not distinguish between cartel-proceedings based on EU law and purely national law, it is less favourable than the rules governing access to documents with a view to preparing actions for damages stemming from violations other than against competition law.

Against this background the Cartel Court is referring the following questions to the ECJ (See case C-536/11).

1. *Whether a national provision making access to the file conditional on the consent of all parties to the proceedings and restricting the court from weighing the interests protected by EU law is incompatible with European Union law,*

*and (if the answer is negative to question 1):*

2. *Such a national provision that does not distinguish between proceedings based on national law or EU law and between leniency documents and other documents is incompatible with European Union law when other corresponding provisions in national civil and penal procedures allow for access to the file without the parties' consent subject to a weighing of conflicting interests.*

The case is still pending.

#### *Fines in a case concerning draft beer*

The investigation was triggered by a complaint of a cash&carry company concerning an alleged infringement of Art 101 TFEU. According to the complaint, the main Austrian breweries would not supply cash&carry companies with draught beer as they were distributing their beer themselves or through small local beverage distributors. This boycott was based on an agreement which had been reached in the context of a trade association meeting, according to which no cash&carry company should receive draught beer. The complainant also informed the BWB about illegal resale price maintenance and restriction of sales.

The BWB sent requests for information, questioned witnesses and conducted inspections end of June 2011. Evidence was found that the breweries concluded an agreement within the framework of their professional association to not supply cash&carry markets with draught beer. The companies decided to cooperate with the authority and the case was brought to court via a settlement procedure. The Cartel Court established that the refusal to supply cash and carry markets with draft beer based on an agreement which had been reached in the context of a

trade association infringed Article 101 TFEU and Article 1 of the Cartel Act. In total, the Court imposed fines of € 1 110 000.

#### Food Retail Market

Starting on 27 February 2012 the BWB conducted dawn raids at the headquarters of the leading Austrian food retail group. The dawn raids that lasted more than a week concerned a number of different groups of retail products inter alia the sectors of beer and coffee. The alleged anticompetitive conduct under scrutiny includes horizontal agreements with competitors - in parts mediated by joint suppliers - and vertical agreements (price fixing) with suppliers (including hub & spoke).

The BWB has since conducted more than 10 dawn raids at other companies in the course of this investigation. Concerning the product beer the BWB has already brought the case to Court. Regarding all other products the investigations are ongoing.

#### Cartel investigation into the insulation market:

The BWB has conducted dawn raids with a focus on the XPS and EPS insulation market at the beginning of August 2011. The investigation concerns information exchange with regard to price increases/prices as well as direct contacts between the companies if one company sold the insulation material below a certain level. In addition, the allegations relate to illegal price maintenance.

The BWB has brought the case (vertical) against one of the leading producers to Court. Two dealers of insulation products have decided to cooperate with the authority and settlements with fines have been reached. Investigations concerning the horizontal elements are still ongoing.

#### Textile cleaning sector: pending proceedings regarding horizontal agreement

In August 2011, the BWB filed an application for the imposition of fines and a declaratory decision respectively against two undertakings which are active in the textile cleaning sector. The companies pooled their business activities in a separate entity (joint venture), the only purpose of which was to coordinate the parents' competitive behaviour on the textile cleaning market, notably by sharing markets and customers between them.

The Court proceeding is still pending before the Cartel Court and has been recently suspended until the ECJ decides upon the request of the Austrian Supreme Cartel Court for a preliminary ruling regarding the admissibility of declaratory judgements under regulation 1/2003 (ECJ C-681/2011) which concerns another proceeding (see information on cartel investigations in the freight forwarding sector above).

#### Radius clause IV: Appeal against mistakes in the application of economic methods

The market entrant (factory outlet center) filed an application against the incumbent shopping mall under Art 101 TFEU at the Cartel Court. The case concerned exclusivity clauses between the shopping mall and its shop tenants that prohibit any opening of additional shops in competing shopping malls or factory outlet centers within a certain radius (50km) and thereby foreclosing the market for competing shopping malls and factory outlet centers.

