

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN AUSTRIA 2013 - 2014

Executive Summary

In 2013 - 2014 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 2013 - 30 June 2014) an emphasis was again put on the food retail market, leading to further dawn raids. A remarkable number of procedures with the Cartel Court could be finished by the imposition of fines. However, also in other industries the BWB continued to observe wide spread practices in vertical and trilateral price fixing, leading to several procedures with the Cartel Court. 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. As many undertakings have sought the possibility to settle in cartel proceedings in the past years, leading to an impressive total of 15 settlement cases just this year, the BWB also issued guidelines on its practice concerning settlements. Furthermore, the BWB put much effort into the investigation of some big mergers, eg in the media sector. 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.

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 2013 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/Documents/BWB-Tätigkeitsbericht%202013.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 2013 - 30 June 2014) 58 new cartel cases were examined, leading to a substantial number of dawn raids, many of them in the food retail market. In

addition, 28 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

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 about 40 companies (food retailers as well as producers) since 2012. A large number of product categories were concerned, but the focus so far has been on brewery products, dairy products and non-alcoholic products.

Several food retailers and their suppliers are alleged to have participated in cartels, infringing Art 101 TFEU and § 1 Austrian Cartel Act, 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 the 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.

As reported last year fines on several producers and on the REWE Group, one of the leading Austrian food retail groups, have been imposed by the Cartel Court for resale price maintenance between retailers and producers since 2012. In the reporting period (July 2013 - June 2014) proceedings could be finished and fines imposed on eight breweries, two producers of dairy products and one mill. As of November 2014 a total of approximately € 25 Mio in fines has been levied on the concerned companies.

Investigations as well as proceedings are ongoing and concern large retailers (as eg Spar), but also smaller retailers and a number of producers. It is expected that the proceedings and investigations in this sector will not be closed in the near future as new companies get into the focus of the BWB. Most prominently, currently proceedings are ongoing against Spar before the Cartel Court. Additionally, there are also proceedings before the Court against one of the bigger suppliers of Spar. As the investigation had considerably broadened in scope some companies of the sector were subject to multiple inspections. A number of proceedings against smaller retailers as well as producers have been settled before the BWB, but are still awaiting a court date before the Cartel Court.

Insulation Cartel Case

The BWB investigated an infringement of article 101 TFEU by several suppliers as well as retailers of expanded polystyrene (EPS). In 2011, a former employee of one of the leading Austrian insulation companies for 20 years was questioned as witness by the BWB with regards to anticompetitive behavior in the insulation sector. According to the witness information exchange 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 were taking place on a regular basis. In addition, the allegations related to illegal resale price maintenance.

The BWB has conducted dawn raids at five companies' premises with a focus on the EPS and XPS insulation market. Additionally there were a number of dawn raids at some retailers for such materials. So far the producer of insulation products Steinbacher, Swisspor and Austrotherm as

well as 4 retailers (Baumax, Hornbach, Bauhaus and OBI) have been fined a total of € 1.6 Mio by the Cartel Court. The fines were levied for illegal price information exchanges between producing companies (i.e. Austrotherm as well as Swisspor) as well as illegal resale price maintenance between Steinbacher and a number of retailers (Baumax, Hornbach, Bauhaus and OBI). The last of the aforementioned companies (Austrotherm) was fined in September 2014. Proceedings against additional companies are pending and the BWB has recently conducted dawn raids.

Fine for RPM in consumer electronics industry case

As reported last year, 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, following an application by the BWB. 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.

Following up the initial investigation triggered by this survey, the BWB continued its investigation in online restraints in 2013/2014. Following the applications by the BWB, the Cartel Court imposed in total about € 2 Mio against the producers Grundig and Pioneer, the general importer Lurf and the retailer MediaSaturn, all active in consumer electronics, for resale price maintenance and vertical restrictions against online sales.

A similar proceeding concerned electronic products for pole care which ended in a fine amounting to € 50.000 for the wholesaler SSA Fluidra.

