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*(2000-2001)***1. Legislation**

1. At the moment, a quite substantial reform of competition law is being prepared. Proposals for new legislation and amendments to the existing Cartel Act and the EU Competition Act have been drafted and discussed in a public consultation procedure, which has resulted in a large number of comments. The proposal will be presented to parliament this fall.

2. The emphasis of the envisaged reform clearly lies on the organisational structure of competition law enforcement, the introduction of new investigative powers for the authorities and a reform of the sanctions-system.

3. In detail, the intention is to create an independent Federal Competition Authority (*Bundswettbewerbsbehörde*), that will be competent for the take-up and investigation of competition cases, while the Cartel Court remains to exist as the decision making body. At the same time the compilation of the senates will be changed, so the professional judges hold a majority over the expert lay judges in both instances.

4. The new Competition Authority will be based on existing resources of the Competition Unit of the Federal Ministry for Economic Affairs and Labour, and will also largely take over the competences of the latter in the field of European competition law. In addition, a „Public Prosecutor in Cartel Matters“ (*Bundeskartellanwalt*) will be set up within the Federal Ministry of Justice. Its task is the replacement of the Cartel Courts ex-officio powers which were only introduced by the last amendment to the Cartel Act but have been subject of criticism in terms of fair trial ever since.

5. The Joint Committee on Cartel Matters will be abolished as well as the existing Official Parties. The function of the latter to initiate proceedings and make applications to the Cartel Court will be taken over completely by the *Bundswettbewerbsbehörde* and the *Bundeskartellanwalt*.

6. To fulfil the task of investigating competition cases the *Bundswettbewerbsbehörde* will be vested with substantial powers including requests for information and in cases where there is reasonable suspicion of an infringement of competition law the *Bundswettbewerbsbehörde* can obtain a search warrant from the Cartel Court.

7. The proposal creates the framework for an enhanced and more effective co-operation with sectoral regulation authorities. It further authorises the *Bundswettbewerbsbehörde* to undertake investigations of certain sectors of the economy when it can be assumed that competition in this sector is distorted. The *Bundswettbewerbsbehörde* may comment on general issues of 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.

8. Another major change is proposed for the sanctions-system which is currently based on criminal penalties, but which has never become very effective in practice. It will be replaced by a system of fines to be imposed by the Cartel Court. The level of fines differs according to the severity of the infringement and can reach 10 % of the aggregate turnover of the undertakings concerned in case of forbidden implementation of a cartel, a concentration or the abuse of a market dominant position respectively. A new

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provision gives the Cartel Court discretion to take into account the undertakings' co-operation in the investigation of cartel cases when calculating the amount of fines. Although this provision cannot be regarded as a leniency programme it may give an incentive to cooperate with the authorities.

9. In the area of merger control the Cartel Court may revoke a decision permitting a concentration when it is based on incorrect or incomplete information for which one of the undertakings is responsible or the undertakings concerned commit a breach of an obligation attached to the decision.

2. Special sectors

Telecommunication

10. With 3 1/2 years of regulating the Austrian telecommunications sector, Telekom-Control GmbH formally ceased to exist on March 31, 2001 in accordance with § 5 Par. 2 of the KommAustria Act (KOG) and was made part of the Austrian Regulatory Authority for Telecommunications and Broadcasting (RTR GmbH), which was established under Par. 1 of the same Act.

11. As of April 1, 2001, RTR is to assume Telekom-Control GmbH's previous responsibilities in the telecommunications sector, including Telekom-Control's function as agent to the Telekom-Control Commission. In addition, RTR will also serve as the operating arm of the new regulatory authority for broadcasting, also known as the Austrian Communications Authority ("KommAustria").

12. The focus of Austrian telecoms regulation currently lies on Network Access, UMTS/IMT 2000, Wireless Local Loop and GSM 1800. With regard to Network Access one major issue is the unbundling of the local loop:

13. According to the *Regulation of the European Parliament and of the Council on unbundled access to the local loop*, which entered into force on January 2, 2001 (EC) No 2887/2000), public telecommunications networks operators with significant market power shall provide for unbundled access to their local loops and associated facilities. This obligation - in particular with regard to the local loop with and without further technical facilities - existed under Austrian law already prior to the enactment of this Regulation.

14. Decisions from 1999 and 2000 the Telekom-Control Commission (TKK) issued orders with regard to access of alternative network operators and service providers to the unbundled local loop, all of which expired on September 30, 2000.