The Cartel Court rendered a decision based on an economic expert opinion's market definition and market shares to analyse if de minimis and the block exemptions apply. However, according to the BWB the economic expert engaged by the Cartel Court had made several economic application errors and misconceptions when applying the SSNIP test and therefore came to a – with market conduct contradicting –, relatively wide market definition that includes all shopping malls, inner city and factory outlet centers within a geographical area of approximately 50km. The BWB therefore appealed against the decision taken by the Cartel Court. The question was if

in addition to the legal question "methods for market definition" also economic application errors and misconceptions of a method can be appealed.

In December 2011 the Supreme Cartel Court rendered a decision (16 Ok 8/10, Rz 5.15) stating that it can only review the general appropriateness of a specific method. It can however not review the result of the application of the generally appropriate method.

The BWB considers the decision of the Supreme Cartel Court declaring itself not competent in these questions as problematic as it further strengthens the already dominant role of external economic experts in proceedings with the Cartel Court. Consequently, it raises questions regarding due process taking into account that the decision making instance (i.e. Cartel Court) outsources the investigation of economic questions to a court expert and at the same time decides on the opinion of the court's expert whose decision cannot be appealed.

#### Market Inquiry into Liquid Fuels Sector

In the course of the last five years, the BWB has repeatedly looked into a broad range of topics concerning the markets for Diesel and Premium Gasoline, including inter alia the "rockets and feathers" issue, the competitive situation on regional retail markets and Platts' price assessment (analysis of price formation mechanism) etc.

Now the BWB has seen the necessity for a comprehensive and updated analysis of this industry; the appropriate instrument for achieving this, is a formal market inquiry according to Article 2 of the Austrian Competition Act.

In order to carry out this exercise within the resource limitations a small authority faces, the workload has been divided into three parts, which will be addressed in sequence.

Part I will focus on the upstream (wholesale) markets. It will concentrate on defining the competitive constraints refineries face. Empirical data about the regional provenance of product flows into the Austrian market in combination with an analysis of price formulas applied could shed some light on this issue. The analysis is intended to be supplemented by an examination of the relationships between the major players.

Part II is intended to capitalize on a unique data source as since autumn 2011 the Austrian petrol stations are legally required to inform the energy regulator about every price change. This data bank shall be used to analyse possible price reaction patterns at the micro level. Detecting price leadership may be one of the focal issues but the exercise will not be limited to that. Several hypotheses may be worth of being tested. To cite an example: It would be analyzed if common structures can be revealed in local clusters of petrol stations exhibiting extraordinarily high or low prices.

Part III will deal with retail markets in general. The core issue will be the room for manoeuvre retail stations may enjoy. The analysis will take into account the differentiated structure of retail stations and also cover the link between retail and the wholesale market.

First requests for information have been sent to the major companies active in the wholesale liquid fuels market in early June. The first report is scheduled for late fall 2012.

#### Revised Leniency Manual

The BWB issued in late 2011 a revised version of its 2006 Leniency Manual. After more than five years of practical experience with the application of the original version, some amendments were required in the light of the relevant case law and developments at European level (alignment to the ECN leniency model programme). The revisions of the manual aim to provide more guidance to applicants and increase the transparency of the procedure with a view to enhance legal

certainty for companies. The revisions are fully in line with the European Competition Network's Model Leniency Programme.

The key amendments can be summarised as follows:

- Further explanations on the exact content of the duty to cooperate, ie the information required by the leniency applicant: The manual clarifies the scope of the conditions that the applicant must meet under the duty of continuous cooperation, such as the duty not to destroy, falsify, or conceal evidence of the alleged cartel or the duty to neither directly nor indirectly disclose the fact of filing for leniency before the BWB.
- Criteria which is used by the BWB when determining (in its application) the fine within the bands in case of reduction of fines because of leniency applications. Partial immunity may be available within the context of an application for a reduction of a fine: the new manual explicitly stipulates the BWB's previous practice not to take into account additional facts previously unknown to the BWB which are disclosed by a leniency applicant that increase the gravity or the duration of the infringement, when pleading the fine to be imposed on the leniency applicant before the Cartel Court.
- Detailing procedure
- Introduction of a "marker" system in cases, where a leniency application is also filed with the European Commission: in order to alleviate the burden associated with multiple parallel applications on both the companies and the BWB, the manual makes a marker available for applicants to protect their place in the leniency queue in case of reallocation of the case from the Commission to the BWB. Now, not only the first applicant but also subsequent leniency applicants can secure a place in the leniency queue at the BWB by a simplified procedure.