Based on the experience gained in these cases, the BWB's impression is that the increasing application of selective distribution is used to control online sales prices. Online retailers or hybrid retailers (using both online and offline) who distort the recommended price range are confronted with the termination of the selective distribution contract. A common practice is to distinguish between selective distribution for offline and online sales as well as for each member state, even when the retailer is offering both and in several member states. The official justification for terminating the contract is always based on quality and not on price reasons which makes the enforcement very difficult. In addition, the communication of prices seems to switch from written (Emails) to oral (telephone calls) forms. Also this trend hampers enforcement in case the authority does not have the legal possibility to get a search warrant based on wiretapping.

Cartel in freight forwarding sector

In February 2010 the BWB had filed applications to the Cartel Court for the imposition of fines against more than 40 freight forwarding agents and respectively for a declaratory decision against one undertaking enjoying immunity from fines under the leniency programme.

The companies had been organised in an association (SSK) since 1994 issuing collective tariffs for domestic combined shipments of its members. SSK succeeded two registered cartels that dissolved with effect of 31 December 1993 preceding Austria's accession to the EEA on 1 January 1994. In the course of the following years several national proceedings dealt with SSK. In 1995 the "Joint Committee on Cartel Matters", a body then delivering opinions to the Cartel Court, denied the applicability of European Competition law. A 1996 decision of the Cartel Court qualified SSK as a "De-minimis Cartel". SSK also sought legal advice with a law firm

specialized in competition law. The advice given focused on the conditions for a "De-minimis-Cartel" but did not touch onto the question of compatibility with European Competition law.

Only in 2007, following investigations of the European Commission into the freight forwarding sector, doubts arose as to the applicability and compatibility of the agreement with European competition law, eventually leading to the liquidation of SSK.

The BWB assumed that the agreements concluded within SSK affected trade between Member States as they covered the whole territory of Austria, included the biggest market players (some of them affiliates of international companies), also covered non-domestic clients, etc.

In addition to the leniency applicant six undertakings admitted their participation in anticompetitive agreements.

A decision of the Cartel Court in February 2011 established the existence of the agreements but dismissed the BWB's claims on grounds of lack of culpability, as the members of SSK could rightly rely on the Cartel Court's 1996 decision, the cartel had not been operating in secrecy and had recurrently been seeking legal advice. Furthermore the Cartel Court found Art 5 Reg 1/2003 did not confer the power of a (simple) finding of an infringement to NCAs.

The BWB appealed against this decision. The European Commission acting as amicus curiae delivered an opinion to the Austrian Supreme Cartel Court.

Against this background in December 2011 the Supreme Cartel Court decided to stay proceedings and referred questions to the ECJ regarding (1) the relevance of a situation where an undertaking erred about the lawfulness of its conduct with regard to the imposition of fines and (2) the NCAs' competence to find that an undertaking participated in a cartel which infringes EU competition law in a case where no fine is to be imposed on the ground of leniency.

In the Court's judgment of June 2013 those questions were answered as follows:

1. Article 101 TFEU must be interpreted as meaning that an undertaking which has infringed that provision may not 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.
2. Article 101 TFEU and Articles 5 and 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] must be interpreted as meaning that, in the event that the existence of an infringement of Article 101 TFEU is established, the national competition authorities may by way of exception confine themselves to finding that infringement without imposing a fine where the undertaking concerned has participated in a national leniency programme.

On 2 December 2013 the Supreme Cartel Court referred the case back to the Cartel Court in order to decide on the declaratory decision and amend the facts with a view to the imposition of fines.

During the following months the vast majority of undertakings concerned entered into discussions with the BWB ascertaining their participation in an infringement and achieving settlements with the BWB as to the amount of the respective fines to be applied for by the latter at the Cartel Court.

This process was finished mid June 2014 by filing substantiated applications for the imposition of fines. The Cartel Court has not yet rendered a decision.

Publication of 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. 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 intends to make it easier - especially for small and medium-sized enterprises - to recognize infringing behaviours. The guidance is not binding.

