

Austria

1. Country facts

1.1 Political background

Austria is a Federal Republic composed of 9 Bundeslaender: Burgenland, Kaernten, Niederoesterreich, Oberoesterreich, Salzburg, Steiermark, Tirol, Vorarlberg and Wien.

The head of state is the President, currently Thomas Klestil who was elected on July 8, 1992 and who will be terminating his second 6-year term in the spring of 2004. The head of government is the Chancellor. Since February 4, 2000, it has been the conservative Wolfgang Schüssel. The last governmental coalition was composed of Schüssel's conservative party, the ÖVP, and the controversial extreme right party of Jorg Haider, the FPÖ. Anticipated elections were held on November 24, 2002 (instead of July 2003) because of tensions and dismissals within the coalition government.

The governmental coalition collapsed in favor of the conservatives who won the elections on a narrow majority of votes. After negotiation, the conservative party has opted for a new coalition with the FPÖ, but in the new government, only 3 ministers instead of 6 come from that party. Negotiation to form the new government took several months. In the meantime, domestic politics was on stand-by, as was the legal reform on telecommunications that had been initiated quite precociously.

The bicameral Austrian parliament is called the Federal Assembly or Bundesversammlung and consists of the Federal Council or Bundesrat (64 members; members represent each of the states on the basis of population, but with each state having at least three representatives; members serve a four- or six-year term) and the National Council or Nationalrat (183 seats; members elected by direct popular vote to serve four-year terms).

Telecom regulation is a prerogative of the Federal State but the Bundeslaender have competencies in the field of regional development and local broadcasting. As a result, national telecom regulation requires agreements between the Federal State and the Bundeslaender.

1.2 Demography¹

- **Population:** 8,139,300 as of end 2002
- **Average population density:** 97.4 per km² (low in international comparison)

¹ Statistics Austria, end 2002

As in Switzerland, the Austrian population is rather concentrated on the lowlands because of steep slopes, poor soils and low temperatures in the alpine regions. In terms of population, Vienna ranks far before any other Austrian city.

Table 1: Main cities in Austria

Rank	City	Inhabitants
1	Vienna	1,500,000
2	Graz	226,244
3	Linz	183,662
4	Salzburg	142,662
5	Innsbruck	113,382

Statistics Austria, end 2002

Generally, the Austrian geography is similar to the Swiss, with the consequence that problems and opportunities are quite alike in both countries. For instance, the mountain area causes similar problems in terms of access, cost and quality of infrastructure. As a result, one of the most discussed topics in Austria is universal service and in particular the obligation to provide equal services on a nationwide level. On the other hand, population concentration in the lowlands offers interesting business opportunities for telecom operators in the sense that infrastructure build-out costs are relatively low in relation to the population to be served.

1.3 Telecom consumption habits

Table 2: Consumption habits fixed telephony in Austria

Fixed voice telephony	1998	2000	2001
Main lines per 100 inhab.	49.1	46.68	46.81
Call minutes per capita	1236.1	2168.6	2844
Call minutes % change	————— + 130% —————>		

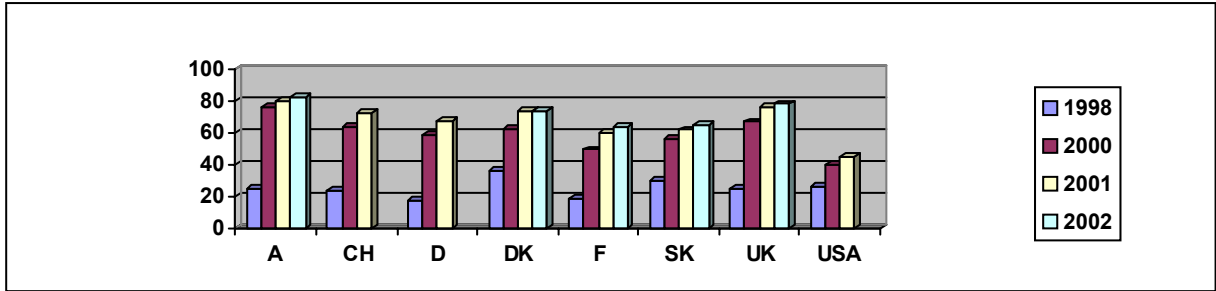
Table 3: Consumption habits mobile telephony in Austria

Mobile telephony	1998	2000	2001	2002
Mobile subscribers per 100 inhabitants	24.94	76.15	80.66	82.8
Call minutes per capita	251.4	735.7	985.6	
Call minutes % change	————— + 290% —————>			

Sources ITU, RTR and Austria Statistics for Austrian population

As shown in the figure below, Austria has a very high mobile penetration rates.