It shall be noted that there is a pending legislative proposal, to be discussed at the Austrian Parliament, which also provides for some significant amendments of the Austrian leniency programme (in particular new thresholds). Its enactment will thus require further amendments to the leniency manual.

## ***1.2. Mergers and acquisitions***

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

Between 1 July 2011 and 30 June 2012 a total of 294 national concentrations were notified.

In 6 cases parties withdrew their notification in phase I, in 3 of them because the transaction was not a notifiable merger. In one case the parties agreed on remedies in phase I, thereby avoiding a phase II proceeding.

In 10 cases an application for in-depth-investigations was filed by one or more of the official parties leading automatically to phase II proceedings. In one case the parties withdrew their notification during phase II and notified the merger in a slightly modified version again. In three cases the application for examination with the Cartel Court was withdrawn by the official parties. In one case the Cartel Court cleared the merger only subject to remedies, in one case without remedies. In two cases the Cartel Court rejected the application for examination as the mergers were not notifiable (and the BWB does not yet have the power to reject these notifications). Two cases are still pending.

## *b) Summary of significant cases*

### *Let's Print / Goldmann:*

Europe's markets for rotogravure and off-set printing have suffered from overcapacity in the last decade. This has caused drastic market adjustments even in Austria. The merger notified in September 2011 concerned Austria's largest printing operator Let's Print and the former second largest operator Goldmann that has become insolvent. The scrutiny of the BWB concentrated on geographic delineation of the markets for off-set printing of advertisements and for magazine printing (see eg the merger with the European Commission, M.3178, Bertelsmann Springer / JV).

The market investigation indicated that in the market for off-set printing of advertisement, orders above 50.000 copies and with repeated production are placed on an international market comprising Austria and neighboring countries. The same is true for printing of magazines and leaflets, though in this field for some customers national production is critical due to special requirements of production and delivery of products. Though the parties' combined turnover proved to be much larger than the turnover of the remaining second largest competitor in Austria, the parties are facing fierce competition from several competing groups (Oberndorfer/Circle Printers, Stark Druck, Jungfer Druckerei, Weiss-Druck, Kraft-Schlötels, Euro Druckservice, Appl Druck) that are active in Austria and neighboring countries.

The BWB has accepted commitments to safeguard that capacity (ie. printing machines) of the target is maintained in the region or otherwise opened to inquiry of competitors. With these commitments the merger could be cleared in an early phase II.

### *Berglandmilch / Stainzer Milch*

After intensive prenotification consultation with the BWB and the FCP, Berglandmilch, a major player in the Austrian milk market, notified the incorporation of Stainzer Milch (Stainzer) into Berglandmilch in August 2011.

Today Berglandmilch is one of the largest food producers in Austria. With approximately 1.400 employees, it processes about 1.2 billion kilograms of milk a year under the brand names of Schärddinger, Desserta, Tirol Milch, Latella, Landfrisch, Stainzer, Alpi resp. Alpiland. Roughly 350 different fresh products, long-life milks, cheeses, butters, yoghurts and curd cheeses are produced. The Berglandmilch group numbers some 15.000 suppliers who are also the owners of the concern. With an annual turnover of approximately 540 Mio EUR and an export quota of approximately 35%, Berglandmilch ranks amongst the most important dairies in Central Europe.

Stainzer is a cooperative society with approximately 450 suppliers, 65 employees, more than 30.000 tonnes produced milk a year and a turnover of 21,6 Mio EUR in 2010.

Due to the high market share of Berglandmilch on the market for raw milk as well as on several markets for milk products, the merger was examined intensively by the BWB and the FCP. After an extensive market test of proposed commitments (inquiring milk farmers, trade and competitors), they decided to clear the merger under certain conditions with immediate effect. These conditions primarily concern the delivery area, the obligation to buy raw milk and bio raw milk from third parties as well as the obligation to offer for sale certain (large) quantities of raw milk.

