ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN AUSTRIA 2012 - 2013

Executive Summary

In 2012 - 2013 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 2012 - 30 June 2013) an emphasis was put on the food retail market, leading to a remarkable number of dawn raids. However, also in other industries the BWB observed wide spread practices in vertical and trilateral price fixing, resulting in fines amounting to € 26 Mio. For the purpose of competition advocacy and prevention of future infringements the BWB therefore published guidelines clarifying the BWB's legal assessment of the practices involved. Furthermore, the BWB put much effort into the investigation of some big mergers, eg in the telecommunication market and in the media sector. An amendment to the Austrian Competition Act and to the Cartel Act entered into force on 1 March 2013 and brought further improvements and clarifications, eg by harmonizing the Austrian limits for de minimis cartels with European law, introducing a stop-the-clock provision in merger proceedings, clearly regulating the concept of collective dominance, improving BWB's powers to request information and clarifying and improving BWB's powers regarding inspections of premises. Consequently, the BWB also revised the existing Manual on Leniency. 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 2012 can be viewed at http://www.justiz.gv.at/web2013/file/8ab4a8a422985de30122a92c3e89637f.de.0/bkanw-t%C3%A4tigkeitsbericht-2012.pdf;jsessionid=833853E3B971218466275B96548E1C5B. The annual report of the BWB can be found at http://www.bwb.gv.at/Fachinformationen/Bußgelder/Documents/Tätigkeitsbericht%202012.pdf.

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

a) Summary of activities

In the period under review (1 July 2012 - 30 June 2013) 73 new cartel cases were examined, leading to a substantial number of dawn raids, many of them in the food retail market. In addition, 32 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

Cartel investigation of the freight forwarding sector: CJEU ruling clarifies that legal advice is not a safeguard

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 decided to refer two questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling (C-681/11). The Court of Justice was asked, first of all, whether a company which has infringed EU competition law may escape imposition of a fine where the infringement has resulted from that undertaking erring as to the lawfulness of its conduct on account of the terms of legal advice given by a lawyer or of the terms of a decision of a national competition authority. The second question that the Court has been asked is whether, where a company participates in a leniency programme, the national competition authorities may, whilst finding an infringement of competition law, refrain from imposing a fine upon it.

On 18 June 2013 the CJEU ruled that first of all that the fact that a company has characterised its conduct wrongly in law cannot have the effect of exempting it from imposition of a fine, save in exceptional cases, for example where a general principle of EU law, such as the principle of the protection of legitimate expectations, precludes imposition of a fine. However, a person may not plead breach of the principle of the protection of legitimate expectations unless he has been given precise assurances by the competent authority. Consequently, legal advice given by a lawyer cannot, in any event, form the basis of a legitimate expectation on the part of a company that its conduct does not infringe EU competition law or will not give rise to the imposition of a fine.

As for the national competition authorities, since they do not have the power to adopt a decision concluding that there is no infringement of EU law, they cannot cause companies to entertain a legitimate expectation that their conduct does not infringe the competition rules. Moreover, at the time the Austrian Cartel Court examined the companies' conduct on the basis of national competition law only.

Consequently, the Court decides that EU competition law must be interpreted as meaning that a company which has infringed that law may not escape imposition of a fine where the infringement has resulted from the company erring as to the lawfulness of its conduct on account of the terms of legal advice given by a lawyer or of the terms of a decision of a national competition authority.

Secondly, the Court notes that EU competition law does not provide expressly that the national authorities have the power to find an infringement of the EU competition rules without imposing a fine, but it does not exclude that power either. The Court states that such a decision not to impose a fine can be made under a national leniency programme only in so far as the programme is implemented in such a way as not to undermine the requirement of effective and uniform application of EU competition law. Thus, in the case of the Commission's power to reduce fines under its own leniency programme, the Court recalls that reduction of a fine for cooperation on the part of companies participating in infringements of EU competition law is justified only if such cooperation makes it easier for the Commission to carry out its task. The company's conduct must also reveal a genuine spirit of cooperation.

Finally, immunity from or not imposing a fine is possible in strictly exceptional situations only, such as where a company's cooperation has been decisive in detecting and actually suppressing the cartel, in order not to undermine the effective and uniform application of EU law.

Consequently, the Court decides that the national competition authorities may by way of exception confine themselves to finding the infringement without imposing a fine where the company concerned has participated in a national leniency programme.

Printing Chemicals Cartel: Decision of CJEU on third-party access to file

On 6 June 2013 the Court of Justice of the European Union (CJEU) held that EU Member States cannot adopt legislation that deprives plaintiffs of all rights to access evidence in a cartel file of an antitrust authority. The issue was referred to the CJEU in the context of a cartel damage claim filed before an Austrian court by a third party. The plaintiff had requested access to the file from the proceedings between the cartel participants and the Austrian Competition Authority, which also contained materials received as part of leniency applications.

The CJEU ruled that European Union law, in particular the principle of effectiveness, precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made available under a leniency programme, by third parties who are not party to those proceedings with a view to bringing an action for damages against participants in an agreement or concerted practice is made subject solely to the consent of all the parties to those proceedings, without leaving any possibility for the national courts of weighing up the interests involved.

Food Retail Market

Following the extensive sector inquiry in 2005 to 2007, the BWB has again focused on the food retail market since 2011. Enforcement activities were triggered amongst others by complaints. Meanwhile ex officio investigations and dawnraids were conducted on the premises of two leading food retail chains, accounting for approximately 65 % of the market, as well as of a large number of producers. In total, the BWB dawnraided more than two dozen companies (food retailers as well as producers) since 2012. A large number of product categories were concerned.

Several food retailers and their suppliers are alleged to have participated in cartels, infringing Art 101 AEUV and § 1 Austrian Cartel Act 2005, by fixing consumer prices vertically and trilaterally.

While several proceedings are still pending, in 2013 some proceedings could be ended via a settlement procedure. Following ex officio investigations and dawnraids conducted by BWB on the companies' premises, several companies cooperated with the authority in bringing the infringement to an end. Since the BWB is one of the smallest competition authorities in Europe (20 case handlers) settlements allow swift resolution of cases and at the same time ensures fast compliance with competition law.

In January 2013 the Cartel Court handed down a fine of € 1.125 Mio against the dairy producer Berglandmilch. The Court held that Berglandmilch agreed on consumer prices with several food retailers between 2006 and 2012. The product concerned is mainly cheese.

In May 2013, the Cartel Court imposed a € 20.8 Mio fine on the REWE Group, one of the leading Austrian food retail groups, for Resale Price Maintenance (RPM) between the latter and a number of retailers. The Court held that REWE agreed on consumer prices with a number of producers between 2007 and 2012 concerning a variety of products. However, the infringement mainly concerned beer and dairy products.

Investigations as well as proceedings are ongoing.

Fine for RPM in consumer electronics industry case
Following an application by the BWB, in March 2013 the Cartel Court imposed a € 2.9 Mio fine on Philips Austria GmbH (Philips Austria) for Resale Price Maintenance (RPM) between the latter and a number of retailers. The vertical restraints against online retailer, which were found to take place between 2009 and mid-2012, concern the whole range of consumer electronic products offered by Philips Austria.