After receiving numerous comments on the draft document from interest groups, consumer protection organisations, businesses and other interested parties, the BWB finalised the guidance in July 2014. The guidance deals with vertical price agreements, especially resale price maintenance and clarifies which types of cases the BWB could see as potentially problematic. Furthermore, it addresses some questions and topics that may concern every sector:

- Why are vertical price agreements problematic according to European and Austrian competition rules?
- Which legal provisions apply?
- When do potentially problematic agreements or certain behaviours typically occur?
- Vertical price maintenance is a restriction of competition by object.
- What are the characteristics of a non-binding price recommendation?
- Unilateral measures that may infringe competition rules.
- Which kinds of behaviour are in principle impermissible/permissible?
- What should a company do if violations occur?
- Special topics and examples.

The main aim is to give (non-exhaustive) guidance to suppliers and retailers (at all trade levels), and to small and medium-sized businesses in particular. The guidance explains both clearly problematic behaviour and generally non-problematic behaviour (for example non-binding price recommendations).

In conclusion, selected examples illustrate the subject to provide additional assistance to companies.

The guidelines can be found at www.bwb.gv.at/Aktuell/Seiten/Kartellrecht-einfach-erkl%C3%A4rt---Finale-Version-zum-Leitfaden.aspx (German version) and www.en.bwb.gv.at/News/Seiten/Competition-law-easily-explained-Final-version-of-the-guideline-.aspx (English version).

Publication of guidelines on settlements

Many undertakings have sought the possibility to settle in cartel proceedings in the past years. A total of 15 cases were settled this year alone in Austria. To increase transparency and legal security the BWB has published settlement guidelines.

The guidelines have been elaborated in consultation with a number of experts and practitioners. Settlements have proven a useful tool to swiftly ensure that infringements come to an end, avoid long and costly procedures and free resources for other investigations.

In Austria, the BWB is only an investigating authority but has not yet the competence to decide on antitrust cases. Only the Cartel Court as court of first instance has decision making power. Therefore settlements in Austria include the Court as a decision making body. However, in Austria, the Austrian Cartel Act (ACA) and the Act for Non-Contentious Proceedings ("AußStrG"), which is applicable to proceedings before the Cartel Court, provide for a legal basis for proceedings that come close to settlement procedures. Such proceedings are summarized in the following paragraphs:

Pursuant to Section 30 AußStrG there is the possibility that the parties to antitrust proceedings reach a settlement before the Cartel Court. [The ACA as such does only indirectly deal with settlements reached before the Cartel Court (see Section 34 ACA dealing with the enforcement of decisions and settlements)]. Such settlement terminates antitrust proceedings and no substantive decision on whether or not the party/parties has/have infringed cartel law will be rendered after the settlement has been reached.

Moreover, the Cartel Court may render a decision without giving any reasoning pursuant to Section 39 (4) AußStrG if the decision is in conformity with the requests or intention of all parties and the parties waived their right to appeal. In practice, this is only feasible where all parties' requests are aligned and thus, where the parties have already agreed on some kind of settlement before initiating the proceedings before the Cartel Court.

Additionally, pursuant to Section 30 ACA, the BWB may take into consideration the cooperation of the party/parties when requesting the fine. This is due to the fact that the Cartel Court may not impose a higher fine on the undertaking concerned than the fine that was requested by the BWB. If the parties admit to the facts of the case and accept BWB's legal assessment of the case as well as the height of the fines requested by BWB in a settlement declaration BWB takes into account this cooperation with a reduction of up to 20%.

The settlement guidelines clarify the existing practice and provide a framework for future settlements.

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 Yessss! (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.

Indeed, a market entry did not yet materialize, and Austria's remaining MNOs continuously increased prices for new and pre-existing customers. MNOs also claimed that they had to adjust prices to compensate for rising costs (e.g. LTE investments) and declining revenues (e.g. roaming).

I.2. Mergers and acquisitions

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

Between 1 July 2013 and 30 June 2014 a total of 306 national concentrations were notified.

In one case the parties agreed on remedies in phase I, thereby avoiding a phase II proceeding. In one case the parties withdrew the notification of the merger in phase I after the period for investigation was prolonged for further two weeks.

In seven 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 one case without remedies. In two cases the parties withdrew their notification. In two cases the official parties withdrew their application for examination with the Cartel Court, in one of them as parties offered remedies in November 2014.

b) Summary of significant cases

Otis / Jeitler-Fida

In July 2013 OTIS Gesellschaft mbH notified the acquisition of sole control on Jeitler-Fida Aufzüge GmbH with the BWB. The proposed transaction affected the elevator market.

