

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN AUSTRIA 2014 - 2015

Executive Summary

In 2014 - 2015 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 2014 - 30 June 2015) an emphasis was again put on the food retail market. However, also in other industries the BWB continued to uncover hard core cartels, leading to several procedures with the Cartel Court and the imposition of a total of fines of more than € 23 million. Furthermore, the BWB put much effort into the investigation of several big mergers. Last but not least, the BWB continued to put emphasis on intensifying international co-operation not only within Europe but also outside the European Union, amongst others by organising an international two-day conference.

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 2014 can be viewed at <http://www.justiz.gv.at/web2013/html/default/8ab4a8a422985de30122a92c3e89637f.de.html>. The annual report of the BWB can be found at http://www.bwb.gv.at/Zusammenschlusse/Zusammenschlusse_2013/Documents/Taetigkeitsbericht%202014_HOMEPAGE_4.9.pdf.

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

a) Summary of activities

In the period under review (1 July 2014 - 30 June 2015) 47 new cartel cases were examined, leading to a substantial number of dawn raids, many of them again 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.

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

ba) Agreements, recommendations and sector inquiries

Food Retail Market

The BWB has continued its enforcement activities concerning resale price maintenance. Following numerous dawn raids, further fines amounting to a total of approximately € 2,5 Mio have been imposed by the Cartel Court on 3 breweries, one producer of dairy products, one producer of mineral water and 4 minor food retailers during the reporting period (July 2014 - June 2015). The aforementioned decisions were based on settlement agreements between the concerned companies and the BWB.

Furthermore, the Cartel Court has imposed a fine of € 3 Mio on a major food retailer for resale price maintenance concerning dairy products. The decision has been appealed; a decision by the Supreme Court is expected in late 2015 or early 2016.

A number of investigations and contentious proceedings are still ongoing, in particular further proceedings against one large food retail company for resale price maintenance concerning a number of different product groups.

Cartel in freight forwarding sector

In last year's report a detailed account was given on a cartel in the freight forwarding sector. Many companies organised in an association (SSK) had agreed on and issued collective tariffs for domestic combined shipments of its members. Moreover, the scheme included an agreement on sharing certain customers. The proceedings stretching over almost five years included a preliminary ruling of the European Court of Justice.

In December 2014 the Cartel Court eventually imposed fines totalling approximately € 17,5 million against 30 companies active in the freight forwarding market for the infringement of Art 101 TFEU by agreeing on the tariffs for domestic combined shipments. A declaratory decision was taken against one undertaking enjoying immunity under the leniency programme.

Against the background that most of the undertakings concerned ascertained the BWB of their participation in the infringement, the Cartel Court broadly confirmed the legal assessment of the BWB and the reasoning applied in calculating the level of fines applied for.

Wholesale steel traders fined for horizontal restrictions

The Cartel Court imposed fines amounting to overall € 430,000 on four wholesale steel traders for collusion and concerted practices concerning the pricing of commercial steel. One company made a leniency application and was granted immunity. Concerning one further company, a fining decision is expected shortly. All companies have agreed to a settlement.

The decisions correspond to the submissions made by the Austrian Competition Authority between November 2014 and May 2015. The information provided by two leniency applicants played an important role in the investigations.

Between January 2012 and November 2013, 16 multilateral meetings took place, during which a series of competition law infringements occurred. In particular, the companies engaged in information exchange, agreed on minimum prices and coordinated a contemporaneous, uniform modification of their terms of payment, which they attempted to implement in August 2012.

A series of mitigating circumstances were taken into account in determining the fine. The companies only implemented the agreements to a very limited extent and often deviated from the agreements through their conduct on the market. Also, the enrichment derived from the

infringement has been at most very marginal. A series of companies also terminated their participation before the beginning of the investigations. Furthermore, all companies were granted reductions for settling the case.

Hotel online booking platforms

The BWB has been undertaking its investigations into hotel online booking platforms in close contact with other European authorities looking into this issue and with the European Commission coordinating these efforts. The core concerns have been price- and other parity-clauses (i.e. room availability, clauses concerning other conditions). These restrictions figure also under the term of MFN-clauses (MFN = "Most Favoured Nation").