Figure 1: Mobile telephony subscribers per 100 inhabitants, international comparison



Sources: ITU and World Markets research Center, Country reports January 17, 2003

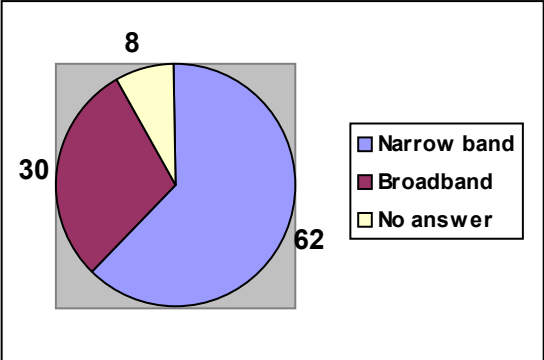
Table 4: Consumption habits Internet in Austria

Internet	1998	2000	2001	09. 2002 ¹
Penetration rate PC	23.34%	27.95%	n.d.	64%
Penetration rate Internet	8.72%	25.86%	31.94%	50%
of which Narrow band	n.d.	n.d.	n.d.	62%
ADSL	n.d.	n.d.	n.d.	9%
Cable Modem	n.d.	n.d.	n.d.	21%
Surfing time per month/capita in hours*	n.d.	n.d.	n.d.	5.2

Sources ITU, * Nielsen Netratings and Austrian Internet Monitor

¹ All figures from Austrian Internet Monitor, quarterly survey on 3,500 people representative of the population above 14 years, that is 6.69 million people in Austria.

Figure 2: Narrow band and broadband penetration September 2002 in Austria



Sources ITU and Austrian Internet Monitor

2. Brief telecom history

2.1 Historical background and liberalization process

Liberalization and privatization of the national PTT took place in several steps in Austria and quite late compared to other countries in Europe. The main impulse came from Austria's entry into the European Economic Area in 1993 and full membership of the European Union in 1995. Until 1994, the Austrian Postal and Telegraph Administration (*Österreichische Post- und Telegraphverwaltung* PTV) operated a state monopoly offering telecommunications networks and services and postal services. PTV was a department of the Federal Ministry of Transportation, Innovation and Technology (now *Bundesministerium für Transport, Innovation und Technologie*, bmvit).

The Austrian Post Restructuring Act (*Poststrukturgesetz*) of 1996 created Post and Telekom Austria AG as the successor of PTV to continue PTV's activities. Post and Telekom Austria AG was created on May 1, 1996 as a wholly-owned subsidiary of Post-und Telekom Beteiligungsgesellschaft mbH, or PTBG, a holding company of the Republic of Austria which operated its ownership through the Ministry of Finance.

In 1996, the operation of transmission paths for telecommunications services, excluding public voice telephony, was fully opened to competition, as well as the mobile telephony market. In October 1996, Post and Telekom Austria AG transferred its mobile communications business to its wholly-owned subsidiary Mobilkom.

The liberalization of the Austrian telecommunications market was completed on January 1, 1998, as recommended by the Directives of the European Commission. This completion meant liberalization of public voice telephony via the fixed network. The principles of liberalization of the Austrian Telecommunications market are laid down in the Telecommunications Act (*Telekommunikationsgesetz TKG*) enacted on August 1, 1997.

The partial privatization of Telekom Austria began in 1998, when 25 % of its shares were sold to Telecom Italia. In November 2000, another portion of 28 % of Telekom Austria shares were sold at the Vienna and New York stock exchanges and buyers were mostly Austrian private investors. Today, a little less than 50% of the historical operator still belongs to the Federal Government by the means of the ÖIAG (*Österreichische Industrieverwaltungs Aktien-gesellschaft*) a 100 % state-owned company, which holds shares in a number of important Austrian industrial enterprises and is responsible for the privatization of state assets.

2.2 Incumbent operator

The Telekom Austria Group (TA AG) is the largest telecommunications group in Austria and also has international operations in the Internet and mobile communications business in Liechtenstein, Croatia, Slovenia and the Czech Republic.

