



Austria ❖

Situated in the centre of Europe, Austria is land-locked between Germany, Italy, Switzerland, Slovakia, Hungary, Slovenia, Liechtenstein and Czech Republic. Austria is a Federal Republic; it joined the EU in 1995. A top priority of the current Coalition Government is the implementation of a package of measures designed to boost the competitiveness of Austria as an European business location.

Economy

The joining of the EU, the introduction of the European single currency, the increasing internationalisation of the economy and a rapid economic structural change, have all characterised and fundamentally changed the framework conditions and scope of action of Austrian economic policy within the last few years. Austria's accession to the EU forced the government to accelerate structural reforms and open the economy, removing many non-tariff barriers (NTBs) to merchandise trade and fully liberalising cross-border capital movements.

Austria has a well-developed social market economy with a high standard of living, in which the Government has played an important role. It is one of the 12 richest countries in the world in terms of GDP (gross domestic product) per capita, has a well-developed social market economy, and a high standard of living. Its economy is dominated by services, accounting for 70 percent of employment, followed by manufacturing. Small and medium-sized companies are predominant.

The Government has implemented during the last years an ambitious privatisation programme, which will considerably reduce government participation in the economy. Austria enjoys well-developed industry, banking, transportation, services, and commercial facilities.

Importantly, the government has been less bound than its predecessors by the Austrian tradition of setting economic policy in consultation with the so-called 'Social Partners' consisting of the representative bodies of business, farmers,

PROFILE	
Population:	8.21 million***
GDP (Current US\$):	379.01 billion***
Per Capita Income: (Current US\$)	47,030 (Atlas method)** 41800 (at PPP)**
Land Area:	82,445 sq. km
Life Expectancy:	79.91 years***
Literacy (%):	98 (of ages 15 and above)
HDI Rank:	19**
<i>Sources:</i> - World Development Indicators Database, World Bank, 2011 - Human Development Report Statistics, UNDP, 2011 (**) For the year 2011 (***) For the year 2012 (est.)	

and labour. Designed to minimise social unrest, this consensual approach has come under criticism for slowing the pace of economic reforms. The government broke precedent by not consulting with the social partner institutions on important economic policy decisions such as social benefits reform and balancing the budget.

Competition Law and Institutions

The main Austrian competition regime comprises of two laws: the *Cartel Act of 2005* (*Kartellgesetz 2005* — 'the *Cartel Act*') and the *Competition Act, 2002* (*Wettbewerbsgesetz 2002* — 'the *Competition Act*'). The Cartel Act contains all the rules on cartels, vertical agreements, on distribution, abuse of dominance, mergers and enforcement procedure.

Furthermore, the *Competition Act* contains provisions relating to the Federal Competition Authority (*Bundeswettbewerbsbehörde* — 'the *FCA*') and the Competition Commission (*Wettbewerbskommission* — 'the *CC*'), an advisory body to the FCA.

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By way of an amendment of the Competition Act in 2006, a leniency system was introduced in the Austrian competition regime (similar to the EU leniency programme) to promote cartel enforcement. The Austrian leniency programme has proven to be a success and even led to the introduction of a leniency system in criminal matters in 2010 which applies, for example, in case of bid rigging.

On January 25, 2012, a draft bill for a comprehensive amendment of the Cartel Act, the Competition Act and the Act on Local Supplies and Market Conditions (*Nahversorgungsgesetz*) was submitted to the Austrian Parliament on June 12, 2012. It was adopted by the Austrian Parliament in December 2012 and will enter into force as of March 01, 2013.

The proposed amendment of the Competition Act aims at strengthening the investigative powers of the FCA, in particular with respect to obtaining information from companies during investigations and improving co-operation with other authorities, such as the Federal Bureau of Anti-Corruption and the police.

Federal Competition Authority (FCA)

The FCA was established as a monocratic authority with the Competition Act 2002. Its main function is the investigation and detection of possible restrictions on competition, as well as the filing of petitions with the Cartel Court. Decisions in cartel cases, abuse of dominance cases and phase 2 mergers, however, are met by the Cartel Court.

The Director General of the FCA is independent in carrying out its tasks and is not bound by instructions of a Minister or any other institution although the FCA administratively belongs to the Ministry of Economics.

The FCA is there to oversee the functioning of Austrian competition regimes and has been given the following powers:

- to investigate national competition cases;
- to participate in proceedings before the EC, and give assistance in Commission investigations;
- to investigate economic activities where possible competition infringements are suspected;
- to oversee the consistency of Austrian and European competition law, as well as of the decisions issued by the regulatory bodies and the cartel jurisdiction;
- to cooperate, with regard to the Competition Law, with the Cartel Court, the Cartel Appeal Court (Supreme Court), the administrative authorities (including the regulatory bodies), and the FCP; and
- to provide the FCP with information, upon request.