The competition authorities accepted these commitments to ensure access to milk procurement markets in a merger affecting dairy products markets. To address the authorities' concerns, the parties offered to introduce an additional distribution channel for raw milk by committing to procure milk from non-member farmers at the generally available index price for milk exports.

Consequently, farmers who were not members of an association and whose contracts of sale to other dairies were discontinued were offered access to the market at market price.

With these rather far reaching commitments which were considered by the BWB and FCP to be sufficient to solve any competition problem, the merger could be cleared in phase I.

#### Austrian mobile market: Telekom/Yesss!

Austrian mobile network operators H3G and Telekom Austria (TA) aim to bring major changes to national mobile telecom services markets: Following H3G's acquisition of Orange Austria which has been notified with and is currently assessed by the European Commission, TA notified the purchase of Yesss!, i.e. Orange's no frills sub-brand from owner-to-be H3G end of May 2012. While sole remaining competitor T-Mobile supports the merger, seeking to obtain some of Orange's spectrum by way of respective remedies, BWB's and FCP's investigations which are carried out in close cooperation with the national regulatory authority produced evidence indicating the Yesss!-acquisition would strengthen TA's dominant position.

The authorities' concerns relate to a large number of market relevant facts eg Yesss!'s position as closest competitor to TA's own bob-brand (pricing, marketing, consumer awareness etc) and TA's recent (2011) independently implemented price increase which did not result in loss of subscribers and was not attacked but followed by all major competitors in the Austrian mobile and fixed telecom markets. Therefore end of June 2012 BWB and FCP both applied for an in-depth investigation of the case with the Cartel Court. The Cartel Court has ordered an economic expert to scrutinize and answer the relevant factual and legal questions, namely market definition and non-existence/existence/strengthening of TA's dominant position. The expert's opinion is pending, the Cartel Court's decision is due end of November the latest.

The BWB, FCP and the regulatory authority are closely cooperating with the European Commission which assesses the above mentioned, narrowly linked merger of H3G with Orange. Also the decision of the European Commission is expected by the end of November.

#### Moser - Styria

In September 2011 the biggest and the third biggest Austrian media company notified the creation of a joint venture in which they envisaged to bring in their regional woman magazines. The companies are the dominant players in (already highly concentrated) regional media markets, but are active in different regions.

The BWB filed an application for an in-depth review with the Cartel Court. The BWB was concerned that the companies could further strengthen their dominant position in the advertising markets in regional print media by combining also their activities with regard to advertisement in regional woman magazines. Furthermore, the BWB was concerned about a reduction in media plurality.

In its decision in February 2012 the Cartel Court divided the advertising market in advertisements in regional print magazines and advertisements in regional print media (ie daily and weekly newspapers). Therefore it only perceived a market dominant position in the region Tyrol which would however not be further strengthened by the merger. The Cartel Court also came to the conclusion that the merger would not lead to the creation of a dominant position in other affected regions. Furthermore, the Cartel Court did not see the reduction of media plurality, amongst others because it could not be proven that companies would be driven out of the market because of the merger and in general woman magazines were not most important for opinion making.

The Cartel Court therefore cleared the merger without remedies.



## **II. International co-operation**

The BWB puts great emphasis on intensifying international co-operation with other (Non-)European competition authorities both on bilateral and European level.

Besides many bilateral contacts at different occasions, the BWB invited several European competition authorities for intensive bilateral meetings. In addition, the BWB together with the Russian Antimonopoly Service FAS created an international Oil Working Group in January 2012. This group should allow the exchange of experiences and information between the competition agencies of Central and Eastern Europe. After the kick-off meeting in Moscow in January it has resumed in June in Vienna and in September 2012 in Kasan/Russia.