Last but not least due to the investigations of several European authorities, two major companies submitted proposals for remedies and changed their contracts with the hotels accordingly. The proposals aim at narrowing the MFN-clauses but not at abolishing them (so-called narrow MFN). In its essence the proposals are about reducing the MFN-clauses to distribution channels using websites.

To check how these changes might affect the potential concerns the BWB undertook a market test addressing all Austrian hotels:

By receiving 570 answers (515 of them answering all questions) the rate of return was deemed quite satisfying. About 45 % of the respondents assessed the price-parity-clauses as a very strong impediment to their room of manoeuvre in responding to market demand, 28 % judged it as a "simple" impediment and only 11 % saw no problems. The answers with respect to parity-clauses concerning room availability and other conditions yielded similar statistical distributions of objections and approvals. The review revealed clearly the importance of online-platforms for the tourism industry: only 3 % of hotels have no contracts, a vast majority are partners to several platforms; online platforms are generating 37 % of overnight-stays. But half of the bookings are still generated by more traditional channels (telephone, e-mail etc.); the hotels' own websites count for only 13 % of night-stays.

The BWB drew the conclusion that narrowing MFA-clauses to websites might prove to be a viable remedy for its concerns by balancing the competitive latitude of the hotels with the benefits booking platforms provide.

Cartel in the ski-sector

In April 2015 a fines decision was taken regarding four sports article retailers of a famous ski-resort in western Austria. Three of them met to agree on prices of ski and ski equipment, as well as prices for the rental and the service of this equipment. Furthermore, the prices for winter clothing and lockers for ski equipment were fixed. Additionally, they recommended the fixed prices to the other smaller sports article retailers and invited them to join the cartel meetings, as did the fourth retailer in this case. In total they received fines amounting to nearly € 420,000. The four sports article retailers settled the case after discussions with and helping the BWB to clarify the facts.

Market study of mobile telecom sector

In August 2014, the BWB launched a market analysis of the Austrian mobile telecom sector in view of quantifying price increases which have been taking place for customers and understanding their causes. The investigation is being carried out in close collaboration with the Austrian telecoms regulator, the Austrian Federal Cartel Prosecutor and labour and consumer associations.

Reasons for the market study are the major changes the Austrian mobile telecom services market has undergone in 2012/2013: In 2012, the European Commission approved the

acquisition of Orange Austria by Hutchinson 3G Austria (COMP/M.6497) subject to remedies. The remedies accepted for the four-to-three concentration were aiming at lowering market entry barriers for potential mobile network operators (MNOs) and virtual providers (MVNOs). Additionally, a smaller accompanying merger regarding the acquisition of Yesss! (a no-frills brand of Orange) by the former monopolist was cleared by the Austrian Cartel Court without remedies.

At the time, the BWB was concerned that the mergers would impede competition and the submitted remedies would not suffice to address the competition concerns.

In fact, for the time span the remedies were in force no market entry did materialize, and Austria's MNO's continuously increased prices for new and pre-existing costumers. It took until the beginning of 2015 that new NVNO's entered the Market (UPC, Hot, Vectone Mobile) and the price increase in the sector ceased.

It is intended to finalise the market investigation in autumn 2015.

Guidance Paper Published for Funeral Services Providers

In October 2014, the BWB published a short guidance paper ("Standpunkt") on competition issues arising in the area of funeral services.

Formerly heavily regulated with legal monopolies on most of the cemeteries in Austria, the funeral services business has been liberalised since 2002. Nevertheless the situation has been slow in adapting to the new legal environment. Over the past years the competition authority has received a number of complaints regarding incumbents impeding competitors from entering the local markets.

The BWB has therefore developed a general framework for analysis and enforcement which it has consistently applied over the last three years.

The guidance paper summarizes the BWB's experience and provides guidance for the stakeholders (cemetery administrators, funeral service providers, communities, etc.). It focuses on the issues concerning essential facilities and provides recommendations for securing market access.

The main issues addressed are: separation of cemetery administration from the funeral services business; setting up clear and transparent rules for the use of essential facilities (avoiding excessive bureaucracy); and properly informing clients.