The starting point of BWB's investigation was a survey of online retailers by the Vienna University of Economics and Business (Wirtschaftsuniversität Wien) which indicated, inter alia, that certain industry players in Austria would exercise pressure on local trading partners' resale prices. Further investigations revealed indications that Philips Austria is one of the industry players that enforce RPM against online retailers. These indications led to a dawn raid in September 2012. Subsequently, Philips Austria fully cooperated with the BWB in clarifying the facts and provided additional information to support the BWB's investigation.

In light of the cooperation and as part of a settlement, the BWB applied for a fine of € 2.9 Mio fine with the Austrian Cartel Court in mid-February. All parties waived their right to appeal the BWB's application. The decision of the Cartel Court confirming the fine is therefore final.

Guidelines on vertical price fixing
In the course of recent enforcement activities the BWB has observed wide spread practices in vertical and trilateral price fixing by food retailers and their suppliers as well as in the consumer electronics industry. As yet fines amounting to € 26 Mio have been imposed for those infringements. For the purpose of competition advocacy and prevention of future infringements the BWB prepared a written standpoint clarifying the BWB's legal assessment of the practices involved. The paper was presented to the public on 13 June 2013. All interested parties were invited to comment by 1st August 2013.

The BWB outlines in the beginning of the paper the legal framework for its scrutiny: Horizontal and vertical price fixing is qualified as hard core restriction under EU as well as national competition law. Vertical price fixing combined with horizontal coordination is addressed as special concern. Those practices imply horizontal coordination of retailers eg by way of the communication between retailers and suppliers. Only non binding recommendations of resale prices by suppliers are compatible with competition law. The standpoint draws a list of conduct that is qualified illegal by the BWB as well as a list of compatible conduct.

Illegal conduct (outline):
- Oral or written coordination or fixing of resale prices / minimum prices (for promotion) between retailers and suppliers.
- Agreement on bonuses, rebates and other incentives as remuneration for observance of agreed prices.

- Applying penalties, suspension of deliveries or other disadvantages for non observance of agreed prices.
- Penalties applied or the threatening with a reduction of purchase prices by a retailer to a supplier who fails to implement identical or similar resale prices when selling its products to other retailers.
- The retailer demands as condition for a raise of the purchase price that a particular resale price level is observed by other retailers which has to be proven by the supplier.
- Agreements between supplier and retailer with the purpose to safeguard that the resale prices of other retailers keep within a particular frame or to safeguard a best price clause (preventing underpricing of a retailer's particular product by competing retailers) or a most favoured customer clause (aiming at uniform prices at wholesale and/or retail level).
- Participation of a retailer in the supervision of resale prices (price monitoring) by a supplier or vice versa: eg obligations or incentives for suppliers to communicate to retailers deviations from recommended/minimum prices by other retailers, obligations or incentives for retailers to communicate to suppliers deviations from recommended/minimum prices by other retailers;
- A supplier communicating to retailers in advance time and amount of resale price changes by one other retailer.
- Agreements between suppliers and retailers on exclusive time frames for promotions or on coordination of the timing of promotional activities by different retailers.

Legal conduct (outline)
- Recommendation of resale prices to a retailer provided the recommendation is in fact and legally non binding.
- Promotional activities have to be organized autonomously by retailers. Information exchange with supplier is legal only to the extent that it is necessary for the planning of quantities.
- Price monitoring is acceptable for retailers and suppliers on their respective markets.
- Suppliers are allowed to clarify towards retailers their marketing strategy when submitting non binding price recommendations, unless this supports directly or indirectly horizontal coordination of retailers.

The BWB is assessing the answers received during the review. A final version will be published in due time.

Cartel in the insulation market
The BWB investigated an infringement of article 101 TFEU by several suppliers of expanded polystyrene (EPS). The sector has been of considerable interest to the authority since an anonymous informer provided the BWB with documents in 2007, according to which the insulation companies infringe competition law by agreeing on prices. In 2011, a former long-standing employee of one of the leading Austrian insulation companies was questioned as witness by the BWB with regard to anticompetitive behavior in the insulation sector. According to the witness, information exchanges were taking place on a regular basis with regard to price increases/prices as well as direct contacts between the competitors if one company sold the insulation material below a certain price level. In addition, the allegations related to illegal resale price maintenance. The BWB conducted dawn raids at four companies' premises with a focus on the EPS and XPS insulation market; additionally there were a number of raids at some retailers for such materials. So far the insulation products producer Steinbacher as well as 4 retailers (Baumax, Hornbach, Bauhaus and OBI) have been fined a total of € 1.135 Mio Euro by the Cartel Court. Proceedings against additional companies are pending.

Bauer Verlag / Pressegrosso
In 2007 the Federal Cartel Prosecutor (FCP) and the Federal Competition Authority (BWB; together the official parties) filed a claim against Heinrich Bauer Verlag (publisher) and two companies being active in Austria on different levels in the business of distribution of

newspapers and magazines to end consumers via retailers. The official parties asked for prohibition of resale price maintenance and absolute territorial protection that are generally part of distribution agreements between publishers, wholesalers and retailers.

First the Cartel Court declared in 2008 that the activity of wholesalers in the distribution of newspapers and magazines is not covered by the privilege for sales agents and that Art 101 TFEU fully applies. This decision was confirmed in 2009 by the Supreme Cartel Court.

In the second legal proceeding the Cartel Court dealt with a possible justification of the asserted infringements according to Art 101 para 3 TFEU. In March 2013 the Cartel Court dismissed the claims of FCP and BWB in substance. The Cartel Court explicated that a prohibition of the asserted infringements would result in negative consequences on all levels of distributions. Though the prohibition of resale price maintenance is likely to have positive effects on end consumer prices, this advantage would be outweighed by disadvantages resulting from the prohibition regarding the availability of newspapers and magazines. Thus it was acknowledged that the number of retail outlets selling print titles would be reduced as well as the number of less marketable print titles available via retail. The Cartel Court did not find that competition was eliminated because there is evidently competition between publishers and between wholesalers of newspapers and magazines. Retailers are in competition amongst each other via their range of products and presentation of print titles.

Under the given legal framework that does not allow scrutiny of facts but only of legal findings of the Cartel Court and taking regard of the factual finding of the Cartel Court mentioned above, the official parties did not appeal this decision.

Digitization of Cinemas

In 2012 the BWB investigated a cooperation between film distributors and cinema operators with the aim of furthering full digitization in Austria. The system was managed by a platform of the associations of the film industry and of cinema operators. The management of financial transfer and accounts was assigned to an independent firm.

In the competitive assessment the BWB came to the conclusion that the cooperation did not impede or exclude any competitor but rather created an additional option for financing the changeover to digital equipment for cinema operators that have not been addressed by commercial offers for the funding of digital equipment that have been available on the market until then. The BWB concluded that the cooperation would boost technical development and safeguard at the same time competitive market structure on the markets for cinema operators as well as on the market for film distributors. Encouragement of solidarity mechanisms for funding of the digital changeover was called for as well by the European Commission (COM(2010) 487) and the Council of the European Union (OJ 2.12.2013, C 325/1). Due to the above argument the investigation was closed.