As Director General Thanner was appointed to preside the UNCTAD IGE 11<sup>th</sup> session in July 2011, he agreed with UNCTAD to make an additional contribution during the presidency with an emphasis on the Mediterranean region. As a first step a Round Table in Vienna was organised in December 2011 together with UNCTAD and with participation of the OECD and many national competition authorities from the region. The meeting allowed an exchange of experience and provided a forum for discussion of burning issues. Speakers included inter alia Commissioner Johannes Hahn from the European Commission, Professor Giorgio Monti from the EUI and Professor Maher Dabbah from the Queen Mary University. Hot topics were merger control, state aid, independence of competition agencies and powers of investigation. Many high level representatives of NCAs very openly discussed recent regional developments and how to create an environment of competition culture. Detailed information on this meeting can be found in the report on BWB's website [www.en.bwb.gv.at/Events/Seiten/MediterraneanRoundTable.aspx](http://www.en.bwb.gv.at/Events/Seiten/MediterraneanRoundTable.aspx). As a follow up to this initiative a meeting was organized in Geneva in the course of the UNCTAD yearly session on competition where future closer cooperation among the authorities of the Mediterranean region was discussed. Morocco proposed to take the lead and will organize a meeting in Morocco in November 2012 to discuss the exact organisation of the cooperation.

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

The BWB 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.

Besides numerous press contacts the BWB regularly releases information on important cases. Due to the amendments in the Cartel Act and the Competition Act, the BWB now publishes also information on notifications, the application for the examination with the Cartel Court by an official party, the decision clearing a merger under certain remedies as well as decisions of the Cartel Court in other than merger cases.

## **IV. Changes to competition laws and policies**

### **Planned reform of Austrian Competition Law**

In June 2012 the Federal Government introduced a bill which is expected to pass Parliament by the end of the year. The main topics of the reform are the following: It is planned to strengthen the Federal Competition Authority's competencies, especially regarding its powers to request information from undertakings, and to facilitate the cooperation with other authorities. Furthermore, the leniency programme will be aligned to the ECN Model Leniency Programme. The draft bill also contains some improvements with respect to the abuse of a dominant position

(e.g. establishing the concept of collective dominance) and as a result of a reform of the provision concerning agreements of minor importance hard core restrictions will be prohibited irrespective of the market shares. Finally, it is also envisaged to facilitate actions for damages because of infringements of competition law.

## **V. Resources of competition authorities**

By 30 June 2012 - additional to the Director General and the Deputy Director General - 14 lawyers, 7 economists, two other professionals and 4 persons as support staff, i.e. all together 29 persons, were working at the BWB. More staff is still needed. Each case handler is responsible for all cases (mergers and antitrust) in specific sectors.

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

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 seven professional judges who are partly involved in other matters and are supported by fifteen lay judges. Additionally, the Cartel Court relies on advisory opinions of independent economic experts of its own choice.

The Supreme Cartel Court comprises one panel being composed of three professional judges and two lay judges.

## **VI. Changes in special sectors: regulatory authorities**

### ***VI.1. Broadcast***

#### **Regulatory issues – Must carry obligation in favour of Austrian Broadcasting Corporation**

Section 20 of the Audiovisual Media Services Act stipulates that cable network operators shall retransmit the radio and television channels of the Austrian Broadcasting Corporation (ORF), if this is possible without any unreasonably major input and expense.

Liwest Kabelmedien GmbH (Liwest), an Upper Austrian cable network operator who offers both digital and analogue transmission of TV-programs to its customers, already retransmitted a special-interest ORF-channel (“SPORT+”) for its digital customers. Later on Liwest rejected a request from ORF to add “SPORT+” also to their analogue bouquet.

Liwest argued on the ground of Section 20 of the Audiovisual Media Services Act that the already ongoing digital (and unencrypted) transmission should be judged as sufficient in order to comply with the above mentioned obligation. Furthermore an obligation to retransmit “SPORT+” by means of analogue transmission would constitute a technical regression which itself would thwart legislator’s intention to foster future digitalisation of communication networks. ORF on the contrary pointed out that the Act on the Austrian Broadcasting corporation foresees a service provision mandate for ORF as regards his programmes including “SPORT+” and that ORF had to ensure inter alia due regard to diversity of opinions, which should be taken into account when applying section 20 of the Audiovisual Media Services Act.

The broadcasting regulatory authority Austrian Communications Authority (KommAustria) decided that Liwest had to retransmit “SPORT+” also to the benefit of its analogue customers. In KommAustria’s view the legislator’s intention when imposing the mentioned must carry

obligation was to ensure that as many as possible customers of a cable network operator should benefit from a must carry obligation.

The case is still pending at the Federal Communications Senate (Bundeskommunikationssenat), ie the appellate body.