15. Three Decisions of March 12, 2001 issued by TKK are in line with previous orders and furthermore contain numerous new provisions. The Decisions are valid for an unlimited period of time; the charges, however are limited until September 30, 2002. Being a public telecommunications network operator with significant market power, Telekom Austria AG (TA), within the scope of its reference offer for unbundled access to the local loop to be published according to the above mentioned EU Regulation, shall also offer so-called "frequency unbundling"/"line sharing", an unbundling variant not requested in these procedures and therefore not ordered. With regard to "bit stream unbundling"/"bit streaming", there exists a separate offer from TA based on a private law agreement for Internet access via ADSL.

16. The unbundling partner is entitled to employ all transmission systems used by TA and its affiliates on the local loops to which he has access for the provision of voice telephony services, leased line services and data services, in particular for multimedia broadband and fast Internet services.

17. For determining the costs of the local loop an analytical bottom-up model was used which had been developed in co-operation with the Wissenschaftliches Institut für Kommunikationsdienste (WIK) [Scientific Institute of Communications services]. The bottom-up model calculates the cost on the basis of the Forward Looking Long Run Average Incremental Cost approach (FL-LRAIC). This approach aims at simulating market prices in a competitive situation not yet existing, by taking into account only the unavoidable costs directly and indirectly attributable to the product - plus an extra charge for common and overhead costs - of an efficient company and network on the basis of current cost. Within the scope of the FL-LRAIC method the bottom-up model only serves for determination of the investments; other cost, mainly operating expenses and cost of capital (WACC) are considered separately.

Electricity

18. As reported last year the Austrian electricity market will be completely liberalised from October 1st 2001. The regulation authority, Electricity Control Ltd. (*E-Control GmbH*), has been set up on the basis of the Energy Liberalisation Act and took up work on March 1st 2001. *E-Control GmbH* is an organisation under private law which also has to perform judicial duties by act of law. These are performed by *E-Control GmbH* itself as well as by the Electricity Control Commission (ECC; authority with judicial power), which consists of three members.

19. The major objective of. is to guarantee benefit for all market participants in the course of the liberalisation. Regulation will be effected in a transparent way and on a non-discriminatory basis. The principle of non-discrimination is given top priority and shall provide suppliers as well as customers with security that their rightful interests will be safeguarded.

20. The functions of E-Control Ltd. as laid down in the Energy Liberalisation Act of 2000 comprise among others the following:

- Provision of proper conditions for the work of the Electricity Control Commission
- Elaboration and issuing of electricity price comparisons for ultimate consumers
- Monitoring and unbundling
- Monitoring of clearing and settlement centres for transactions and pricing of balance energy
- Monitoring of the import of electrical energy from non-member states of the EU
- Elaboration and issuing of market rules
- Elaboration and issuing of technical and organisational rules (TOR)
- Determination of the amount of compensation payments resulting from the combination of the networks of different proprietors (network operators)
- Charging, administration and allocation of rates for stranded costs

3. Enforcement of competition laws and policies

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

Summary of activities:

22. In the period under review, the expectations of the new ex officio examination powers of the Cartel Court were not met. This development induced the new Austrian government to propose an alternative institutional set-up for the antitrust procedure. This proposal is still under review and will have

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a significant impact on the social partners' position within antitrust enforcement. Whether one of the two new antitrust authorities will be independent from political influence will depend on whether the proposal will reach constitutional majority vote in the parliament.

23. The sector study concerning the electricity industry carried out by the Joint Committee has not been finished up till now; the information collected has proven necessary for the evaluation of a merger project concerning some of the most important energy supply companies in Austria. The case is still pending in phase II of the control procedure.

24. The informal co-operation between the antitrust enforcement institutions and the sector specific regulators is an important and integral part of case handling in the everyday practice. The sector regulators (telecom and energy) are constantly invited to give their expert opinion in sector specific cases and are invited to take part in the investigative measures of the Joint Committee and the Cartel Court.

25. The borders of measures against collusive practices has been tested by the Federal Public Procurement Control Authority by denying plaintiffs their right to complain against alleged procedural infringements in connection with the public tender of the introduction of a social security card system in Austria. As one of the plaintiffs was engaged in all complaining bidding communities, the possibility of collusive behaviour was seen as sufficient to exclude all bids and bidding communities concerned from the further procedure.