Revised Leniency Manual adopted

On the occasion of the recent amendment of the Austrian competition law the BWB has revised the existing Manual on Leniency. The first leniency manual had been published with the coming into force of the legal rules on leniency in 2006 and has been revised in November 2011. The actual revision of the leniency manual takes into account the case law of the Cartel Court and the Supreme Cartel Court and seeks a further alignment with the ECN Model Leniency Programme (MLP), including its latest revision published in November 2012.

The major changes are as follows:

- Level of evidence to be provided by the first leniency applicant (so called ‘type 1A’): the new leniency manual contains a detailed list of evidence and information to be provided which is in line with the MLP. Since there was no indication of the necessary evidence to be provided by

the leniency applicant in the previous Austrian leniency manual, the evidential threshold for immunity is thus increased.

- Immunity application after inspections by the BWB (so-called 'type 1B') based on the new § 11 (3) 1 lit b Competition Act: The leniency manual clarifies that, despite the open formulation of the legal basis, immunity will be granted only once either to a type 1A or to a type 1B applicant in a given case. A type 1B applicant submits evidence after the BWB has carried out an inspection or has sufficient evidence to apply for a search warrant. The applicant has to provide additional evidence that allows successful proof of an infringement of Art 101 TFEU (or § 1 Cartel Act) in a procedure before the Cartel Court.
- Marker system: In alignment with the MLP the new leniency manual opens the marker system to all immunity applicants (as previously it was available only for cases with EU-dimension). The BWB grants a marker when an applicant delivers all information required by the form attached to the leniency manual. The BWB sets a period not exceeding eight weeks within which the applicant has to perfect the marker.
- Summary applications: An applicant that has filed, or is in the process of filing, a leniency application with the European Commission may file summary applications with BWB. The marker is granted based on the date and time of the summary application. In this case, full submission of all relevant evidence within a given time limit is only required by the BWB, if it decides to act upon the case.

Further amendments include the possibility to confidentially approach the BWB to clarify if immunity is still available in a particular case as well as a clarification of the applicant's duty to cooperate (e.g. with relation to former employees). The leniency manual also clarifies that applications for immunity or for reduction of fines are not taken into consideration once the BWB has filed an application to impose a fine with the Cartel Court.

bb) Abuses of dominant position

Taxi-APP-Providers: no abuse by central dispatch offices for radio taxis

Based on the complaint of two Taxi-APP-providers, in January 2012 the BWB filed an application with the Cartel Court to bring an abuse of a dominant position of the two dispatch offices for radio taxi to an end.

The taxi-app providers reported the following problem while trying to penetrate the taxi market in Vienna: As soon as they convinced a certain number of taxi drivers to use the offered taxi-app-application for customer recruiting, the radio taxi dispatch office terminated the contracts with these taxis[1]. The termination of the contract was based on the exclusivity clause in their contract.

To gain a foothold on the Viennese taxi market[2] it is necessary to have a certain pool of drivers reachable. Otherwise neither the radio taxi headquarters nor the taxi-app-provider would be able to guarantee the consumer a taxi in the requested time which has to be as short as possible to be attractive on the market.

The BWB argued that the only two radio taxi dispatch offices have a dominant position and that they abused their dominant position in using the exclusivity clause to expel the taxis that had tried to use the new technology. The key argument was that taxi apps are different to radio taxi

[1] A contract is always linked to a specific car, not to a driver or a company.

[2] Currently, the Viennese taxi market comprises about 4 500 taxis from which 2.537 cars are registered in one of the two dispatch offices for radio taxi. The latter are furthermore part of bigger taxi companies whereas the others are "smaller entities" from one (e.g. private cars used from time to time as taxis) to 3 taxis. In addition, for a full market description it has to be noted that there are 4 500 taxi concessions which are not used at the moment, insiders say that Vienna is already "overtaxied" with 4.500.

headquarters and the exclusivity clause would therefore not by applicable: taxi apps are a new technology and moreover insofar different from radio taxi offices as they involve only two parts (the customer and the taxi) not three parts (the customer, the radio taxi dispatch office and the taxi). Apps are therefore more similar to a private telephone call to order a taxi or a customer who just raises the hand on the street to stop a taxi. The application of the exclusivity clause would therefore only be used to create a market barrier.

The Austrian Cartel Court and Supreme Cartel Court did not qualify the market but just ruled in June 2012 and July 2013 respectively that contracts including exclusivity clauses with only one month cancellation period can never be an abuse because this period is too short to produce abusive effects.

I.2. Mergers and acquisitions

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

Between 1 July 2012 and 30 June 2013 a total of 298 national concentrations were notified.

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

In six cases an application for in-depth-investigations was filed by one or more of the official parties leading automatically to phase II proceedings. In two cases the Cartel Court cleared the merger only subject to remedies. In two cases the parties committed themselves to remedies and consequently the official parties withdrew their application for examination with the Cartel Court. In one case the Cartel Court rejected the application for examination as the merger was not notifiable (and the BWB does not yet have the power to reject these notifications). One case is still pending.

b) Summary of significant cases

Consolidation of Austrian mobile market: Telekom/Yesss!
The Austrian mobile telecom services market has undergone major changes in 2012:

Parallel to the acquisition of Orange Austria by H3G, both mobile network operators, which was notified with the European Commission (Orange acquisition) at the beginning of May 2012, Telekom Austria (TA), ie the major fixed and mobile network operator in Austria, notified the purchase of Yesss!, i.e. Orange's no frills sub-brand from owner-to-be H3G end of May 2012 with the Austrian competition authority (Yesss! acquisition).

Since both acquisitions almost exclusively affected the Austrian market, the BWB applied for referral of the Orange acquisition to Austrian agencies (Art 9 EU Merger Regulation). The European Commission however informed the BWB that it would not refer the case. In order to prevent lengthy proceedings on jurisdiction and enable thorough assessment of the merits the BWB refrained from further pursuing referral.

The BWB and the Federal Cartel Prosecutor (FCP) carried out investigations in close cooperation with the national regulatory authority. The investigations produced evidence indicating the Yesss!-acquisition would strengthen Telekom Austria's dominant position. The authorities' concerns related to a large number of market relevant facts eg

- TA was – even pre merger – able to implement price increases[3];
- high market concentration and TA's market shares would further go up post merger;
- Yesss! was close competitor to TA's own ("no frills") bob brand;
- Yesss! was an important competition constraint;
- no sustainable market entries to be expected;
- existing coordination[4] between providers would be intensified.

Therefore end of June 2012 the BWB and FCP both applied for an in-depth investigation of the case with the Cartel Court. The Cartel Court assigned an economic expert to give her opinion on the relevant economic and legal questions. Dismissing the BWB's and FCP's findings the opinion held the merger would not lead to the creation or strengthening of a dominant position on the market for mobile telecommunication services in Austria. The economic expert predicted price increases for customers in the pre- as well as in the post-paid segment. Nevertheless the expert expected that in the future new tariffs and brands will be placed on the market. The economic expert also discussed the aspect of coordinated effects and concluded that the incentive to coordinate will not increase due to the Yesss! acquisition if the European Commission imposes a remedy within the Orange acquisition to allow Mobile Virtual Network Operators (MVNOs) access to the H3G network.