### **Regulatory issues – Social networks**

In January 2012 KommAustria issued a decision regarding ORF's facebook pages. KommAustria ordered ORF to shut down 39 of its facebook pages on the grounds that the Act on the Austrian Broadcasting Corporation does not allow ORF to provide social networks and links to other cooperations with social networks.

The procedure was opened ex officio in July 2011. KommAustria surveyed 62 facebook pages whether they were to be judged as an online-offer of ORF as regards responsibility and factual control of the page. Finally, KommAustria found 39 facebook pages to be under determining influence of ORF and ordered these to be shut down.

The case is still pending at the Austrian Constitutional High Court (Verfassungsgerichtshof).

### **Regulatory issues – Market analysis**

Under the Austrian Telecommunications Act 2003 (TKG) KommAustria is required to carry out regular reviews and analyses of broadcasting-specific markets for the provision of communications networks and services ("broadcasting transmission services"). Currently three market analysis procedures are pending. The markets concerned are 1. market for analogue terrestrial transmission of FM radio broadcasting signals to end-users, 2. market for access and the digital terrestrial transmission of television signals to end-users using the MUX A and MUX B multiplex platforms and 3. market for access to transmission facilities and the digital terrestrial transmission of television signals to end-users.

Due to rulings issued by the European Court of Justice (ECJ) and the Austrian Administrative Court (Verwaltungsgerichtshof), it was necessary to comply with new procedural requirements in these ongoing market analysis procedures from the beginning of 2011: Since those rulings were issued, market analysis procedures under the TKG 2003 have no longer been conducted as single-party procedures or as procedures involving only the companies identified as possessing significant market power, but must involve all parties affected by the procedure.

After an evaluation of the comments received from the individual parties, a supplementary instruction to investigate unresolved material questions was issued in October 2011 regarding the market for analogue terrestrial transmission of FM radio broadcasting signals to end-users and regarding the market for access to transmission facilities and the digital terrestrial transmission of television signals to end-users.

The mentioned procedures are still pending.

## ***VI.2. Telecommunication***

### **Market analysis and implementation**

#### **1. Market definition and analysis: Wholesale market for high-bandwidth terminating segments**

With regard to the wholesale market for high-bandwidth terminating segments of leased lines and of Ethernet links with guaranteed bandwidths (exceeding 2.048 Mbit/s up to and including 155.52 Mbit/s), after representatives of the European Commission had voiced reservations about the draft measure of February 2010 (which subsequently would have led to a veto by the

European Commission), the Telekom-Control-Kommission (TKK) had decided in March 2010 not to use the draft measure as the basis for a decision. In later sessions, the TKK had decided to wait and monitor developments in other EU member states and to notify the draft measure again if another member state submitted a notification with similar content.

As the amendment to the Austrian Telecommunications Act 2003 (TKG 2003) was slated for an earlier entry into force at that time, the TKK planned in its session end of February 2011 to initiate new market definition proceedings and not to continue the ongoing market analysis procedure but to wait until the results of the new market definition procedure were available and to initiate a new market analysis on the basis of the amended Telecom Act once it had entered into force. Due to various delays, however, the process of amending the Telecom Act could not be completed prior to late November 2011. Towards the end of the reporting period, the TKK decided to discontinue this procedure due to the extensive revision of procedural rules governing the performance of market analysis proceedings under Art. 36 et seq. TKG 2003, which had transferred the responsibility for market definition from RTR (ie the Austrian Regulatory Authority for Broadcasting and Telecommunications) to TKK, and due to the simultaneous decision to initiate new market analysis proceedings in January 2012.

## 2. Review of market analysis obligations

### VoB-only reference offer

In addition to other obligations imposed on Telekom Austria (TA) due to its position of significant market power identified on the markets in question, the TKK's market analysis decisions on the retail markets for access to the public telephone network at a fixed location for residential and non-residential customers required TA to offer a wholesale VoB access product which alternative operators can use without simultaneously purchasing one of TA's broadband Internet products, regardless of whether TA itself offers a retail VoB product. TA was also obliged to design this VoB access product so that alternative operators are able to offer access to and use of VoB-based voice telephony services on a non-discriminatory basis. The VoB access product has to be provided with a bandwidth of at least 192/192 Kbit/s, including a data volume of at least 2.4 GB (total upload and download volume). TA was also required to publish the corresponding reference offer for a VoB access product on the company's web site within two months and to update the reference offer on a regular basis. Upon publication, this reference offer was to replace the offer for PSTN resale of a voice telephony access service based on real-time signal transmission; this offer had been required under the previous market analysis decisions but the service itself did not prove to be viable on the market.