Use of forensic software at dawn raids conform to law

A large food retailer filed a complaint with the Higher Administrative Court alleging that the BWB took disproportionate measures in the course of a dawn raid in 2013, in particular by using a forensic IT software ("spy software"). In January 2015, the Higher Administrative Court decided that the measures taken by the BWB were covered by the dawn raid court warrant, including the use of OS Triage.

The Court also confirmed the principle that all data, including IT data, can be saved which can be accessed from the location covered by the dawn raid court warrant, thereby including data saved on external servers, irrespective where it is stored. In addition, it confirmed a legal basis for the use of forensic IT.

1.2. Mergers and acquisitions

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

Between 1 July 2014 and 30 June 2015 a total of 340 national concentrations were notified.

In three cases the parties withdrew the notification of the merger in phase I. In one case the parties agreed on remedies in phase I, thereby avoiding a phase II proceeding.

In one case an application for in-depth investigations was filed by both official parties leading automatically to phase II proceedings. The Cartel Court cleared the merger only subject to remedies.

b) Summary of significant cases

Funke / Axel Springer

Following to the mergers implemented in 2014 (see last year's report), Funke and Axel Springer (AS) filed in May 2015 with the BWB the creation of a joint venture for the marketing of (mainly) print and online advertisement in the media owned by Funke and AS.

The BWB has already dealt with the impact on competition of the cooperation between Funke and AS in advertising sales in the two mergers filed in 2014. Therefore those mergers have been cleared by the Cartel Court with specific conditions regarding the marketing cooperation envisaged by Funke and AS. Precisely the parties were obliged to refrain from international (ie specifically addressing Austrian markets for magazine advertising) marketing of advertising in bundles of magazines owned by Funke or AS.

In the new procedure in 2015, the BWB focused to safeguard that those conditions would in future as well be observed by the Joint Venture of Funke and AS. As the parties agreed to correspondent commitments the merger could be cleared in phase I.

Voestalpine Switch System GmbH/WS Service GmbH

In April 2014 the Voestalpine Switch System GmbH ("VAS") notified the acquisition of 49% of the shares of WS Service GmbH ("WS"). WS is a subsidiary of the OEGB Infrastructure AG ("OEGB-Infra"). The proposed transaction affected the market for switch services.

Since VAS is in a dominant position in the primary market for switch production nationally, the BWB had concerns regarding a market foreclose in the secondary market of switch services. For this reason, both the BWB and the FCP filed an application for in-depth investigation with the Cartel Court in May 2014.

On the basis of two experts reports (an economic expert and a technical expert, respectively) the BWB together with the FCP finalised a list of remedies. The Remedies include in particular:

- an information transfer concerning switches to competitors of WS by VAS,
- a temporary limitation of the turnover of the new joint venture on the affected market,
- the commitment for an open competitive bidding process for switch services by the OEGB-Infra,
- an annual reporting of the competitive bidding processes and the evolution of the market of switch services by an expert for a time span of five years.

After reaching an agreement on these remedies the BWB and the FCP withdrew their application for in-depth review and the merger was cleared in October 2014.

Merger of breweries: Brau Union/Vereinigte Kärntner Brauereien

In November 2014 the brewery Brau Union notified the intended change from joint to sole control of the brewery business of Vereinigte Kärntner Brauereien (VKB). Due to the high market concentration in the region Carinthia and Osttirol both the BWB and the FCP filed an application for in-depth review with the Cartel Court. In close cooperation with the BWB and the FCP the parties prepared a remedy proposal which was market tested. About 100 information requests were sent to buyers from the food retail sector and catering industry as well as competitors. The overwhelming majority of respondents considered the proposed remedies as sufficient or the merger even unproblematic.

Consequently, the Cartel Court cleared the merger with the following remedies in February 2015:

- continuation of the brewery business of VKB, including the brewery in Villach, for 5 years
- separate market appearance of Brau Union and VKB including the continuation of the existing distribution system
- in case of stable economic conditions prolongation of the two remedies mentioned above for a total of 8 years
- prohibition to acquire breweries and beverage wholesalers by Brau Union in the region Carinthia and Lienz (Osttirol) for 8 years.

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.