The Cartel Court therefore cleared the Yesss! acquisition without obligations/commitments end of November 2012.

The BWB holds the Cartel Court's decision wrong mainly with regard to the facts it established. Still, since the Supreme Court can only review legal findings but not facts established in the decision of the court of first instance, the BWB did not appeal against the Cartel Court's decision.

The BWB, FCP and the regulatory authority were closely cooperating with the European Commission which assessed the above mentioned, narrowly linked merger of H3G with Orange (Orange acquisition). The European Commission defined one market only, comprising all kinds of mobile telecommunication services for end costumers (no further segmentation eg business/residential, "full service/no frills"). It expected negative effects on competition inter alia because of the strong market position and the fact that the undertakings involved were close competitors, leading to a reduction of competitive restraints exercised by other competitors. Finally the European Commission cleared the merger subject to commitments[5] directed at enabling market entrance for new competitors, although the BWB and the FCP were not convinced that the commitments proposed would enable market entrance.

KNAUF/USG

In September 2012 the acquisition of all shares of USG Deutschland GmbH and USG Ltd. (U.K.) by Knauf International GmbH (Germany) and Knauf AMF Ceilings Ltd (U.K.) was notified with the BWB.

The merging parties were operating in the field of suspended ceiling systems - while USG was producing the substructure, Knauf was producing the boards. To a large extent the boards were sold together with the substructure. Nevertheless, both products could be defined as different markets. As both companies reach together a market share of more than 40% on combined products and 60% only in the market of substructure, requests for information were sent to competitors and customers. The investigation revealed the problem that after the merger the

[3] eg price increase by implementing internet service fee which had been followed instantly by all competitors

[4] eg price increase by simultaneous implementation of inflation clause and internet service fee

[5] http://europa.eu/rapid/press-release_IP-12-1361_en.htm

combination of different substructures with different boards of competitors could be limited. Therefore the BWB filed an application for in-depth review with the Cartel Court.

The BWB could withdraw its application during the in-depth review as commitments were agreed on: Knauf committed itself to selling their substructure and their boards also separately at non-discriminating market conditions, thereby allowing a combination with competitive products. The merger was therefore cleared in December 2012.

Remedies in merger in the outdoor advertising market
In August 2012 Ankünder GmbH (Ankünder), the dominant regional outdoor advertiser in the province of Styria, notified the acquisition of 49 % of the shares of three companies active in the outdoor advertising market from Gewista-Werbegesellschaft mbH (Gewista), ie one of the two leading national outdoor advertisers. In two companies Gewista will remain the shareholder of the rest of the shares. In addition to the formally notified transactions, Ankünder acquired all outdoor advertising activities of Gewista in Styria and Gewista acquired a share of 24.9 % in Ankünder in return.

The first question was whether these additional transactions have to be notified and could therefore be scrutinized by the BWB. In contrast to the notifying parties, the BWB was convinced that the acquisition of all outdoor advertising activities in Styria was part of the whole transaction and therefore had to be notified, too, although as a "stand-alone" transaction it would not have fulfilled the turnover thresholds. During the proceeding the notifying parties changed their opinion and agreed to the investigation of this additional transaction which was the most problematic one from a competition point of view.

The BWB therefore focused its investigation on the acquisition of outdoor advertising activities in Styria. The BWB was concerned that the already very dominant market position of Ankünder would be further strengthened. The BWB therefore filed an application for in-depth review with the Cartel Court.

At the request of the notifying parties the BWB started in parallel negotiations on remedies which were repeatedly subject to a comprehensive market test. Finally, the parties committed themselves to important remedies which were able to eliminate the competition concerns of the BWB. The remedies mainly concerned the sale of posters and city lights in Styria and the limitation of a further increase in numbers until 2016. Furthermore, a certain number of poster lights have to be made available for competitors at specified, economically attractive conditions. The remedies aim at enabling and increasing competition in the outdoor advertising market in Styria.

Consequently, the BWB has withdrawn its application for in-depth review which led to the termination of the proceeding in mid January 2013.

Six Group / PayLife Bank GmbH: cleared subject to remedies
In March 2013 Six Group notified the intended purchase of (at least) 77,73% of the assets of PayLife Bank GmbH, Vienna (Austria); in the end 100% of the assets have been subject to the merger. Six is a Swiss based provider of cashless payment services (mainly processing services for cashless payments) and other similar services in the market for financial services. PayLife Bank is based in Vienna and the incumbent for Maestro-, MasterCard- and Visa-payment services and to a minor extent also in other related markets (e.g. "Quick-Card" payments). PayLife bank is a joint venture of almost all Austrian banks and savings banks.

PayLife bank used to have a rather very high market share for Maestro services (up to almost 90%) and high market shares for Credit Cards (mainly MasterCard). However, the market shares decreased in the recent years dramatically. The BWB and FCP filed an application for in-depth

review with the Cartel Court. After comprehensive investigations the merger was cleared subject to remedies.

The remedies focus on safeguarding the vertical functioning of the market as the horizontal overlap of the two merging entities did not raise important concerns: Six is obliged to grant all competitors equal access to so called "Not guaranteed bank transfers" with Maestro-cards ("ShortCut"). This shall allow alternative providers to serve the market at the same conditions, thereby leading to benefits for consumers who had to finance excessive fees with cashless purchases with Maestro-cards so far. A trustee will observe the fulfilment of the remedies.

MPV/PGV: creation of a joint venture for logistics in the distribution of magazines and newspaper from publishers to retailers

In February 2013 Morawa Pressevertrieb GmbH & Co KG (MPV) und Presse Großvertrieb Austria Trunk GmbH (PGV), ie the only two companies active in Austria in the distribution of newspapers and magazines from publishers to retailers, notified the creation of a joint venture (JV). They intend to bring in their logistics into the JV. The JV should mainly carry out the logistics for its parent companies but also be active in the transport of books and other products for third parties which can be combined well with press logistics.

The BWB as well as the FCP filed an application for in-depth review with the Cartel Court for the two following reasons: First, they considered that the transaction would not qualify as merger as the JV would be active in the long run for more than 80 % of its turnover for its parent companies. Second, an intensive market investigation showed that publishers shared the fear of the BWB that the concentration of the logistics would amongst others lead to the alignment of more than 60 % of the costs as well as to the intensification and simplification of exchange of information. All these factors would lead to a further reduction in competition without guarantee that efficiencies will be passed on to contracting parties and consequently to consumers. In addition, the concern of the official parties was directed in particular to the effect of the transaction on the transport of books: a market investigation showed that all market participants thought that a monopoly would be created.

Having employed an economic expert, the Cartel Court decided end of September 2013 that - in contrast to the official parties' view - the transaction constitutes a merger which could be cleared with remedies. The decision confines itself to transport of newspapers, magazines and several other items. Transport of books is not covered any more since the parties cut back on this subject due to the critical expert opinion.

The official parties will decide on whether to appeal the decision within four weeks. The case is therefore still pending.