Following publication of the reference offer mid November 2010 as part (Annex 5) of the reference offer for broadband Internet access, TKK instructed RTR to review the reference offer in order to ensure compliance with the market analysis obligations. After a public consultation from December 2010 to January 2011 and further modifications of the reference offer by TA, TKK decided in February 2011 not to require additional changes to the above-mentioned reference offer and to discontinue the review procedure.

### Reference offers for unbundling and virtual unbundling

In the market analysis decision M 3/09 of September 2010 referring to the wholesale market for physical network infrastructure, the regulatory authority had found Telekom Austria (TA) to have significant market power on this market. As the decision had required TA to publish various reference offers (for physical unbundling, for access to ducts and dark fibre as ancillary services and for virtual unbundling), TKK instructed RTR to conduct a comprehensive review of the reference offers in December 2010. The two reference offers were also submitted to a public consultation among market participants.

In parallel to the consultation procedure and after receiving the extensive comments and opinions submitted, RTR held several meetings with TA in which the individual elements of each reference offer were reviewed on the basis of the input received from market participants. In the course of the review process, TA submitted several adapted versions of the offers. As it was not possible to reach agreement on all of the contentious points discussed, TA was instructed by a letter in July 2011 to make changes to several points disputed by TKK in the reference offers. TA fulfilled this instruction by submitting reference offers appropriately revised after which TKK decided in July 2011 to resume the procedure.

#### Interconnection reference offer

TKK issued official decisions with regard to Telekom Austria (TA) in Procedures M 4/09 (Fixed-link origination) and M 5/09 (Fixed-link termination). TA had also been identified as having significant market power on the markets for fixed-network origination and individual fixed network termination in July 2010 and had been obliged to publish a reference offer for its fixed-network origination and fixed-network termination services. Due to the transition of its own network to a next-generation network (NGN), TA was also required to prepare a migration plan in cooperation with the alternative operators.

End of May 2011, this NGN migration plan was published as Annex 13a of the reference interconnection offer of TA. As the other provisions governing the reference interconnection and the migration plan complied with the market analysis requirements, no further steps had to be taken.

#### **Further proceedings**

Further topics of proceedings before the national regulatory authority with effects on the competitive situation of market participants were e.g.

- the imposition of a penalty on a mobile broadband service provider in the 3,5 GHz range due to non-compliance with coverage obligations as stated in the frequency allocation decision
- various dispute settlement decisions regarding facility sharing between fixed network operators,
- a position paper on the topic of infrastructure sharing in mobile networks to inform mobile network operators about the TKK's position on the shared use of infrastructure in cooperation arrangements,
- two dispute settlement proceedings regarding service features of "virtual unbundling".

#### **Legal initiatives**

A major Amendment to the Telecommunications Act entered into force on 22 November 2011 (Federal Legal Gazette I No. 102/2011; several consumer protection provisions were scheduled to enter into force on 21 February and 21 May 2012). The Amendment implements the European directives 2009/136/EC ("Better Regulation") and 2009/140/EC ("Citizens' Rights") on national level.

The amendment created approximately 30 new or expanded areas of responsibility for the regulatory authorities in charge of electronic communications. In addition to reinforcing the rights of users as mentioned above, the content of the amendment focuses on promoting efficient investments and innovation with regard to new and improved infrastructure by duly accounting for the risk borne by companies that make such investments and by allowing cooperation arrangements in order to diversify investment risk. In addition, a regulatory concept for electronic communications to be prepared by the TKK is intended to enhance the predictability of regulation. In the future, the regulatory authority will also be responsible for certain aspects of network security and network integrity.