In order to comply with its functions, the FCA is provided with extensive investigative powers, including dawn raids, if ordered by the Cartel Court. Furthermore, the FCA is

authorised to undertake investigations of certain sectors of the economy, when it is assumed that competition in a sector is distorted (i.e. sector inquiries). Companies must grant information and/or access to business-related documents on request, or risk criminal prosecution.

Federal Cartel Prosecutor (FCP)

In addition to the FCA, the position of ‘Federal Cartel Prosecutor (*Bundeskartellanwalt*—‘*the FCP*’) was created within the Federal Ministry of Justice. Like the FCA, the FCP is a statutory party to competition proceedings, but is bound by instructions of the Federal Minister of Justice. In general, the FCP focuses on cases, which have a public interest dimension, and may have recourse to the investigative powers of the FCA. The FCP may also appeal against all decisions of the Cartel Court.

Competition Commission (CC)

The Competition Commission (*Wettbewerbskommission*—‘*the CC*’) serves as an advisory body to the FCA. The CC, as a board of experts, provides expert opinions – on request of the FCA and the Minister of Economic Affairs – on questions, regarding competition policy and gives recommendations in merger cases. The CC also provides expert opinions. The social partners, whose influence was generally diluted by the 2002 amendments, among others, nominate half the members of the CC. The FCA, however, is not bound by the Commission’s recommendations.

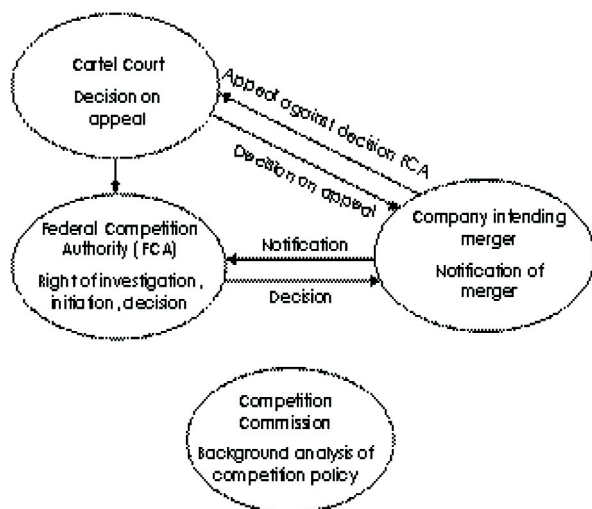
The social partners and the other four members nominate four members and their deputies of the CC. Their deputies are nominated by the Federal Minister for Economy, Family and Youth.

Cartel Court (Kartellgericht) and Supreme Cartel Court (Oberkartellgericht)

The Cartel Court, which is comprised of five panels that are each composed of two professional judges and two lay judges, is the decision making body in Austria. The Cartel Court employs seven professional judges who are partly involved in other matters and are supported by fifteen lay judges. The Supreme Cartel Court is comprised of one panel, which is composed of three professional judges and two lay judges.

The Cartel Court has the sole right to issue binding decisions and is responsible for administering all competition proceedings provided for in the Cartel Act. The only remaining criminal law aspects of cartel behaviour, namely bid rigging and fraud, are not dealt with by the Cartel Court but by the ordinary criminal courts.² The Cartel Court has exclusive jurisdiction to decide whether a certain agreement or behaviour violates competition law. The parties in a proceeding before the Cartel Court including the two statutory parties may appeal against its decision before the Upper Cartel Court.

Structure and procedure of merger control in a new institutional setting:



Source: WIFO

Box 1: Cartel Court seeks clarification regarding third-party Access to File

On October 12, 2011, the Austrian Cartel Court decided to stay proceedings concerning a third-party's application for access to the file relating to the imposition of fines in the so called Printing-Chemicals-Cartel and seek the European Court of Justice (ECJ)'s guidance by way of a request for a preliminary ruling.

As per the Article 39/2 of the Austrian Cartel Act, third-parties may only obtain access to the file with the prior consent of all parties to the respective proceedings. This does not only apply to parts of the file containing leniency applications but to all documents. According to the declared will of the Austrian legislator, this specific provision shall promote the disclosure of infringements of competition law whereas the interest of third-parties in facilitating claims for damages has to stand back.

Following leniency applications in April 2009, the Bundeswettbewerbsbehörde (Federal Competition Authority, FCA) had applied for the imposition of fines against several undertakings active on the market for printing chemicals for sharing customers, fixing prices and exchanging commercially sensitive information. The Cartel Court (26 March 2010) ruled in favour of the FCA's pleadings and imposed total fines of • 1 519 000. This decision was upheld by the Supreme Cartel Court (4 October 2010).