In December 2014 the BWB organised a two-day conference in Vienna. More than 200 participants from more than 30 countries were attending the conference. As on the first day the **Competition Conference** was opened only for National Competition Authorities and selected Institutions, experiences on best practices in investigations and settlement procedures were exchanged. On the second day which was open for the public, independence, institutional design and investigative and decision making powers of national Competition Authorities versus due process and defence rights were discussed. The high-ranking conference speakers included Vice-President of the European Court of Justice Koen Lenaerts, who was giving a lecture about due process in competition cases, Director General for Competition Alexander Italianer, who pointed out the necessity of strong national Competition Authorities and the associated need of adequate staff, budget and powers, President of the Belgian Competition Authority Jacques Steenbergen, who talked about the independence and institutional structure especially of smaller Competition Authorities, and President of the French Competition Authority Bruno Lasserre. More information can be found at <http://www.en.bwb.gv.at/Events/Seiten/Competition-Conference-2014.aspx>.

As reported last year, a **Euro-Mediterranean Competition Forum (EMCF)** was created in 2012, supported by a coordination committee composed of the Competition Council of Morocco, BWB and the United Nations Conference on Trade and Development (UNCTAD). In July 2014 a third workshop was held in Geneva on the independence and accountability of competition authorities. Many National Competition Authorities took part in that Workshop and had a fruitful discussion. As a result the importance of having strong judicial and administrative powers for competition agencies as well as the possibility of appeal to a higher judicial body was underlined. Furthermore, independence, if possible guaranteed by statute, was considered an essential issue for younger agencies in ensuring effective competition law enforcement. The next EMCF workshop will be hosted by the Competition Authority of Malta in January 2016. Topics like the

new coordination team, future working program, economic analysis and impact assessment are planned to be on the agenda.

The BWB signed a **cooperation agreement** with the Competition Authority of Albania and Tunisia in December 2014 and Egypt in June 2015.

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.

The BWB started to organise the so-called "**Competition Talks**" in October 2012. Since then the Lunch Debate Event is taking place every second month dealing with hot topics in competition matters. The debates are meant to attract companies' management and antitrust related practitioners in order to raise awareness of competition offenses. About sixty representatives from companies, lawyers and public offices are attending the events. During the reporting period the competition talks tackled topics such as dawn raids, the cartel law from the view point of the Ministry of Justice, the new Directive on Private Enforcement on EU Competition Law and the way forward in its implementation, liberal professions, online trade in the focus of competition authorities, competition law and statutory health insurance.

In 2015 the BWB organized with the partner firm Dorda Brugger Jordis and ELSA (European Law Students' Association) the first BWB **Moot Court**. Interested students from Austria had the opportunity to apply for the Moot Court. Six teams each consisting of three people from different universities prepared oral and written pleadings for this competition. The teams were supported by law firms and professors. After the application deadline, the best male and female students were selected. The jury consisted of persons from the BWB and Dorda Brugger Jordis. The review of the pleadings and the hearing took place according to specified criteria. Here, among other things, the facts and legal analysis, argumentation, rhetoric, teamwork and time management of the participants played an essential role. The jury had the great role to determine the best team and best speaker. The team from the Vienna University for Economics and Business Administration convinced the jury and were awarded as the best team. The best speaker was a student of the Faculty of Law of the University in Innsbruck (Tirol). The BWB intends to organise a Moot Court also next year to pique the students' interest in Cartel Law.

Besides numerous press contacts the BWB regularly releases information on important cases. The BWB publishes information on notifications, the application for the examination with the Cartel Court by an official party and the decision clearing a merger under certain remedies. The Cartel Court is obliged to publish information on decisions in other than merger cases.