The Austrian State (via ÖIAG) holds 44.7 % of Telekom Austria shares, Telecom Italia holds 14.8 % (it announced its intention in October 2001 to dispose its stake in Telekom Austria) and 38.0 % is free traded. The ownership of Telekom Austria could change again in April, as Telecom Italia intends to resell the rest of its shares in Telekom Austria to the Austrian State (ÖIAG). The Austrian State, on the other hand, wishes to continue privatization. One interested party is Swisscom, who is currently studying the possibility of becoming an important shareholder in the Austrian telecom operator². Swisscom with its treasury of 2.93 billion € would have to pay 1.2 billion € to obtain 25% of Telekom Austria's shares.

The Group has four main strategic business segments, in each of which it is the leading provider in Austria:

- Telekom Austria- Fixed Line: Voice telephony

Telekom Austria's network infrastructure provides blanket coverage for all of Austria and is fully digitized. Additionally, Telekom Austria is the leading provider of fixed line services for other operators in Austria

- Datakom - Data

The business segment data (Business Solutions) encompasses the market for data communications services, in particular leased lines and switched data networks. In the area of data services Datakom has a market share of 58 % in Austria.

- Jet2Web - ISP

The Internet business segment comprises the Telekom Austria Group's Internet activities both in Austria and the Czech Republic. Jet2Web is Austria's leading Internet service provider in the residential segment with a market share of 40% at the end of June 2002.

The Czech Internet provider Czech On Line, a wholly-owned subsidiary of Telekom Austria, had approximately 252,000 customers at the end of June 2002. By launching voice telephony for business customers, expanding the infrastructure as well as providing additional value added services, Czech On Line is in the process of being transformed from an Internet service provider into a full service telecommunications provider.

- Mobilkom - Mobile Communications

The business segment mobile communications encompasses all operative activities of Mobilkom Austria and those of its subsidiaries VIP-Net (Croatia), SI.MOBIL (Slovenia) and Mobilkom (Liechtenstein). In Austria, Mobilkom Austria had 3 million customers and a market share of 44.4 % measured in minutes at the end of 2002. Mobilkom Austria was granted a UMTS license for Austria; network expansion is currently under way. In light of the high mobile penetration in Austria (82.2 % in the end of December 2002) Mobilkom Austria is focusing increasingly on improving the quality of its customer base. Through its Czech and Slovenian mobile telephony subsidiaries, Mobilkom Austria has interesting business perspectives, as penetration rates are still relatively low in these countries (48.7% and 64.9%

² Le Temps, Genève, January 23, 2003.

respectively). Mobilkom Austria has very recently opted for a partnership with Vodafone, Europe's leading mobile telephony operator.

In comparison with other European operators, Telekom Austria has a low debt volume of 'only' 2.954 billion €. Its strategy to reduce debt has led to positive results in 2002, with a debt reduction of 95.1million € during the 9 first months of 2002.

Table 5: Telekom Austria AG profile

Name	Telekom Austria AG		
Services	Full service: Fixed, mobile and Internet		
Date of entry	1881		
Ownership %	44.7% Austrian Government (ÖIAG) 14.8% Telecom Italia 38.0% publicly held		
Market share %	Subscribers	Call minutes	Revenues
Fixed lines (Subscriber line and local calls, long-distance and international)	> 95%	55.6%	80%
Mobile (subscribers)	44.45%	42.9%	n.d.
Internet Dial-up DSL	87%	N/A	n.d.

Sources Telekom Austria AG and VAT

2.3 Main competing operators

There are more than 100 licensed operators in Austria, out of which approximately 50 are still operating. Telekom Austria AG mainly competes with the following companies: United Telekom Austria (UTA), Tele 2, European Telecom, eTel, Priority Telekom, CyberTron, Infonet, Global One, AT&T, GNS, AUCS, Equant, MCI WorldCom, KPNQwest, Netway, UPC Telekabel, and T-Online.

- There are three main operators in the fixed telephony market, open to competition since 1998: Telekom Austria, UTA, and Tele2. It is difficult to say anything about their respective market share, as this kind of data is confidential in Austria. What we can observe is that Telekom Austria is still the market leader. Especially in the field of subscriber lines, Telekom Austria is very dominant with over 95% of the subscribers. Competitors essentially rely on call-by-call carrier selection and pre-selection to get access to the Austrian consumer. On December 31, 2001, the competitors achieved a market share of 43.8% based on traffic volume in the fixed line telephony market - including Internet dial-up.