Significant Cases

i. Horizontal Restraints

Vienna Construction Cartel Case

26. In this case which attracted large public attention, the Criminal Court of first instance condemned nine managers of construction companies for the breach of the Cartel Law. As they have been found guilty to have rigged a public tender concerning road construction works in Vienna, the court found that although the public procurer has not suffered any essential damage, the pure fact of bid rigging was found harmful for the public interest and economically unjustified. The court was supported in its evaluation by a senior economist of the Austrian Institute of Economic Research (Wifo).

Mona Parfümerie/Estée Lauder Cosmetics

27. This case has already been reported in the last competition report, but the Cartel Court has presented its final decision just recently. Against the opinion of the Joint Committee, the Court found that *Estée Lauder* has imposed economic pressure on the retailers of cosmetic products to keep to its recommended consumer prices. As the plaintiff did not subject to *Estée Lauder's* "recommendation", he has been boycotted by *Estée Lauder*. This behaviour has been found a prohibited cartel. The Cartel High Court has upheld this decision.

ii. Abuse of a dominant position

M-Preis/Coca Cola Beverages

28. M-Preis, a locally important food retail chain in Tyrol, complained against Coca Cola for unilateral deterioration of its contractual annual benefit systems. Coca Cola consented to open its books and confidential information to an independent auditor proposed by the Joint Committee. The Parties reached a formal settlement of their dispute and M-Preis withdrew its complaint.

Internet Service Providers Austria/Telecom Austria

29. The organisation of alternative internet service provider complained against the incumbent telecom company, which is also the largest internet service provider, for offering a product for internet access via conventional telephone line with flat rates, and simultaneously denying the alternative service providers the same possibility.

30. The *Telecom* was arguing that the conventional telephone networks capacity was not adapted for a large scale product variety. In fact the *Telecom* had to withdraw its product from the market as the local telephone network partially crashed. The Joint Committee gave its opinion that the *Telecom* as market dominating company has to grant equal access to the network for all Internet service providers and that technical bottlenecks have to be regulated differently than by denying access to the network to competitors.

Hobex/Bank Austria-Creditanstalt

31. The largest bank conglomerate of Austria charged excess rates for the use of bankcards by a company offering alternative methods of payment to businesses. The Joint Committee gave its opinion that the so called interchange fee could constitute a serious barrier for alternative payment provider to enter the market and proposed a legal ban on the interchange fee. Alternatively it has been proposed to the Cartel Court to lower the rates to an insignificant level.

iii. Non-binding recommendations issued by associations

32. In the period August 1, 2000 to August 31, 2001 a total of 23 non-binding recommendations issued by associations was notified to the Cartel Court. The Federal Chamber of Labour filed requests for amendments in five cases and one declaratory request.

33. The notifying parties predominantly complied with the requests for amendments filed by the Federal Chamber of Labor, so that the recommendations could be registered. In one case the applicants did not follow the amendment and withdrew the notification.

iv. Vertical restraints

34. For the period under review no prohibition procedures were initiated.

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v *Mergers and acquisitions*

35. Between July 1st 2000 and June 30th 2001 a total of 253 concentrations has been notified to the Cartel Court. Of those, 25 transactions concerned the creation of joint venture companies, 29 transactions the acquisition of minority stakes, three transactions a mutual investment and 22 transactions were other types of concentration, mainly asset deals. The remaining 174 transactions concerned the acquisition of sole control and full legal mergers.

36. Three cases were decided by the Cartel Court in the second phase of merger control proceedings. Two resulted in a permission of the transaction subject to conditions and obligations. One case resulted in a prohibition of the notified co-operation. Yet in a number of cases applications for examination were filed by the Official Parties but were eventually withdrawn after additional information had been provided by the parties to the concentration that dissipated initial concerns as to the creation or strengthening of a market dominant position.

Total of notified concentrations	253
Mergers/Acquisition of sole control	174
Joint ventures	25
Minority stake	29
Mutual investment	3
Other types of concentrations	22
Decision in Phase II	3
Permission under conditions/obligations	2
Prohibition	1

Significant cases

Post/feibra

37. As reported last year the *Österreichische Post AG* notified the acquisition of sole control over *feibra GmbH*. The activities of both undertakings overlap in the field of distribution of non-addressed advertising media (i.e. leaflets delivered to each household in a certain area). While the parties argued for a wide definition of the relevant product/service market including all kinds of newspaper and magazine advertisements and supplements the Official Party „Republic of Austria“ regarded the market as narrower including leaflets and possibly supplements with a comparable content. Based on the latter market definition the parties achieve considerable high market shares and therefore an application for review was filed.