Supreme Cartel Court decision on fine due to non-notification of a merger

In October 2010 the BWB filed an application for a fine for the non-notification of two mergers in the logistics sector. The Cartel Court imposed a fine of only € 4500 in January 2011. The BWB appealed the decision as it thought that the fine was inadequately low due to incorrect legal assessment. The Supreme Cartel Court annuled the decision of the first instance in December 2011 and referred it back to the Cartel Court at the same time instructing it to examine whether the company – due to wrong legal advice of its lawyer – could be held responsible and fined at all. The Cartel Court did not find facts justifying such an escape and imposed once again a fine of € 4500 in December 2012.

The BWB once again appealed this decision in January 2013 as it still considered the fine to be inadequately low due to incorrect legal assessment. In June 2013 the Supreme Cartel Court raised the fine to € 100,000. The decision makes clear that in the case of non-notification of a merger companies cannot escape the imposition of a fine due to the legal advice given by a

lawyer as turnover thresholds and the definition of a merger transaction are basic knowledge which is or must be known by every company active in cross-border business (see similarly also the ruling of the CJEU in the cartel in the freight forwarding sector mentioned in point I.1.ba). Furthermore, it clarified that - even if the merger was not considered to raise anti-competitive effects - the non-notification of a merger has to be considered a severe violation of the Cartel Act as it undermines the effectiveness of the rules governing merger control.

Based on the duration of the violation (3 years), the high financial power of the company, the importance of the violation and the fact that the merger did not raise anti-competitive effects, the Supreme Cartel Court imposed a fine of € 100,000.

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 the framework of the international Oil Working Group created jointly by the Russian Antimonopoly Service FAS and the BWB in January 2012, the BWB together with FAS initiated the creation of an **oil information exchange platform** in September 2012. The oil information exchange platform offers the possibility to exchange basic information. It should provide primarily a first indication of what is going on in the different jurisdictions. If more information is requested, the respective competition agencies have to get into contact with each other. The platform provides a tool to facilitate these contacts. Participation to the platform is open to all interested competition authorities and free of charge. The platform is currently in the pilot phase; several authorities have started to put in information.

The Competition Council of Morocco in cooperation with the BWB and the United Nations Conference on Trade and Development (UNCTAD) organised a meeting held in Rabat in November 2012. The meeting aimed at allowing some reflection on and have discussions on the possibility to put in place a **Euro-Mediterranean Competition Network**. The meeting in Rabat follows the general consensus to foster regional cooperation in the area of competition law and policy, expressed by competition authorities in the meetings in Vienna, December 2011, in Doha, April 2012, and in Geneva, July 2012. The ambassador of the European Union in Morocco, the Austrian ambassador to Morocco, high level representatives of competition authorities in the Euro-Mediterranean area and neighbourhood (Austria, Egypt, France, Malta, Morocco, Qatar, Tunisia and Turkey), representatives of UNCTAD and the European Commission as well as representatives of the civil society participated. During the two days meeting three round tables were held. The first Round Table allowed for an information exchange of the institutions present, each presenting their experiences and their activities in cooperation. Also present and future needs and priorities were presented. In the course of the second Round Table it was discussed how regional cooperation could be organized in the future and what type of structure should be chosen. Also it was decided who would be actively involved in coordinating the activities. The third Round Table had as objective to establish the working programme for 2013.

Further to the meeting in Rabat the first EMCF workshop on Advocacy was organised in July 2013 in Geneva on the margin of the thirteenth session of the Intergovernmental Group of Experts (IEG) on Competition Law and Policy. The workshop dealt with competition advocacy.

The BWB signed cooperation agreements with the Moroccan Competition Council in November 2012 and with the Eurasian Economic Commission in December 2012. Both agreements have already shown practical results. For instance, in April 2013 members of the Moroccan Competition Council came to Vienna within the framework of the agreement in order to participate in a knowledge exchange programme.

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 was eg active in competition advocacy in the on-going reform of the **Common Agricultural Policy** of the European Union with regard to the application of competition law in the agricultural sector: The BWB was involved in discussions at national level as well as within the ECN. It also commented on the legislative proposal of the European Parliament in written form to the Austrian Ministry of Life and members of the European Parliament. Furthermore, the BWB was involved in the implementation of the milk package into national law and advised different stakeholders (Austrian Ministry of Life, representatives of chambers and companies) on how competition rules apply to the agricultural sector.

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 in order to raise awareness of competition offenses. About fifty representatives from companies, lawyers and public offices are attending the events. The competition talks so far tackled topics such as the recent amendment of the Austrian Cartel Act, powers, rights and duties as well as practical questions with regard to dawn-raids, the print media sector and its challenges, the new instrument of competition monitoring introduced by the last amendment of the Competition Act, the revised leniency manual as well as practical questions concerning vertical price fixing and the corresponding guidelines recently published by the BWB.

On 18 and 19 April 2013, the BWB hosted a national and international **conference on prevention**, partly in cooperation with the Austrian Chamber of Commerce. On the first day Representatives of Austrian authorities, international organisations, as well as lawyers, entrepreneurs and members of the business community touched upon the subject of prevention in the context of competition law. The main topics raised during the national conference were: How can real prevention work? How can employees be trained in order to avoid wrong behavior? If it is a matter of organizational culture how can competition authorities help to implement a system for building awareness? What kind of role play "compliance programs" of law firms in order to prevent forbidden actions? The conference took both an academic view on the theory of prevention as well as practical aspects of human and organisational behaviour, the deterrent effect of fines and the role and the consequences of compliance programs. Finally, international guests discussed the practicability of prevention campaigns and other tools for competition authorities. On the second day representatives of 16 different national competition authorities participated in an international knowledge exchange giving an interesting insight of how different tools to foster compliance are implemented in their countries.[6]

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. Due to the amendments in the Cartel Act the Cartel Court is now obliged to publish information on decisions in other than merger cases.

[6] More information can be found at
http://www.en.bwb.gv.at/News/Seiten/ConferenceonPreventionandCompliance.aspx

IV. Changes to competition laws and policies

Reform of Austrian Competition Law

An amendment to the Austrian Competition Act and to the Cartel Act (KaWeRÄG 2012) entered into force on 1 March 2013 and brought further improvements: The position of the Austrian Federal Competition Authority (BWB) regarding investigations has been improved, especially regarding its powers to request information from undertakings. The power of the BWB regarding inspections of premises has been clarified, the BWB is now also empowered to seal premises.

The Austrian leniency program has been adjusted according to the standards of the leniency program of the European Competition Network (ECN). The BWB may refrain from seeking the imposition of a fine for undertakings that discover a cartel or, if the BWB already knows the facts, it may seek a reduced fine. A revised leniency manual was published in March 2013 (see point I.1.ba above).

The "Competition Monitoring" as another tool of the BWB for monitoring competition has been introduced.

The KaWeRÄG 2012 brought also improvements with respect to the abuse of a dominant position: The concept of collective dominance is now clearly regulated in the Cartel Act, better supervision of undertakings with significant market power is now ensured.

The Austrian limits for de minimis cartels are harmonized with the European Commission's 'de-minimis' regulation for cartels (C 2001/368). Therefore, only minor cartels involving members with a total market share of up to 10% for horizontal cartels or up to 15% for vertical restraints are excluded from Austrian cartel rules. Hard Core Cartels are in any case within the scope of the Austrian Cartel Act regardless of the cartel members' market shares.