The assessment of the BWB showed that the concentration on the elevator market has continued to increase due to past (not notifiable) acquisitions. According to antitrust law the presumption of collective dominance was met. The BWB was concerned that, with the acquisition of Jeitler-Fida, the collective dominance would have been further strengthened such that competition would be harmed.

For this reason, the BWB has filed an application for in-depth investigation with the Cartel Court in August 2013. The expert appointed by the Court concluded in its opinion that the proposed transaction would lead to a strengthening of a dominant position on the market for maintenance and repair of technologically younger standard lifts, so that initially a prohibition of the merger was recommended. However, in a later supplement to its report, the expert came to a contrary conclusion. For this reason, the merger was approved by decision of the Cartel Court in January 2014 without conditions.

In March 2014 the defendant appealed against the decision of the Cartel Court which information should be published by the Cartel Court. The decision of the Supreme Cartel Court in this respect is still pending.

Saubermacher / Kärntner Restmüllverwertungs GmbH

In August 2013 the Saubermacher Dienstleistungs-AG ("Saubermacher"), ie a waste collector, notified the planned acquisition of a non-controlling minority share in the Kärntner Restmüllverwertungs GmbH ("KRV"), ie an operator of a waste incineration plant. The merger concerned the market of waste incineration.

Since the merger did not appear unproblematic from BWB's perspective, the applicant applied for the extension of the time limit for filing a request for examination by two weeks. As remedies could be agreed on, the competition concerns of the BWB could be solved in phase I.

The main focus of the investigations of the BWB was on the non-discriminatory access to the waste incineration plant of KRV, because the BWB feared that the market position of companies competing with Saubermacher would be significantly weakened by the acquisition. At the request of the applicant, the BWB began negotiations on possible commitments. The applicant and the BWB could finally agree on the following commitments that were found to be suitable to remove the merger specific competition concerns:

- KRV committed not to discriminate third parties against Saubermacher and to request usual market conditions from third parties.
- KRV further committed to reserve at least 73% of Saubermacher's capacity for third parties. KRV however has the right to reject offers from third parties and thus leave the reserved capacity unused if the offered conditions are not cost-covering.
- In case of unused capacity, KRV is allowed to offer this capacity to Saubermacher as long as no cost-covering offer is submitted by a third party.
- The BWB has to be informed in advance if KRV rejects an offer of a third party due to business considerations or if KRV offers the reserved capacity to Saubermacher. Furthermore KRV has to provide the documents underlying these considerations at BWB's request.
- The remedies are valid as long as Saubermacher holds a participation in KRV.
- KRV committed to report its delivered quantities and prices for the preceding calendar year (starting on 31/01/2015). At BWB's request the respective contracts have to be submitted at full length.

Funke / Axel Springer

In September 2013 Funke and Axel Springer (AS) approached the German and the Austrian competition authorities with their plan to transfer to Funke the regional print business of AS as well as most of AS's magazine business, ie women's magazines and TV programme magazines (part 1). In addition to that, they planned to create joint ventures for cooperation in advertisement sales and in the distribution of print media (part 2). In November and December both transactions of part 1 were filed with the BWB.

Due to Funke's - indirect - shareholding in Austria's dominant magazine publisher Verlagsgruppe News and due to the fact that Funke's own magazines and most of the AS magazine business transferred are exported to Austria, the BWB and the FCP were concerned that a single or collective dominance on reader and advertising markets for women's and TV magazines could be strengthened by the merger. Thus the BWB as well as the FCP applied for an in-depth-investigation of the merger with the Cartel Court.

The Cartel Court finally cleared the case with the conditions negotiated by the official parties with Funke and AS. The conditions are as follows:

- Reduction of the influence and insight of Funke into the business of Verlagsgruppe News (shares are managed and held by an independent trustee).
- Ban on international sale of advertisement bundles in magazines by Funke or AS addressing Austrian markets.
- Several conditions safeguard that the Austrian edition of the magazine TV-Digital (which was acquired by Funke) is produced independently and considers programmes of Austrian TV stations (including regional non-commercial TV stations) appropriately.