IV. Changes to competition laws and policies

Changes to the Federal Act Against Unfair Competition (UWG):

In spring 2015 an amendment on the Federal Act Against Unfair Competition - UWG - (Federal Law Gazette I No. 49/2015) passed the Austrian Parliament. The changes do not have substantial character. Clarifications bring fine-tuning in the wording according to the wording of the Unfair Commercial Practice Directive: The already existing major general clauses concerning aggressive (§ 1a UWG) and misleading commercial practices (§ 2 UWG) have been formally

supplemented or clarified by explanatory examples according to the Directive on Unfair Commercial Practices.¹

Reform of Austrian Competition Law

After the substantial reform of the Austrian Competition Act and the Cartel Act (KaWeRÄG 2012 - entered into force on 1 March 2013) there are on-going discussions for further reforms. The Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (directive on antitrust damages actions) entered into force on 26 December 2014 and Austria needs to implement it in the legal system by 27 December 2016. Further improvements are also discussed concerning limitation periods, the National Competition Authority's powers of inspection and measures to strengthen the transparency of decisions.

V. Resources of competition authorities

By 30 June 2015 - additional to the Director General and the Deputy Director General - 17 lawyers, 4 economists, one other professional and 6 persons as support staff, i.e. all together 30 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 five 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

„radiothek.ORF.at“

ORF, the Austrian public broadcaster, planned to provide a live-streaming service and an on demand service of his FM-programs on a single platform, the „radiothek.ORF.at“. The service was designed to be similar to the existing platform for video content, the “TVthel.ORF.at”. KommAustria allowed the service under certain conditions, the BWB raised complaint, so the decision has not yet been binding (cf. <https://www.rtr.at/de/m/KOA1127715004>).

Digital radio DAB+

KommAustria, the national regulatory authority, had to emit for the period from May 2015 to May 2017 a new digitization concept. As one of several matters KommAustria codified the preparation

¹ Concerning § 1a UWG (aggressive commercial practices) there have been made formal supplements (e.g. focusing on time, location, nature or persistence, the use of threatening or abusive language or the abuse of any specific misfortune). The facts of recent misleading advertising in § 2 of the UWG had to be supplemented by the individual facts for combating misleading business practices in Article 7 Directive on Unfair Commercial Practices. E.g. essential information has to be delivered on time, not in an unclear, unintelligible, ambiguous or untimely manner and the commercial purpose has to be indicated. The former § 30 (Advertising with regard to bankruptcy) is now repealed.

of a tender for digital terrestrial radio in the standard DAB+ in the year 2017. As preliminary action, KommAustria will survey the interest in the diffusion of radio in the DAB+-standard in 2016. As preparation of the tender on broadcaster-side a DAB+-trial in Vienna started in May 2015 (cf. <https://www.rtr.at/de/m/Digikonzept2015>).

Must Carry

Upon an application of DORF TV GmbH, a local, non-commercial TV-broadcaster, KommAustria had to accord a must carry requirement in the cable-TV network of LIWEST Kabelmedien GmbH, a regional cable-TV operator. KommAustria had to determine a reasonable fee for the broadcaster. The decision was confirmed by the Federal Administrative Court (cf. Federal Administrative Court, 15.09.2014, W194 2001567-1/7E) (cf. <https://www.rtr.at/de/m/KOA196013093>)

DVB-T to DVB-T2 switch-over

Starting with October 2014 KommAustria permit the start of the switch-over from DVB-T to DVB-T2. The switch-over will be done gradually in several steps, and started with the multiplex-platform MUX B in the region Carinthia. The switch-over shall be accomplished end of 2017 with the multiplex-platform MUX A in the region of Vienna. This switch-over is one of the requirements for the clearing of the 700 MHz-band from broadcasting services, as announced in ministry lecture in summer 2015.

Short reporting right

Sky Österreich Fernsehen GmbH, an Austrian satellite TV-broadcaster, has been obliged by KommAustria to provide their emitted signal of broadcasted football-matches of the supreme division to oe24 GmbH, an Austrian cable-TV broadcaster. The oe24 GmbH is entitled to record these signals in order to produce and send short reports in the TV program "oe24" under certain, in the decision specified, conditions.

The decision is only partly binding (cf. Federal Administrative Court, 15.04.2015, W194 2103335-1/4Z). Apart the proceeding is pending before the Federal Administrative Court. (cf. <https://www.rtr.at/de/m/KOA380015009>)

VI.2. Telecommunication

Market definition and analysis

Due to the Wholesale Access Commitment of Hutchison 3G Austria Holdings GmbH published in Nov. 11, 2012 (<https://www.drei.at/portal/de/bottomnavi/ueber-drei/wholesale/downloads/>) several Austrian companies decided to start MVNO activities based on wholesale services provided by Hutchison Drei Austria GmbH.