Fixed telephony over cable could be a significant breach in Telekom Austria's market dominance. There are over 80 regional cable operators providing telephony and broadband Internet over cable, and if capacities were maximized, cable could reach 50 percent of Telekom Austria's fixed line customers. For the moment however, customers have not yet been too enthusiastic about fixed telephony over cable.

- In the mobile telephony market, liberalization was introduced in 1996. Mobilkom had launched its analog network in 1990, its GSM 900 network in December 1994 and its GSM 1800 network in February 1999. T-Mobile entered the Austrian market with a GSM 900 network in 1996 and introduced its GSM 1800 network in 1999. Austria's third mobile operator One (formerly Connect) joined Mobilkom and T-mobile on the market in 1998 with a GSM 1800 network. Tele.ring, Austria's fourth operator entered the market in May 2000. All four operators obtained four out of six UMTS licenses. The others went to two newcomers: Telefónica³ (by the means of its Austrian daughter company European Telecom) and Hutchison Whampoa.
- In the Internet broadband market, penetration rates are not very high yet. Additionally, the customers are divided between ADSL access and cable modem access. For ADSL, Telekom Austria had to offer its competitors an adequate wholesale offer before launching its own offer on the market. Some operators such as UTA offer ADSL over their own infrastructure which is alternative raw copper or optic fiber. There are more customers using cable access than the ADSL technology. At the end of 2001, the respective number of subscribers was 220,000 for cable and 113,900 for ADSL. The main operators are Jet2Web, Telekom Austria's subsidiary, and UTA. Among the cable operators, the largest one is UPC Telekabel, supplying the Viennese area.

³ Telefónica is in the process of withdrawing from Austria.

Table 6: Ownership and market shares of main telcos in Austria

Name	Ownership	Market share
Fixed telephony		of Traffic
Tele2	100% Tele2 Sweden	Approx. 10% ⁴
UTA	91% Austrian energy companies 9% Raffeisen Holding	Approx. 10% ⁵
Tele.ring	100% Western Wireless Corporation	Approx. 5% ⁶
AMIGA	100% Primus Telecommunications Group	Less than 2%
Priority Telekom	100% UPC Cable owned by UnitedGlobalCom Inc.	n.d.
Mobile telephony		of Subscribers
Mobilkom	100% Telekom Austria	44.45% (end 2002) ⁷
T-Mobile	100% Deutsche Telekom	30.23% (end 2002)
One-Connect Austria	100% TDC	20.92% (end 2002)
Tele.ring	100% Western Wireless Corporation	4.40% (end 2002)
Internet		
UTA	100% UTA Telekom AG	18%
One/I-One	100% Connect Austria	3%
Cable Modem		
Chello Broadband	100% UPC Cable	n.d.

Sources: Companies, Communications report RTR, own calculations

Note: As there is no obligation for companies in Austria to provide market data, the amount of relevant information with regard market shares is very restricted.

3. Legal framework

3.1 EU directives

Austria is often praised as being one of Europe's better students with regards to the transposition and implementation of European law into national law. In the past, Austria has shown considerable speed in the transformation of its national telecommunications market regarding European Directives. Indeed, Austria joined the European Union in January 1995 (together with Sweden and Finland) and had to catch up with European law very rapidly. Competition in the mobile market was introduced in 1996 and the fixed market was opened to competition in January 1998 as in most other EU countries.

⁴ This is an approximation made by Tele2 itself. The Austrian regulator does not have information on market shares of the different operators.

⁵ Source: World Markets research Center

⁶ Ibid.

⁷ Source: RTR website: www.rtr.at

Austria also undertook early measures to transpose the new regulatory package into a new national legislation. As a matter of fact, the new Communications Act (KIG) has already been submitted to interested parties for review and approval. Notwithstanding, as we will see below, there are a few points where the implementation of European law may be problematic for Austria, e.g. in the field of mobile number portability and competition surveillance.

3.2 General national framework for telecommunications

The Austrian legal framework for telecommunications is the Telecommunications Act (*Telekommunikationsgesetz*), TKG, enacted on August 1, 1997. The TKG was very largely inspired by the European Directives on Telecommunications and served as the legal basis for the total liberalization of the telecommunications market. A set of ordinances completes the law such as the Interconnection Ordinance, the Ordinance on Tariffs for Value Added Services, the Universal Service Ordinance, and the Numbering Ordinance etc. The TKG determines all matters related to telecommunications including the set-up and functioning of the NRA.