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.

As reported last year, a **Euro-Mediterranean Competition Forum** (EMCF) was created, supported by a coordination committee composed of the Competition Council of Morocco, BWB and the United Nations Conference on Trade and Development (UNCTAD). A second thematic workshop was held in November 2013 in Tunis on the relationship between competition authorities and regulators in which the experiences of the different competition authorities were addressed. 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 bi-annual conference will be held in Malta. It will deal with the future work programme of the Forum, its structure and it will also serve to discuss case-to-case cooperation between the agencies of the region.

The BWB signed a **cooperation agreement** with the Competition Authority of Montenegro in October 2013. The signing of the agreement was accompanied by a study visit of the competition authority in order to exchange knowledge. A study visit was also organised for members of the Moroccan Competition Council and of the German Bundeskartellamt in spring 2014.

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 franchising and the delineation to a cartel, the external experts' role in cases before the Cartel Court, the current case law, compliance with cartel law and the analysis of the effectiveness of merger constraints.

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. Resources of competition authorities

By 30 June 2014 - additional to the Director General and the Deputy Director General - 17 lawyers, 5 economists, one other professional and 5 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.

V. Changes in special sectors: regulatory authorities

V.1. Telecommunication

Market definition and analysis

Between July 2013 and June 2014, the ongoing market analysis proceedings were continued and/or finalized with regard to the following markets:

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

Wholesale call termination in individual mobile public telephone networks

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.

The Telekom-Control-Kommission („TKK“), the competent national regulatory authority in this matter, adopted final decisions in September 2013 which found all mobile network operators to have significant market power (SMP) on their individual mobile termination markets 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”) 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.

Wholesale call termination to individual fixed telephone networks

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 issued final decisions in September 2013 which found all fixed network operators to have SMP on their individual fixed termination markets. While A1 Telekom was found to have SMP on its individual fixed termination market and was obliged to direct and indirect interconnection, price control (pure-LRIC with rates of 0.137 Eurocent per minute (peak) and 0.085 Eurocent (off-peak)), non-

discrimination and separated accounts, 34 alternative operators were also considered to have SMP with regard to termination in their networks and were subjected to a price-control obligation with the same pure-LRIC termination like A1 Telekom.

Wholesale call origination from the public telephone network at a fixed location

(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 final decision in September 2013 which found A1 Telekom to have SMP and imposed certain remedies like direct and indirect interconnection, non-discrimination, separated accounts and price control based on cost-oriented charges according to fully-distributed historic costs.

Wholesale 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. After TKK adopted a draft measure in March 2013 which found A1 Telekom to have SMP on the physical infrastructure access market, the European Commission raised serious doubts in July 2013 with regard to the wholesale market for local access to physical infrastructure and also the wholesale broadband access market as to the compliance of the intended draft measures and especially the price-control remedies imposed on A1 Telekom with community law. In an expert opinion issued in September 2013, BEREC (Body of European Regulators in Electronic Communications) considered that the Commission's serious doubts with regard to both markets were not justified. In a decision in November 2013, the Commission recommended to amend or withdraw TKK's decisions. TKK's final decision was then adopted in December 2013 and found A1 Telekom to have SMP on the a.m. market; the remedies (access, non-discrimination, price-control, reference offers, separated accounts) remained basically unchanged. However, A1 Telekom 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.

Wholesale broadband access 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. The a.m. serious doubts letter from the Commission of July 2013 issued after TKK had adopted a draft measure in March 2013 which found A1TA to have SMP covered the retail-minus price-control remedy proposed for the wholesale broadband access market for business products as well. After BEREC's expert opinion of September 2013 and the Commission's recommendation of November to amend or withdraw TKK's decision, TKK's final decision was adopted in December 2013 and found A1 Telekom to have SMP on the a.m. market; the remedies (access, non-discrimination, price-control, reference offer, separated accounts) remained basically unchanged.