38. The Cartel Court stated in its decision that the relevant market was not the advertising market per se, but the market for the distribution of a certain kind of advertisements, namely leaflets. Those leaflets can be distributed through the parties or their competitors or (at least to a certain extent) as supplements to newspapers. In this light *Österreichische Post AG* was already holding a dominant position prior to the concentration, not only due to its market share but also because *Österreichische Post AG* is the only market participant offering services in the whole territory of Austria and has access to the post-boxes of the recipients whereas competitors (including *feibra*) put the leaflets on the doorhandle.

39. The Cartel Court also found it likely that foreign competitors in the course of liberalisation of postal services will enter the market. One of the parties' competitors is a subsidiary of the Dutch Post Office. Therefore the concentration will contribute to the improvement of the international competitiveness of the parties. To prevent adverse effects to competition resulting from the parties dominant position the transaction was permitted under obligations. *feibra* shall remain an autonomous legal entity at least until December 31, 2005. The *Österreichische Post AG* must not enable access to post-boxes to *feibra* and has to offer its „Info-Mail“ services to competitors of *feibra* on a non-discriminatory basis. The compliance with the last point is subject to annual review by an independent auditor.

ZVB AG, Verlagsgruppe NEWS et al („profil/FORMAT“)

40. This case concerned (through various transactions) the merger of the publishing companies of two of the largest weekly political magazines in Austria (profil and FORMAT). This transaction was preceded by lasting tough competition between these two magazines, which had led to severe financial problems especially on the part of *profil*.

41. Concerns arose as to the creation or strengthening of a dominant position particularly in the markets for political magazines and advertisements. For those reasons the Cartel court decided to initiate proceedings ex officio. While the Cartel Court dismissed its concerns regarding the advertising market as there is no distinct market for advertising in (political) magazines, it established that the concentration as initially notified would have led to the strengthening of a dominant position of *Verlagsgruppe NEWS* in the (readers) market for political magazines. Another legal criterion for the assessment of this case was the possible reduction of plurality of the media.

42. However, the transaction was eventually cleared subject to obligations providing for the independent direction of the editorial department of *profil* and a guarantee for continued existence of *profil*, thus addressing the main competition concerns.

Wolters Kluwer Beteiligungs GmbH/Linde-Verlag Wien GmbH

43. The notified acquisition of *Linde-Verlag Wien* by *Wolters Kluwer Beteiligungs-Gesellschaft mbH*, a 100 % subsidiary of *Wolters Kluwer International Holding B.V.*, Amsterdam resulted in applications for review by the Official Parties Republic of Austria and Federal Chamber of Labour. The Joint Committee on Cartel Matters which was ordered by the Cartel Court to submit an expert opinion came to the following conclusions after investigating the notified transaction.

44. The market for publishing of specialised legal media (print products, electronic media) was determined as the relevant product market, which can further be divided into submarkets for books and commentaries, specialist journals and online services in the area of law, economics and taxes. The relevant geographic market was found to be national in scope due to the area of applicability of Austrian law. The total volume of the relevant market was estimated at about ATS 500 million (~ EUR 36 Mio).

45. The parties' position on the relevant market can be summarised as follows:
Wolters Kluwer is a publishing group which, through its subsidiaries, is active on a worldwide basis on several markets for specialised publications with an emphasis on law, economics and taxes. *Wolters Kluwer* achieved an annual turnover of more than EUR 3,5 billion worldwide. In Austria *Wolters Kluwer* holds a 40 % stake in *Manzsche Verlags- und Universitätsbuchhandlung AG* which already held a dominant position on the relevant market. The market share of *Manz* is estimated between 30 and 35%. *Linde* is active in the same market and holds an estimated market share of 20 to 25%. The acquisition of

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Linde would therefore have strengthened Wolters Kluwer's dominant position on the market for specialised legal publications in Austria which it already holds through its participation in Manz.

46. The Joint Committee could not establish any justifications for the concentration, particularly there were no indications for improvements of competition conditions to be brought about by the concentration. Furthermore the concentration was not necessary for the preservation or improvement of the international competitiveness of the businesses involved and was not justified by the national economy. In the contrary it was expected that reduced competition following the concentration could lead to price increases and a decrease in the range of publications.

47. The Joint Committee recommended that the acquisition of Linde by Wolters Kluwer should only be permitted if Wolters Kluwers sold its stake in Manz or at least reduced the level of participation under a degree of controlling influence.

48. In the absence of such structural undertakings offered by the parties the Cartel Court shared the assessment of the Joint Committee and prohibited the concentration.