Source: ECN Brief 05/2011

Anticompetitive Business Practices

Since the new Competition and Cartel Act came into force in July 2002, the right of the Cartel Court to take up cases on its own initiative has ceased to exist. The provisions concerning criminal liability against an involved private person for anticompetitive behaviour was replaced by a sanction system for the involved undertaking similar to the sanction system of the EC. Sanctions are foreseen for any infringement of the Cartel Act. Only in the case of bid rigging is the criminal liability applicable.

In 2006, the current Cartel Act has brought about far-reaching changes to the substantive and procedural rules on anti-competitive agreements and concerted practices. The traditional distinction of Austrian cartel law between various types of cartels and vertical agreements to which a variety of different rules were applicable has been abolished and replaced with three provisions which are - *mutatis mutandis* - in substance (almost) identical to article 101 of the Treaty on the Functioning of the European Union (TFEU).³

Sectoral Regulation

Regulators exist in the areas of energy, electricity and gas (E-Control), Broadcasting and Telecommunications set up (RTR – Rundfunk & Telekom Regulierungs-GmbH) rail (Schienenkontroll GmbH SCG). These "special competition authorities" have been introduced for those special industries, where liberalisation processes are going on during the recent years. In these areas a (natural) monopoly partly persists. With exception of application because of merger control, regulators can appeal in competition law court proceedings.

Telecommunications Sector

Austria setup the Telekom Control Commission in late 1997. The Commission is an independent panel authority with the powers of a Court; and the Austrian Regulatory Authority for Telecommunications and Broadcasting (RTR GmbH; replaced Telekom-Control GmbH as of March 31, 2001) serves as its operative arm.

The Austrian Telecommunications Act 2003 (TKG 2003) became subsequently effective on August 20, 2003. TKG 2003 intends to provide a coherent, reliable and flexible approach to the regulation of electronic communication networks and services in fast moving markets. The act provides a lighter regulatory touch where markets have become more competitive while ensuring that a minimum of services are available to all users at an affordable price and that the basic rights of consumers continue to be protected.⁴

There have been seven amendments made to the TKG 2003 to date (Federal Law Gazette I No. 178/2004, Federal Law Gazette I No. 133/2005, Federal Law Gazette I No. 65/2009, Federal Law Gazette I No. 50/2010, Federal Law

Gazette I No. 23/2011, Federal Law Gazette I No. 27/2011 and Federal Law Gazette I No. 102/2011). The purpose of the Federal Act is to promote competition in the field of electronic communications so that the population and the economy can be provided with reliable, low-cost, high-quality and innovative communications services.⁵

Electricity¹ Sector

The Austrian electricity market was completely liberalised from October 01, 2001. The regulatory 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 01, 2001. With the amendment of the Energy Liberalisation Act (2002), the scope of regulation by E-Control Ltd. was enlarged to the natural gas sector and some important tasks in the field of renewable energy. The amendment came into force in August 2002.

The first experiences of the liberalised electricity market have been very positive. Although international and national wholesale prices rose by about 20 percent from 2000 to 2001, retail prices in the domestic sector remained constant or declined by up to 10 percent in nominal terms.

Box 62.2: First-in-Line Leniency Applicant Fined Due to Negligent, Incomplete Cooperation

On April 14, 2010 the Austrian Cartel Court (“Court”) released a decision imposing an overall fine of Eur1.52mn on four undertakings participating in a the printing chemical sector.

The investigation of the cartel by the Austrian Federal Competition Authority (“FCA”) was triggered by a leniency application by Donauchem. As in other jurisdictions, if all requirements are fulfilled no fine will be imposed on the first leniency applicant for its cooperation with the authority.

However, in this particular case, Donauchem negligently failed to fulfil its obligation of full cooperation. Consequently, the FCA requested the Court to impose a fine on Donauchem despite having been the first leniency applicant.

This decision is definitely a landmark decision regarding a negative outcome for a first leniency applicant. However, because the outcome was based on fact-specific circumstances involving negligent incomplete cooperation of a first leniency applicant, it should not give companies any pause in participating in Austria’s leniency program, so long as they ensure that their cooperation with the FCA is as thorough, accurate, and complete as reasonably possible.

Source: International Antitrust Bulletin, 2010 Volume 2

Box62.3: Internet Service Providers vs Austria/ Telecom Austria

The organisation of alternative Internet Service Providers (ISPs) complained against the incumbent telecom company, which is also the largest internet service provider, for offering a product for internet access via conventional telephone lines with flat rates, and simultaneously denying the alternative service providers the same possibility. The case was dealt with at the Cartel Court.

The Telecom incumbent argued that conventional telephone networks capacity was not adapted for large-scale product variety. In fact, the Telecom incumbent had to withdraw its product from the market as local telephone network partially crashed.