The Telekom-Control-Kommission ("TKK") as the sector-specific National Regulatory Authority initiated new market analysis proceedings regarding call termination in the public mobile network of UPC Telekabel Wien GmbH in December 2014 and adopted a final decision in June 2015 which found UPC to have significant market power on its individual mobile termination market and imposed several specific obligations: obligation to interconnect (directly and indirectly), obligation not to discriminate and a price control obligation. Termination rates were calculated according to the European Commission's recommendation on regulation of termination rates in fixed and mobile networks within the European Union (2009/396/EG, OJ L 124/67, "TR Recommendation") a pure LRIC rate of 0.8049 EUR cents is an approximation to the long-run marginal cost. As in earlier decisions concerning mobile termination rates ("MTR") of other operators, the respective MTR of UPC were set at 0.8049 EUR cents per minute.

In addition, TKK opened its regular – now triennial – market analysis proceedings regarding all telecom markets potentially relevant for sector-specific regulation in March 2015. The proceedings are still pending.

Frequency allocation

Frequency auction with regard to 800 MHz, 900 MHz and 2.100 MHz (“Multiband auction”) – Confirmation of auction results in court proceedings

The multiband auction of the 800 MHz, 900 MHz and 1800 MHz frequency bands originally scheduled for September 2012 but postponed due to the Hutchison-Orange merger was completed in October 2013. The allocation decision was issued to the parties in November 2013. All three bidders succeeded in securing spectrum and auction revenues amounted to slightly over EUR 2 billion (A1 Telekom: EUR 1,029 billion, T-Mobile Austria: EUR 654 million, Hutchison 3 G Austria GmbH - now Hutchison Drei Austria GmbH -: EUR 330 million). Complaints against the decision filed by T-Mobile and Hutchison with the Constitutional Court were dismissed in March 2014. Following withdrawal, the Hutchison complaint with the High Administrative Court was declared baseless and dismissed in June 2014.

T-Mobile’s complaint with the High Administrative Court was dismissed in December 2014 and the allocation decision of the TKK was thus considered final. The High Administrative Court confirmed TKK’s view that the residual term of the GSM frequencies was not affected by the transition from the TKG 1997 licensing system to unlimited general authorisation. It also confirmed that the auction revenues are not a relevant factor for judging the success a frequency auction. The essence of the court ruling was that the fact that revenues were higher than the parties involved expected did not represent grounds to consider the decision unlawful. Nor was it an indication that the revenues were above the ‘market value’ of the frequencies, rather, one of the purposes of the auction was in fact to determine the price that bidders were willing to pay, and thus the market value of the frequencies.

The Court also did not share the criticism that the chosen auction design and the spectrum caps had been set too ‘loosely’ and therefore did not comply with the provisions of the TKG 2003 with regard to promoting competition; the authorities’ procedures were confirmed as correct. In addition, the court held the measures taken by the TKK to prevent collusion in the auction to be legally permissible. The court ruling thus puts an end to any obstacles to rapid expansion of mobile broadband services by telecom operators.

Refarming – Use of the 2,1 GHz frequency range for LTE

After opening proceedings concerning refarming of frequencies in the 2,1 GHz range in September 2014, TKK decided in August 2014 to reallocate existing frequency usage rights for all operators concerned (A1 Telekom Austria AG, T-Mobile Austria GmbH, Hutchison Drei Austria GmbH) in the UMTS range (2.100 MHz) insofar as those frequency bands could now also be used for LTE (4G).

All mobile network operators benefit from a liberalisation of the 2.1 GHz frequency range since the reallocation allows them to use a larger share of their existing frequency spectra than before to provide broadband services via LTE (which in turn benefits end users). As a technology for supplying broadband services, LTE is clearly much better suited than GSM or UMTS.

Reallocating UMTS frequency usage rights as soon as possible was necessary to promote competition within the LTE broadband sector. The positive economic effects triggered by the regulatory authority’s decision include more capacity for broadband services, more coverage spectrum to supply rural areas with broadband and sustained cost savings due to higher technical efficiency.