As in all member states of the European Union, the Austrian Telecommunications Act is currently under revision in the light of the new EU package and the evolution of market and technology conditions after 5 years of implementation. In comparison to other European countries, Austria has been rather quick at revising its telecommunications law. Although the new KIG is already being submitted to the sector, the recent elections and the consequent governmental uncertainty have slowed down the process. It is very likely that in Austria, the new law will not be implemented before the deadline set by the EU Commission (July 24, 2003).

The KIG includes the idea of convergence and complements the KOG, the KommAustria Act, which is the legal basis for the establishment of a broadcasting unit within the national regulator. The KOG entered into force on April 1, 2002 and established a whole new converged telecommunications regulation architecture, composed of the new Austrian communications authority (KommAustria), the Federal Communications Senate (BKS), and the Rundfunk- und Telekom Regulierungs-GmbH (RTR-GmbH). The Telekom-Control Commission (TKK) remained unchanged.

Table 7: Legal basis for communications in Austria 1997

TKG 1997	The TKG is the current telecommunications law and the foundation of liberalization of the telecommunications market.
KOG 2001	The KOG is the current law on broadcasting and the legal basis for convergence within the national regulator. It institutes a whole range of new communications institutions and explains the division of powers between telecommunications and broadcasting.

KIG 2003	The KIG is the name of the revised TKG and focuses on the implementation of the new the EU Directives into national law and on changes in the telecommunications regimes in the light of the practical experience accumulated during the past 5 years. The KIG will become effective in 2003. It is currently circulating as a draft version within the sector, but according to people close to the situation, only minor changes should be introduced into the draft version, based on remarks from the industry. As a result, the version available at present should give clear indications on the future Austrian telecommunications legislation.
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Table 8: Content of the TKG (Austrian Telecommunications Law)

General provisions	Similar to most European Telecommunications Acts, the Austrian TKG of 1997 directs the focus on the promotion of competition within the market, the need for high-quality and innovative services at affordable prices, the securing of equal opportunities for new entrants, the provision of universal service and the protection of customers and operators against the abuse of significant market power.
Universal service	§§ 24 and 25 of the TKG define the concept, content and quality of the USO. The Universal Service Ordinance UDV which entered into force in 1999 gives extensive details on minimum quality standards that the provider must respect (benchmark values). §§ 29 and 30 explain the proceedings of the funding of US.
Rates regulation	§ 18 of the TKG explains the regulator's powers in the fields of rates regulation. The Ordinance on a General Framework for regulations and the Telecom Tariffing Ordinance complete the criteria for intervention by the regulator. The Regulator has power in the field of rates regulation on operators with SMP when the rates are related to fixed telephony and leased lines (not mobile). For the moment, companies are defined as having SMP when they have a market share exceeding 25% in a particular market and a particular geographic area. The regulator can only approve or disapprove rates, but cannot set rates by itself. Price regulation implies that operators with SMP are requested to obtain prior approval of tariffs for voice telephony through fixed lines and leased-lines. Ex ante tariff approval by the TTK is carried out under Open Network Provision Conditions.
IC regulation	§§ 37 to 41 TKG and Interconnection Ordinance ZVO. Interconnection is an obligation for all operators in the market. An operator receiving an interconnection request from a competitor shall reach an agreement within a period of six weeks. If no agreement is reached, the TTK may be requested by either party to issue a decision within 10 weeks. Although

	interconnection obligation relates to all operators, the obligation of cost-oriented interconnection charges (FL-LRAIC bottom-up model ⁸) only falls upon companies with SMP.
Convergence	The TKG does not mention convergence, but the issue was thoroughly dealt within the KOG in 2001, that established convergence within the new regulator, the Rundfunk-und Telekom Regulierungs-GmbH, the RTR. Convergence was essentially introduced in order to coordinate activities within both sectors and make economies of scale in terms of logistic support. There are still two separated operational units.