The Joint Committee gave its opinion that the Telecom incumbent, a market dominant company, has to grant equal access to the network for all ISPs and that technical bottlenecks have to be regulated differently, than by denying network access to competitors.

Source: OECD2000-2001

In terms of wholesale trading Austria is largely integrated into the Central European electricity market. Austrian generators and traders on their own have not in general enough market power to influence prevailing market prices. Those prices are set by market forces and are not regulated by Austrian authorities.⁶ Industrial and commercial prices have reduced by 30-50 percent. Customer switching was mainly registered in the commercial and industrial sector (10 percent); in the house hold sector only one percent of all customers changed their supplier. The unequal development is mainly due to historically low prices for residential consumers in Austria.

Interface between Competition Authority and Regulatory Agencies

The informal cooperation 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 also take part in the investigative measures of the Federal Competition Authority.

For instance, following announcement by various energy companies, electricity and gas tariffs in Austria increased for the end users and industrial consumers in 2003 and 2004. The possibility of further price rises in subsequent years led to heated public discussions on the competitive situation in the Austrian electricity and gas market. This

situation prompted the Minister of Economics and Labour to suggest to the FCA to undertake a general investigation in close cooperation with Energie-Control GmbH (E-Control—the sector energy regulator).

Concerning the application of the Competition Law the Austrian Competition Authority has to work to ensure consistency with decisions of the regulators. According to the principles of data protection, competition authority is allowed to give regulators information, which they need to perform their duties.

Consumer Protection

The Bureau of Consumer Affairs is part of the Federal Ministry of Social Security, Generation and Consumer Protection. As in several other countries, consumer policy and consumer protection *are not assigned to the authority of a single ministry, but competencies are shared by several ministries* (e.g., Ministries of Economic Affairs, Justice, Environment, etc). The Bureau is charged with acting as the general coordinator of consumer-related affairs.

Consumer policy and consumer protection were explicitly recognised as a government responsibility in 1970. Whilst the task was originally confined to quality control, prices, price marking and product information, it has since been extended to encompass a much wider range of activities.

At present, the Bureau is active, primarily in a co-ordinating capacity, in the following fields:

- General Consumer Protection Laws: cancellation of contracts, general standard terms and conditions; unfair contract terms;
- General Law of Contract: legal and commercial guarantees, errors, default, damages;
- Landlord/tenant Law, Housing Law, real estate agents, time-sharing;
- Financial services: Laws governing loans, insurance, banks, securities, leasing;
- Law on Competition: misleading advertising, competitions and prize draws;
- Trade Laws: regulations for trade practices, direct advertising, automotive sector, debt collectors, prices and price marking, data privacy; description of foodstuffs;

- Pharmaceuticals and patients' rights; and
- Telecommunications and public utilities (gas and electricity providers).

There is a Consumer Council at the Austrian Standards Institute (Verbraucherrat). The Council monitors the work of national and international standardisation bodies with a view to representing consumer interests. Delegates to the standardisation bodies are appointed by the council from among suitable experts.

Concluding Observations and Future Scenario

The Austrian competition legislation changed in January 2006. The main content of the proposed amendments of the Cartel Act and the Competition Act are the following:

- The Austrian laws follow the wording of Article 101 and 102 TFEU;
- Abolition of the national system of cartel notifications and implementation of the system of legal exception;
- Introduction of a leniency programme; and
- Changes in merger procedures concerning competencies and new procedural provisions.

The Federal Competition Authority is of the opinion that these amendments will facilitate competition enforcement in all sectors. They bring the national Competition Laws fully in line with Council Regulation (EC) No1/2003, which was the main aim of these amendments.

There has been a comprehensive amendment to the Austrian Cartel Act and Competition Act which has been approved by the Austrian Parliament in December 2012. It aims at strengthening the powers of the Austrian FCA, in particular with respect to obtaining information from companies during investigations and improving co-operation with other authorities, such as the Federal Bureau of Anti-Corruption and the police.

Amongst others, the Austrian *de minimis* regime - which exempts cartels between undertakings that do not exceed a certain aggregated market share threshold - shall be aligned with EU rules.

Endnotes

1. VBB on Competition Law, Volume 2012, No. 2.
2. <http://www.globalcompetitionreview.com/reviews/37/sections/132/chapters/1389/austria/>
3. <http://www.globalcompetitionreview.com/reviews/37/sections/132/chapters/1389/austria/>
4. <http://www.oecd.org/dataoecd/22/9/34830556.pdf>
5. <http://www.rtr.at/en/tk/TKG2003#a1>
6. <http://www.e-control.at/portal/page/portal/medienbibliothek/strom/dokumente/pdfs/WP7.pdf>
7. VBB on Competition Law Volume 2012, No.2.