Decisions of the cartel court shall be published by the court in an online database, the electronic notice board of the courts. The parties involved shall have the opportunity to request specific parts of the decision not to be published, especially commercially confidential information. The publication will help third parties to establish the relevant facts of the case for actions for damages.

A "Stop-the-clock" option in merger control has been introduced. In merger proceedings the BWB has to request an in-depth review within four weeks otherwise the merger is deemed to have been approved. Applicants may apply for a prolongation of this four-week period (six weeks). So there is more time to evaluate the conditions and obligations relating to a merger.

Private enforcement has been strengthened (§ 37a Cartel Act). Companies infringing antitrust rules shall be obliged to compensate for damages incurred. This provision now entitles private parties to file actions for damages based on an infringement of Austrian and European antitrust rules. Decisions of the Cartel Court or of any European competition authority including the European Commission stating that a cartel member has infringed Austrian or European antitrust rules are legally binding on Austrian civil courts.

Another new amendment to the Competition Act was accepted by Parliament and entered into force on 16th July 2013, ie the Verwaltungsgerichtsbarkeits-Anpassungsgesetz - Bundesministerium für Wirtschaft, Familie und Jugend: The amendment was necessary due to a major reform concerning the Federal Constitutional Law (B-VG). A system of administrative courts will enter into force on 1 January 2014. In the Competition Act only minor changes were necessary. As of 1 January 2014 the Federal Administrative Court will be responsible for

complaints against decisions of the BWB (and not the UVS - Independent Administrative Tribunals).

V. Resources of competition authorities

By 30 June 2013 - additional to the Director General and the Deputy Director General - 13 lawyers, 6 economists, two other professionals and 5 persons as support staff, i.e. all together 28 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

Regulatory issues – market analysis

Under the Austrian Telecommunications Act 2003 (TKG 2003) KommAustria, the national regulatory authority, is required to carry out regular reviews and analysis of broadcasting specific wholesale markets for the provision of communication networks and services ("broadcasting transmission services"). Due to new procedural requirements being effective since the beginning of 2011, market analysis procedures under the TKG 2003 have no longer been conducted as procedures involving only the companies identified as possessing significant market power, but all parties potentially affected by market analysis procedures on the respective relevant market.

At last three broadcasting markets were analysed:

1. Wholesale market for the "transmission of analogue terrestrial (FM) radio broadcasting signals to end users". The market includes the terrestrial transmission of FM broadcasting signals in the meaning of a "point to multipoint transmission". The affected relevant geographic market is the national territory of Austria.
2. Wholesale market for "the multiplexing of broadcasting signals via the platforms MUX A and MUX B and the transmission of digital terrestrial TV broadcasting signals to end users". The affected relevant geographic market is the national territory of Austria.
3. Wholesale market for "the transmission of digital terrestrial TV broadcasting signals to end users". The market includes the transmission of digital terrestrial TV broadcasting signals in the meaning of a "point to multipoint transmission". The affected relevant geographic market is the national territory of Austria.

In the context of the market analysis procedure especially the following indicators were analysed: market shares; barriers to market entry; control of infrastructure not easily duplicated; countervailing buyer power; vertical integration and leveraging; pricing.

According to the market analysis procedures, KommAustria concluded that Österreichische Rundfunksender GmbH & CO KG together with ORS comm GmbH & Co KG (together referred to as “ORS”) has significant market power on

- the wholesale market for the “transmission of analogue terrestrial (FM) radio broadcasting signals to end users”, and
- the wholesale market for “the transmission of digital terrestrial TV broadcasting signals to end users”.

The following measures were designated for both of the two above mentioned markets:

- obligation to give unbundled access to broadcasting transmission services to deliver content to end users on request
- cost oriented prices (efficient costs based on ORS costing)
- price control
- non discrimination
- reference offer, and
- accounting separation

The result of the analysis of the wholesale market for “the multiplexing of broadcasting signals via the platforms MUX A and MUX B and the transmission of digital terrestrial TV broadcasting signals to end users” is that no undertaking has significant market power on the relevant market and efficient competition is given. Since there had not been designated measures for this market before, a withdrawal of obligations has not been necessary.

KommAustria started the national consultation of the three draft decisions in April 2013. The national consultation ended at the beginning of May 2013. The coordination procedure with the European Commission (EC), the other European NRA’s and the BEREC started mid May and was finished mid June 2013. The EC had no objections against the results of the Austrian market analysis results, but invited KommAustria to closely monitor the developments in the markets in terms of infrastructure and services competition.

In accordance with the results of the market analysis procedures, the national consultation and the European coordination procedure KommAustria finally took three decisions mid July 2013 concerning the three relevant wholesale markets.

The decisions concerning the wholesale market for the “transmission of analogue terrestrial (FM) radio broadcasting signals to end users” and the wholesale market for “the transmission of digital terrestrial TV broadcasting signals to end users” are both subject to appeal procedures, whereas the decision concerning the wholesale market for “the multiplexing of broadcasting signals via the platforms MUX A and MUX B and the transmission of digital terrestrial TV broadcasting signals to end users” became final.

Advertisement in on-demand-service of public broadcaster

KommAustria determined with its decision of June 2013 rules for limiting the range of the online-service "TVthek.ORF.at", the so far advertising free on-demand service of the Austrian public broadcaster ORF.

ORF requested the extension of the service "TVthek.ORF.at" with more editorial content and requested the introduction of commercials in his service. These changes – especially the adding of advertisings, were qualified as a fundamental change online of the provided service. Thus the formal procedure of the prior evaluation (cf §§ 6 ff ORF-Act) was necessary. In this procedure KommAustria had to approve if the revised service would be suitable to fulfill the core public mandate of the ORF, without affecting disproportionate the competitive situation with regard to competitors or the diversity of the users. The BWB acting as official party for the protection of

competition commented critically on the potential effect of the new service on private competitors on the advertising markets for TV and online platforms.

Summarising, KommAustria, taking account the rules for linear television, banned with its decision[7] the use of commercial breaks in videos and the use of pre-, mid-or post-rolls in the context with news- and current affairs programs. The use as pre- and post-rolls in the remaining online service were allowed, but ORF has no allowance to deploy the use of ad-blockers.

The decision is not final and pending before the Federal Communications Senate (Bundeskommunikationssenat).

VI.2. Telecommunication

Market definition and analysis

The national regulatory authority (NRA) has to perform market analysis proceedings in regular intervals to monitor whether a market is relevant for sector-specific regulation or not (market definition), whether one or more enterprises dispose of market power on this market, whether any competition problems exist on this market or whether there is effective competition (market analysis). In the absence of effective competition, the NRA has to impose appropriate remedies to combat those competition problems.