Retail access of residential and non-residential subscribers to PSTN

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 final decision in May 2014 which found A1 Telekom to have SMP on both retail voice access markets and obliged A1 Telekom 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 out in the price-control obligation, to submit any changes in retail products or charges to ex-ante approval by the NRA and to maintain separated accounts.

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

The wholesale market for terminating segments includes terminating segments of leased lines, of Ethernet services with guaranteed bandwidth and also terminating segments of dark fibre which are made available to wholesale partners who use those services to provide a retail service to their customers. The retail leased lines market is limited to leased lines up to 2,048 Mbit/s. Draft market analysis decisions concerning both markets were notified to the European Commission in April 2013. While no objections were raised by the Commission with regard to the retail leased lines market where no SMP had been found, TKK received a letter of serious doubts from the European Commission in May 2013 with regard to the draft measure concerning the wholesale market for terminating segments criticizing as to whether the measures proposed for the market for terminating segments were compatible with Union law and subsequently initiated a two-month in-depth investigation (Phase II). BEREC also submitted a statement on the draft measure during the procedure which did not support TKK's position. Following a respective decision by the European Commission of July 2013 to amend or withdraw the draft measure because there were insufficient data on which to base both the market delineation and the identification of considerable market power on the part of A1 Telekom, TKK withdrew the draft measure in December 2013.

In response to the objections voiced by the European Commission, supplementary expert opinions were issued in October 2013 and February 2014. A modified draft measure with a revised market delineation was issued in March 2014 and a final decision was adopted in July 2014 which found A1 Telekom to have SMP on the submarket for terminating segments of leased lines and of Ethernet services with guaranteed bandwidths up to and including 2 Mbit/s within 359 municipalities listed in Annex 1 to the decision as well as on the submarket for terminating segments of leased lines, of Ethernet services with guaranteed bandwidths and of dark fibre outside of the a.m. 359 municipalities. As a remedy, A1 Telekom was subjected to specific obligations like access to the a.m. terminating segments, access to ancillary services, price control by a price-cap, non-discrimination, submission of a reference offer and separated accounts.

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. Although the Commission did not have any objections with regard to the draft measure of 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 A1 Telekom, the final decision had to be postponed as long as proceedings regarding the wholesale terminating segments market were still pending because measures on wholesale and retail markets are related. The final decision remained unchanged and was later adopted in July 2014.

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 final decision in September 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 A1 Telekom.

Frequency allocation

Transfer of property with regard to the partial acquisition of A1 Telekom Austria AG by Carso Telecom B.V.

Following a respective notice by A1 Telekom in April 2014, TKK issued a decision in June 2014 which approved the partial acquisition of a majority share of 55% in A1 Telekom Austria AG (and thus the frequencies previously assigned to A1 Telekom) by Carso Telecom B.V., a subsidiary of America Movil S.A.B. de C.V. since neither a technical impact nor harm to competition could be identified.

Frequency auction with regard to 800 MHz, 900 MHz and 2.100 MHz (“Multiband auction”)

The multiband auction of the 800 MHz, 900 MHz and 1800 MHz frequency bands, completed in October 2013, represents an important step in the pursuit of the broader frequency strategy that the regulatory authority has defined in response to rapid growth of mobile broadband service in Austria. Preparations go back to 2009, when the regulatory authority first began to define a refarming strategy and to lay the groundwork for reallocating the digital dividend (800 MHz band), as well as to migrate, as part of allocating the 2.6 GHz band, to a new auction design, i.e. the combinatorial clock auction (CCA).

The auction had originally been scheduled for September 2012: TKK had made all preparations and could have carried it out on schedule. However, because of the takeover of Orange Austria Telecommunication GmbH (Orange) by Hutchison Drei Austria GmbH (Hutchison), the invitation to tender for the frequencies had to be postponed until the corresponding European and national procedures had been concluded. This was necessary because otherwise, for competitive reasons, one operator would have had to be excluded from the allocation procedures, and because of the risk of that operator consequently not having sufficient frequencies to continue their business activities in case the merger would not be approved. It would have been necessary to exclude the operator because Hutchison and Orange, as merger candidates, could no longer have been regarded as independent competitors. In addition, it became apparent very early in the merger process that competitive concerns on the part of the competent authorities could have an impact on the design of the auction. Ultimately, as a consequence of the merger, the TKK decided in close consultation with the European Commission to reserve spectrum in the multiband auction for a new entrant (with no new entrant applying, the reserved spectrum was later auctioned off along with the other frequencies).