Source: Austrian Telecommunications Act TKG, 1997

Changes to be introduced with the new KIG

Of course, the KIG is primarily aimed at implementing the new EU package into national law, but the complete revision also induces modifications in the procedures and practice of Austrian telecommunications regulation. Some of the most debated issues addressed in the KIG, are notably:

- The extent of time for appealing a decision.
- The wish to reduce the number of cases settled in court by promoting mediation procedures.
- The content and funding of Universal service.
- The necessity to guarantee the quality of infrastructure.

All these issues will be addressed in detail in section 6 of this paper.

4. Key regulation actors

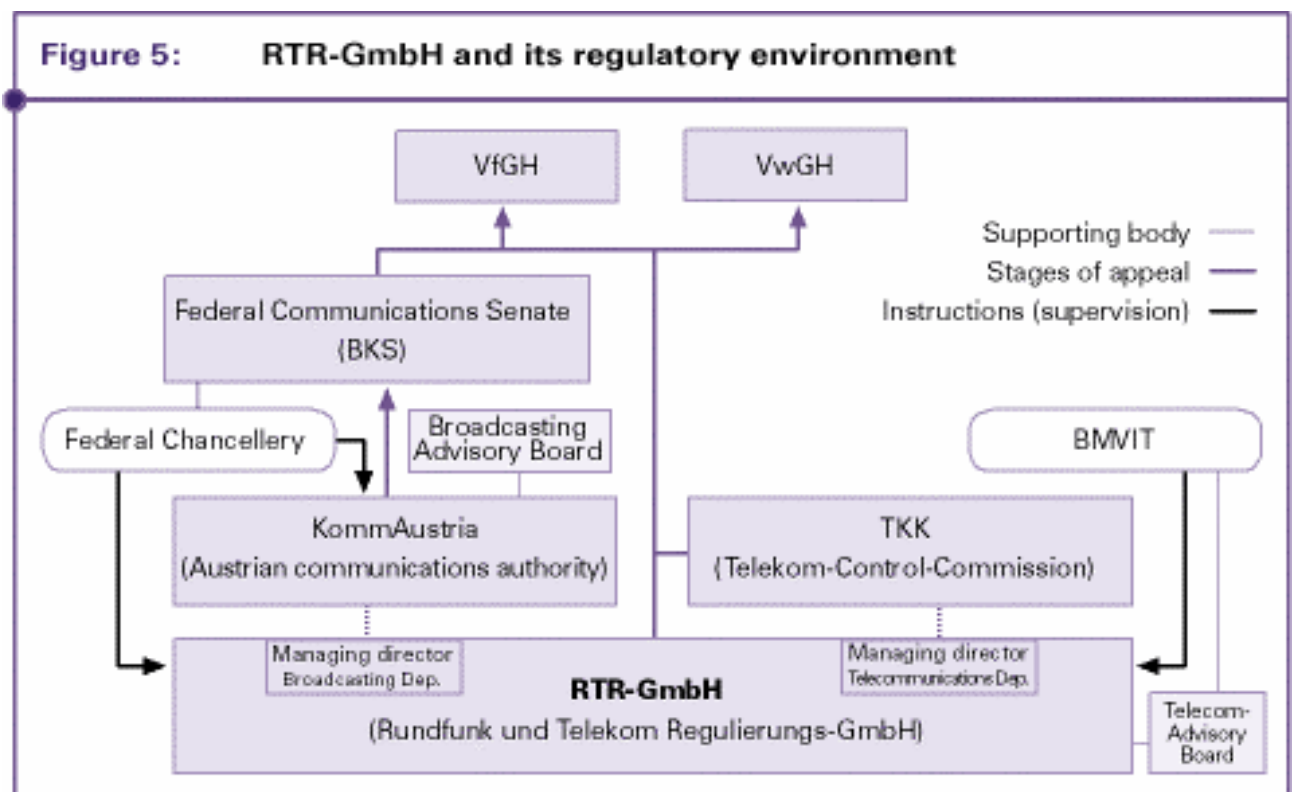
4.1 National Regulatory Agency (NRA)

The Austrian Regulatory Agency Telekom Control GmbH was established in 1997, to accompany the full liberalization process. It was recently (2001) replaced by the new Austrian NRA, the Austrian Regulatory Authority for Telecommunications and Broadcasting *Rundfunk und Telekom Regulierungs-GmbH (RTR-GmbH)*, established as the operative arm of KommAustria and of the Telekom Control Commission to create a convergence regulator under the KommAustria Act (KOG) of April 1, 2001. The idea of a convergence regulator has already been mentioned in the Federal Government's program since February 2000.