The Telekom-Control-Kommission („TKK"), the competent NRA in this matter, initiated market analysis proceedings in January 2012. Individual market analysis proceedings were continued at a later stage for the following separate markets:

- Access to physical network infrastructure,
- Wholesale broadband access market for business subscribers,
- Access of residential and non-residential subscribers to public switched telephone networks at a fixed location (retail markets),
- Terminating segments of leased lines and of Ethernet services with guaranteed bandwidth,
- Retail leased lines,
- Call termination in individual public telephone networks at a fixed location,
- Call origination from the PSTN at a fixed location,
- Call termination in individual mobile public telephone networks,
- Calls of non-residential subscribers via public switched telephone networks at a fixed location (retail market),

Mobile termination

Call termination in individual mobile public telephone networks is an interconnection service in order to secure the mutual connection of subscribers within their network and across network borders.

A specificity of termination markets is the monopoly of the operator concerned on his individual termination market. As a consequence, each operator has significant market power. In addition, a calling subscriber bears the total cost of a call to another subscriber; the called subscriber does not incur any cost. This tariff system named "Calling party pays" produces an externality: whereas the called party decides on the network where incoming calls shall be terminated, the calling party has to bear the respective costs.

[7] available at https://www.rtr.at/de/m/KOA1126113015/KOA_11.261_13_015_Bescheid_Auftragsvorpr%C3%BCfung_TVthek_final.pdf

TKK adopted a draft measure in December 2012 which found all mobile network operators to have significant market power on their individual mobile termination markets. Several potential competition problems were found like e.g. market distortions due to excessive termination charges, subsidization of mobile subscribers by subscribers calling from a fixed network or foreclosure strategies vis-à-vis small mobile operators. In order to match those competition problems, TKK 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") stipulating that rates for the termination of calls in fixed and mobile networks must be set according to the cost of an efficient operator. This cost accounting approach „Pure LRIC" (Pure Long Run Incremental Costs) is an approximation to the long-run marginal cost. The respective MTR were calculated at 0.8049 Eurocent per minute. The draft measure has been submitted to a national consultation among interested parties and to a coordination mechanism at European level including the European Commission, BEREC (Body of European Regulators for Electronic Communications) and other NRAs. The proceedings are still pending.

Fixed termination

As outlined above with respect to mobile termination, also fixed network termination markets can be characterized by the monopoly position of an enterprise and by the calling-party-pays principle (on wholesale level "Calling Party's Network Pays Principle").

TKK adopted a draft measure in December 2012 which found all fixed network operators to have significant market power on their individual fixed termination markets. With regard to termination in the fixed network of A1 Telekom Austria AG („A1TA"), the draft measure found A1TA to have significant market power on this market and stated potential competition problems in case of non-regulation like abuse of market power and leveraging of market power to neighbour markets by setting excessive charges, denial of access, non-price discrimination and price discrimination/margin squeeze. To match these competition problems, A1TA was obliged to direct and indirect interconnection, price control, non-discrimination and separated accounts. In order to avoid excessive pricing, a pure-LRIC termination rate of 0.137 Eurocent per minute (peak) and 0.085 Eurocent (off-peak) was set within the price-control obligation.
In addition, 34 alternative operators were considered to have significant market power with regard to termination in their networks. With the same competition problem (excessive termination rates) prevailing like in the case of A1TA, alternative operators were subjected to a price-control obligation with the a.m. pure-LRIC termination rate of 0.137 Eurocent per minute (peak) and 0.085 Eurocent (off-peak). Like with mobile termination, the draft measure has been submitted to a national consultation among interested parties and coordination with the European Commission, BEREC and other European NRAs. The proceedings are still pending.

Fixed origination

(Fixed) Origination (a wholesale market) is the delivery of calls from one (fixed) network to a call-by-call or carrier-preselect operator or to a service network operator.

TKK adopted a draft measure in December 2012 which found A1TA to have significant market power on the fixed network origination market and identified the following competition problems: leveraging of market power to neighbour markets and abuse of market power vis-à-vis customers (with regard to pricing). To remedy those competition problems, A1TA was obliged to direct and indirect interconnection, non-discrimination, separated accounts and price control based on cost-oriented charges according to fully-distributed historic costs. A1TA may charge a maximum origination of 2.135 Eurocent per minute (peak) and 1.321 Eurocent per minute (off-peak). Like with mobile termination, the draft measure has been submitted to a national

consultation among interested parties and to coordination with the European Commission, BEREC and other European NRAs. The proceedings are still pending.

Access to physical network infrastructure

The wholesale market for physical network infrastructure mainly concerns making available physical connections between a network termination point at subscriber's premises and a corresponding distribution node (either the main distribution frame in case of copper access networks or a metro access node in case of NGA networks) by the incumbent to wholesale partners (mainly unbundlers) who use those connections to provide services to their own retail customers. TKK adopted a draft measure in March 2013 which found A1TA to have significant market power on the physical infrastructure access market and identified the following competition problems: leveraging of market power to neighbour markets by denial of access to its network infrastructure, creation of a margin squeeze, non-price discrimination and bundling with other products or services, denial of access to ancillary services like e. g. collocation on the one hand and abuse of market power vis-à-vis customers by excessive prices on the other hand. To match these competition problems, A1TA was obliged to provide access to unbundled copper and hybrid copper-fibre lines, access to ancillary services like collocation, price control, non-discrimination, submission of reference offers with regard to physical and virtual unbundling and separated accounts. However, A1TA shall be entitled to refuse access to unbundled sub-loops in cases where this could be justified by a deployment of new access technologies within its access network like e.g. vectoring and the availability of a substitute wholesale product called virtual unbundling. In order to avoid excessive prices, the price-control obligation provided A1TA was allowed to charge solely a minimum of either a cost-oriented price according to FL-LRAIC or a price ensuring the absence of a margin-squeeze in comparison to its bitstream access charge and its retail charges. Like in other market analyses, the draft measure has been submitted to a national consultation among interested parties and to a coordination with the European Commission, BEREC and other European NRAs. In July 2013, the European Commission raised serious doubts as to the compliance of the intended draft measures regarding markets 4 and 5 with community law. The proceedings are still pending.

Wholesale broadband access market for business products

The wholesale broadband access market for business products covers broadband services for business customers which are made available to wholesale partners (mainly bitstream ISPs) who use those services to provide a retail service to their customers. TKK adopted a draft measure on March 22, 2013 which found A1TA to have SMP on the wholesale broadband access market and identified the following competition problems: erection of market entry barriers by denial of access to bitstream products, by creation of a margin squeeze and by discrimination with regard to non-price parameters; abuse of market power vis-à-vis competitors by excessive pricing as well as leveraging of market power to neighbour markets (e.g. broadband retail market, retail voice access markets). To match these competition problems, A1TA was obliged to provide access to bitstream services for business customers, access to ancillary services, price control according to retail minus and the absence of a margin squeeze, non-discrimination, submission of a reference offer and separated accounts. The draft measure has been submitted to a national consultation among interested parties and to coordination with the European Commission, BEREC and other European NRAs. On July 25, 2013, the European Commission raised serious doubts as to the compliance of the intended draft measures regarding markets 4 and 5 with community law criticizing the absence of a cost-orientation obligation. The proceedings are still pending.