As a major point, the Amendment introduced new provisions with regard to the bundling of market definition (previously by a Telecom Market Regulation adopted by RTR and now forming

an integral part of the market analysis by TKK) and market analysis (in the form of legal proceedings completed by an administrative decision of the Telecom Control Commission which now covers market definition, designation of undertakings with significant market power and the imposition of regulatory remedies like e. g. access, cost-control, non-discrimination or transparency) in one single process, an extension of the repetition period between market analyses from two to three years and the introduction of structural separation as an additional potential remedy.

In addition, the coordination process with the European Commission and the Body of European Regulators for Electronic Communications concerning draft market analysis decisions by the NRA was revised and the Commission's participation rights extended insofar as the Commission can now raise serious doubts (but no veto) with regard to specific obligations proposed by NRA's.

### ***VI.3. Energy***

#### **Investigation into the functioning of the Austrian electricity market**

In the aftermath of the financial crisis of 2008 electricity wholesale prices have fallen dramatically and have remained at fairly low levels since then. During 2011 the Austrian Energy Regulator's (E-Control) observations and analyses with regard to the development of household prices have highlighted some important unanswered questions. In particular, the dramatic price decrease at electricity wholesale trading venues after the collapse of Lehman Brothers and the subsequent economic downturn have hardly left a visible mark on Austrian retail prices. Within the theoretical scope of E-Control's analyses and models this increasingly large price differential cannot be adequately explained.

E-Control's models and evaluations are based on the regular observation of developments on wholesale and retail markets. Any subsequent analysis is however strictly limited in scope due to the fact that only publicly available data are used. Because of the unexplained difference between retail and wholesale prices and the lack of sufficient data E-Control decided to launch an investigation into the functioning of the Austrian electricity market to update E-Control's models with actual company data. To this end an enquiry was sent out in August 2011 to 19 Austrian electricity suppliers and it was comprised of a few targeted, competition-relevant questions. The goal of this investigation was to analyse the gross margins and procurement behaviour of Austrian retail market suppliers.

By law E-Control is authorised to access company records (§34 E-ControlG) and to undertake market investigations (§21(2) E-ControlG) as well. However, since companies did not supply any data on these competition issues this matter is now awaiting a decision from the Austrian constitutional court.

#### **Fuel Price Regulation in Austria**

The Federal Ministry of Economy, Family and Youth established a legal provision regarding fuel price changes. Since January 2011 gas station operators are allowed to rise prices just once a day at noon (between July 2009 and December 2010 price increases were only allowed at midnight if the gas station was open 24 hours otherwise at start of work, unmanned gas stations could only rise prices until 8.30 a.m.), price decreases may be conducted at all times. Additionally, operators were not allowed to change prices (even no decreases) between Wednesday, 6 June 2012 11 p.m. and Sunday, 10 June 2012 midnight (Thursday, 7 June 2012 was a public holiday in Austria) as well as between the first two summer holiday weekends (again starting on Thursday at 11 p.m. until Sunday midnight).

The regulation of just one price increase a day should make the market more transparent and should therefore help consumers to compare prices.

The regulation about stable prices on public holiday and summer holiday weekends was intended by the Ministry to contain unjustified price increases. As the prices of fuels could be changed neither up nor down in the mentioned periods, it was ensured that the operators had to fix prices that were well balanced for the consumers. If it had been allowed to reduce prices during these periods, the output prices would have been certainly much higher in total, starting with high prices lowered later on. It was however the explicit objective to prevent such price peaks as these would not have been any improvement to the original base determination.

Currently, the Austrian Federal Competition Authority evaluates the implication of the price freeze.

### **Transparency Tool for Gasoline Prices: Data Bank**

In July 2011 a new law on transparency of prices was approved by the Austrian Parliament. This law stipulates that all gasoline stations have to send any price change within 30 minutes to E-Control, the Austria Energy Regulator, which makes the prices available to drivers via a free internet tool. The main idea is to provide to any point in Austria the nearest 10 stations on a map as well the nearest 5 stations with price information.

The Austrian Federal Competition Authority has been legally empowered to get access to the data for its investigations. This provides the BWB with the opportunity to follow price changes - if individual cases arise - more easily. In addition, it enables the BWB to make an inquiry into oligopolistic price behavior.