It is the RTR that is regarded as the Austrian NRA, but the RTR cannot be considered independently of its two decision-making bodies, the KommAustria for Broadcasting and the Telekom Control Commission TKK for Telecommunications.

⁸ For a detailed presentation of the FL-LRAIC model see www.rtr.at

Figure 3: The RTR and its environment



Source: RTR Communications report, 2001

4.1.1 RTR

The RTR is split up into two specialized sections (Broadcasting and Telecommunications) with the Broadcasting Department being newly created and the Telecommunications Department developed from the structures of the former Telekom-Control-GmbH.

The RTR fulfills the following duties:

- Supervision of Austrian telecommunications companies
- Management of the Telekom Control Commission and KommAustria
- Provision of expertise for Telekom Control Commission decisions
- Competence center for affairs in the audiovisual media and telecommunications industries
- Administration of numbering plans
- Allocation of number blocks to providers
- Decisions in cases of arbitration
- Publication of guidelines for arbitration procedures
- Maintenance of a list of reported services
- Ensuring the availability of a consistent directory of private and business telephone numbers in Austria
- Definition of payment rates for the right to use land for telecommunication lines
- Creation of publications

- Public notifications, especially concerning significant market power operators, reported services, interconnection agreements, standard interconnection offers, fundamental decisions made by KommAustria and the Federal Communications Board,
- Monitoring of performance of special coverage duties
- Tendering universal services on behalf of the Highest Telecommunications Authority (OFB)
- Carrying out arbitration procedures under the Television Signal Act (access entitlement systems; issuing of permits/approvals for manufacturers and receiving devices)

- **Management and Organization**

Alfred Grinschgl was appointed as managing director of the Broadcasting section, and Georg Serentschy as managing director for Telecommunications (he replaced his predecessor Prof. Otruba, whose mandate was surprisingly not renewed)⁹. The managing directors are appointed by the Federal Chancellor and the Federal Ministry of Transport, Innovation and Technology after a public advertising of the job. They are supported by approximately 80 employees in the following departments: Economics, Business Administration, Engineering, Broadcasting Frequency Management, Legal, Finance/Personnel/IT and a staff department for Information Management. In total, the number of full-time staff at the NRA (including the decision-making bodies) is 60 people.

- **Ownership Structure and Financing**

The RTR was the first administration of a long series of administrations to be structured as a corporation. 100 percent of the shares in the RTR GmbH are owned exclusively by the Austrian federal government; these shares are administered by the Federal Chancellery in cooperation with the Federal Ministry for Transport, Innovation and Technology. RTR's share capital totals €5,741,153.90 and was contributed in its totality by the federal government. The amount of €2,124,227 serves to finance duties performed under the Signatures Act. Additional financing of the regulatory authority is governed by law, and inflows of funds include license fees and financing amounts contributed by the telecommunications providers in Austria. RTR's regulatory activities in broadcasting are financed by contributions from broadcasting organizations located in Austria. These contributions are determined by each organization's revenues. The total annual budget for the NRA in 2002 amounted to approximately 7.9 million €.

4.1.2 The TKK

The Telekom-Control-Kommission (TKK) is an independent collegial authority, but part of the RTR with legal decision-making powers equivalent to a court. As such, it is considered as the first instance in matters of telecom. It was constituted in November 1997. The TKK is composed of 3 members appointed by the Federal Chancellor for a term of 5 years who hold this office as a sideline. The Supreme Court is entitled to suggest three candidates for selection and appointment by the Federal Chancellor; the other two members are suggested by the bmvit as well as 3 substitute members. The TKK's assignment is laid down in the Telecommunications Act (*Telekommunikationsgesetz*) TKG. The TKK is competent in matters of licensing, determination of universal service compensation, definition of market

⁹ Prof.Otruba had been violently criticized in the media by Telekom Austria short before the expected renewal of his mandate.

dominance, elaboration of market conditions, frequencies allocation and electronic signatures. The TKK also conducts price surveillance on operators that have significant market power.

The TKK's decisions are made with the field competent support of the RTR. The TKK members are not bound by any directives and can act independently. The presiding member is a judge, and there is no legal recourse against its decisions, except for an appeal with the Constitutional Court or the Administrative Court. These Courts can invalidate a decision but cannot make a decision in place of the TKK (overruling). In this sense the TKK is equivalent to a normal court of law. The chairperson of the TKK issues directions to the managing director of the RTR-GmbH.