The auction commenced in September 2013 and was completed in October 2013. The bidders submitted about 4,400 bids during the auction. All three bidders succeeded in securing spectrum. A1 Telekom Austria AG (A1 Telekom) was awarded four frequency blocks in the 800 MHz range (including the block to which more stringent coverage requirements for rural areas are attached), three blocks in the 900 MHz range and seven blocks in the 1800 MHz range, at a total of about EUR 1,029 billion. T-Mobile Austria GmbH (T-Mobile) succeeded in securing a package that includes two blocks in the 800 MHz range, three blocks in the 900 MHz range and four blocks in the 1,800 MHz range, at a total price of EUR 654 million, while Hutchison was awarded a package consisting of one block in the 900 MHz range and four 1800 MHz blocks at a total of about EUR 330 million. Auction revenues amounted to slightly over EUR 2 billion.

Following the new allocations, the share held by each of the operators in the total paired spectrum currently allocated for mobile services roughly corresponds to the operators' market shares based on SIM cards. A1 Telekom, having long-term control of 43% of the paired spectrum, holds 44% of the market (measured in terms of SIM cards). T-Mobile, with a market share of 31%, will control about 30% of the spectrum in the long term, while Hutchison holds 25% of the market and 28% of frequencies (refer to the RTR Telecom Monitor 4/2013).

The allocation decision was issued to the parties in November 2013. Hutchison and T-Mobile have filed complaints against the decision with both the Constitutional Court and the High Administrative Court. Neither the Constitutional Court nor the High Administrative Court granted the motions for suspensive effect filed additionally. In March 2014, the Constitutional Court rejected the complaints since the necessity of specific considerations with regard to a

constitutional question could not be identified. Following a withdrawal of its complaint by Hutchison, the High Administrative Court dismissed Hutchison's complaint in June 2014. The decision of the High Administrative Court on T-Mobile's complaint is expected for December 2014.

V.2. Energy

Inquiry into Electricity End-User Prices

With the highly divergent price behaviour of the industrial, SME and household consumer segments pointing to a need to investigate the competitive situation, in August 2011 the Austrian energy regulator E-Control sent questionnaires to a representative sample of electricity suppliers in order to probe their retail margins and procurement strategies. When none responded, the regulator sent official decisions to three representative companies requiring them to provide the relevant data. All three firms then applied to the constitutional court, invoking their data protection rights. In its verdict of September 2012, reference B 54/12 ua, the court ruled that the relevant provisions of the E-Control Act met the data protection requirements, and that E-Control executive board was entitled to order the transmission of the information. The court took the view that the contested decisions ordered the transfer of the information in a legal manner, were directly connected with E-Control's duty as a regulatory authority to monitor and supervise the electricity market, and did not go beyond what was necessary to fulfil this duty. Consequently the official decisions had not violated the fundamental right of the petitioning companies to protection of their data. Similarly, the administrative Court of Appeal ruled in September 2013 that E-Controls' proceedings were factual and did not object to the questionnaire with the exception of some qualitative questions on procurement (VwGH ZI. 2012/05/0212-10).

At the end of 2013, E-Control therefore again asked 21 electricity suppliers to submit data on procurement costs, costs-to-serve, and revenues for industrial, SME and household consumer groups. By March 2014 all suppliers had submitted the requested data for the observation period 2008 to 2012. After applying a number of cross-checks with other sources, data analysis was well under-way by June 2014. Results and a public report are expected for late 2014 or early 2015.

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

The regulatory authority E-Control filed an application in February 2012 against Gazprom Austria GmbH (formerly GWH Gashandel GmbH) – a subsidiary of Gazprom Export LLC – regarding natural gas long term contracts. E-Control accuses Gazprom of foreclosing the market with restrictive contract terms and deterring other competitors entering this market. Furthermore, Gazprom exploits the contracting parties 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 applied for the ending of the infringement as well as 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.