Terminating segments of leased lines and of Ethernet services with guaranteed bandwidth

The wholesale market for terminating segments of leased lines and of Ethernet services with guaranteed bandwidth consists of the a.m. products (all bandwidths) which are made available to wholesale partners who use those services to provide a retail service to their customers. TKK

adopted a draft measure in January 2013 which found A1TA to have significant market power on the wholesale market for terminating segments of leased lines and of Ethernet services with guaranteed bandwidth and identified the following competition problems: erection of market entry barriers by raising switching cost in contractual conditions like long contract durations, substantial penalties in case of advance cancellation and the loss of discounts; leveraging of market power to the trunk segment market in cases where bundles of trunk and terminating segments cannot be replicated by competitors and to the retail markets by denial of access or discrimination regarding price and non-price parameters due to vertical integration. In order to combat these competition problems, A1TA was subjected to specific obligations like access to terminating segments of leased lines and of Ethernet services with guaranteed bandwidth and to terminating segments of dark fibre, access to ancillary services, price control by a price-cap, non-discrimination, submission of a reference offer and separated accounts. The draft measure has been submitted to a national consultation among interested parties and to coordination with the European Commission, BEREC and other European NRAs. In May 2013, the European Commission raised serious doubts as to the compliance of the intended draft measures regarding markets 4 and 5 with community law. The Commission criticised the definition of a uniform national market including all bandwidths which it considered as not being consistent with previous notifications of 2009 due to different competitive conditions in the market segments below and above 2,048 MHz. The Commission's doubts were supported by a BEREC Expert opinion in June. By a decision of July 2013, the Commission ordered TKK to withdraw the draft measure and to submit a revised version. The proceedings are still pending.

Retail leased lines up to and including 2,048 Mbit/s

The retail leased lines market encompasses leased lines with bandwidths up to and including 2,048 Mbit/s for terminating segments of leased lines and of Ethernet services with guaranteed bandwidth consists of the a.m. leased line products which are made available to wholesale partners who use those services to provide a retail service to their customers. TKK adopted a draft measure in January 2013 which found the market being no longer relevant for ex-ante regulation due to a tendency to effective competition and withdrew all obligations previously imposed on A1TA. The draft measure has been submitted to a national consultation among interested parties and to coordination with the European Commission, BEREC and other European NRAs. The Commission had no objections. As measures on wholesale and retail markets are related, the final decision has been postponed as long as proceedings regarding the wholesale terminating segments market are still pending.

Access of residential and of non-residential subscribers to the PSTN (public switched telephone network) at a fixed location (retail market)

The a.m. retail markets contain all voice telephony access lines of residential and of non-residential subscribers to the public switched telephone networks at a fixed location. TKK adopted a draft measure in April 2013 which found A1TA to have significant market power on both retail voice access markets and identified the following competition problems: abuse of market power vis-à-vis competitors by excessive pricing and leveraging of market power to neighbour markets. To match these competition problems, A1TA was obliged to grant access to a voice-over-broadband wholesale product and to submit a corresponding reference offer, to set its retail charges according to a price-cap as set in a price-control obligation, to submit any changes in retail products or charges to ex-ante approval by the NRA and to maintain separated accounts. The draft measure has been submitted to a national consultation among interested parties and to coordination with the European Commission, BEREC and other European NRAs. The Commission did not raise any objections. The proceedings are still pending.

Calls of non-residential subscribers via public switched telephone networks at a fixed location (retail market)

This retail market contains all voice calls of non-residential subscribers to public switched telephone networks at a fixed location. TKK adopted a draft measure in March 2013 which found

the market being no longer relevant for ex-ante regulation due to a tendency to effective competition and withdrew all obligations previously imposed on A1TA. The draft measure has been submitted to a national consultation among interested parties and to coordination with the European Commission, BEREC and other European NRAs. The Commission had no objections. The proceedings are still pending.

Frequency allocation

Transfer of frequencies with regard to the merger Hutchison – Orange

By a decision of December 2012, TKK approved a transfer of frequencies in the 900 MHz, 2.1 GHz and 2.6 GHz bands between Hutchison 3G Austria, A1 Telekom Austria and Orange Telecommunications Austria. The transfer of frequencies was part of a merger procedure before the European Commission which covered the takeover of Orange Austria by Hutchison 3G Austria (see point I.2b above). TKK did not identify competitive concerns with regard to this transfer. The European Commission had already approved the proposed acquisition of Orange's mobile telephony business in Austria by Hutchison 3G (H3G) under the EU Merger Regulation. The approval was conditional upon the implementation of a commitments package that should facilitate the entry of new players into the Austrian mobile telecommunications market. The Commission had concerns that the elimination of one out of only four mobile network operators in Austria could lead to less competition and higher prices. To address these concerns, H3G submitted remedies, offering in particular to divest radio spectrum and related rights and to provide wholesale access to its network. In light of these commitments, the Commission concluded that the transaction would no longer raise competition concerns.

VI.3. Energy

Cartel / abuse of a dominant position: long term gas contracts

The regulatory authority E-Control opened three cartel proceedings against GWH Gashandel GmbH (“GWH”) – a subsidiary of Gazprom – regarding long term contracts between GWH and Steirische Gas-Wärme GmbH (“StGW”), KELAG-Kärntner Elektrizitäts-Aktiengesellschaft (“KELAG”) as well as Erdgas Import Salzburg GmbH (“EIS”) in February 2012 and April 2012, respectively. In 2006, GWH concluded long term contracts with contract durations of approximately 20 years with the above-mentioned undertakings, without any termination options. Under the conditions laid down in these long term contracts, the buyer is obliged to pay a major share of the annual contract quantity in any event, even if no quantity is taken by the buyer (take-or-pay clause, “ToP”). In addition, the rate the buyer has to pay for the delivered natural gas is tied to the oil price.

GWH and StGW, KELAG, EIS are all active in the wholesale gas supply market. E-Control is of the opinion that the wholesale gas supply market in Austria consists of two markets: on the first level the sales to regional wholesalers like StGW, KELAG, EIS and on the second level the sales to local wholesale companies like Wien Energie Vertrieb GmbH, etc. This can be seen when looking at the different products traded in these markets: unstructured and structured products. GWH has significant sales volumes in the market 'sales to regional wholesalers', and StGW, KELAG, EIS are the main purchasers in this market.

The relevant regional market does not seem to be wider than the Control Area East (Market Area East): Although StGW, KELAG, EIS and the other regional wholesalers are registered at Net Connect Germany (“NCG”), the additional volumes they can buy at the NCG are limited by the ToP requirements in their long term contracts with GWH and other long term contracts. Additionally, the connection between the NCG and the Austrian market is interrupted for some time during the summer months every year, only in winter the two regional markets are connected.

GWH holds a dominant position in this market.

E-Control accuses GWH of foreclosing the market with restrictive contract terms (long term contract duration; ToP clause; oil price indexation). Beyond that, GWH hinders other competitors entering this market. Furthermore, GWH exploits the contracting parties (i.e. StGW, KELAG, EIS) by imposing unfair purchase prices and unfair trading conditions (i.e. ToP clause in combination with the oil price indexation). This behavior is considered to be a cartel (Art 101 TFEU) as well as an abuse of a dominant position (Art 102 TFEU).

E-Control therefore filed an application in April 2012 with the Cartel Court not only for ending the infringement but also for a finding as to whether there was an infringement in the past. The Cartel Court assigned an economic expert to give his opinion on the relevant economic questions. The case is still pending.