4.1.3 KommAustria

On April 1, 2001, the Austrian Communications Authority (KommAustria) was established on the basis of the KommAustria Act (KOG), BGBl. I, No. 32/2001, for the purpose of leading the administration of regulatory activities in broadcasting. The KommAustria authority incorporates the roles of the Private Broadcasting Authority and the Regional Radio Act Commission, which simultaneously serves as the Cable and Satellite Act Commission. KommAustria is also responsible for broadcasting frequency administration, which was formerly the responsibility of the telecommunications offices. KommAustria is responsible for the enforcing of the Private Radio Act (PrR-G) and the Private Televisions Act (PrTV-G).

Tasks:

- Licensing for private broadcasting services
- Licensing for the operation of technical facilities
- Frequency planning and international coordination
- Execution of legal supervisory control over private broadcasters

KommAustria is directly subordinate to the Federal Chancellor. The Federal Chancellor has the right to issue instructions to KommAustria that also bind the managing director of the Broadcasting Department of the RTR. KommAustria is composed of the head of the authority and two members who work full-time unlike the members of the TKK who hold this office as a sideline.

KommAustria makes first instance decisions within the scope of its official efforts. The second instance is the Federal Communications Senate *BKS* in the form of a collegial body with quasi-judicial functions. *BKS* decision cannot be overruled but a complaint may be addressed at the Constitutional Court or the Administrative Court¹⁰.

4.2 Ministry

The Federal Ministry of Transportation, Innovation and Technology (*Bundesministerium für Transport, Innovation und Technologie*) BMVIT, is responsible for creating the framework for

¹⁰ See 4.4 Judiciary powers

telecommunications regulation and enacting the corresponding ordinances. The bmvit is also the National Telecommunications Authority, that enacts and administers regulations required for the implementation of international agreements (in the field of frequencies for instance).

The bmvit is responsible for the regional telecommunications offices (*Fernmeldebehörden*) in Graz, Innsbruck, Linz and Vienna (in charge of the enforcement of the administrative penal provisions of the TKG) and the office for radio systems and, telecommunications terminal equipment. The bmvit can give instructions to RTR's telecommunications department that have to be written and published, but it cannot intervene on the work of the TKK.

Within the Ministry, there are several entities responsible for telecommunications regulation: The Minister's Office for instance deals with policy making and drawing up legislation, whereas the Higher Telecommunications Authority (Höhere Fernmeldebehörde) is in charge of technical regulation.

4.3 Competition Authority

The Austrian competition control system has very recently been restructured on the basis of the new Competition Act (*Wettbewerbsgesetz*) that became effective on July 1, 2002. The competition control system is composed of 4 institutions: The Federal Competition Authority (*Bundswettbewerbsbehörde*), the Federal Cartel Court (*Bundeskartellgericht*), the Federal Cartel Prosecutor (*Bundeskartellanwalt*), and the Competition Commission (*Wettbewerbskommission*).

- **The Federal Competition Authority**

The Federal Competition Authority was established on July 1, 2002 following the Competition Act BGBl I Nr 62/2002 that became effective on the same day. It is an independent, single-headed institution in charge of the take-up and investigation of competition cases. It is based on the resources coming from the former Competition Unit of the Ministry of Economics and Labor. The new Federal Competition Authority remains part of the Federal Ministry for Economics and Labor but it is managed by a Director General who is independent and free from instructions.

The Federal Competition Authority is competent in matters of mergers and abuse of dominant position but it has no decision power. This power is vested with the Federal Cartel Court. Furthermore, the Federal Competition Authority is responsible for supervising the implementation of and compliance with European Competition Law in Austria.

In the field of telecommunications, the Federal Competition Authority is only competent in merger cases and collaborates with the regulator on cases of abuse of dominant position and anti-competitive practices. Collaboration with the regulator is described in Section 2 paragraph 1 and Section 10 paragraph 1 of the BGBl.

The Federal Competition authority has the rights to request information from companies suspected of abuse of dominant position, to visit those companies and copy their documents and have a search warrant delivered upon request by the Cartel Court.

- **Public Prosecutor in Cartel Matters (*Bundeskartellanwalt*)**

Also part of the Austrian competition system, the Public Prosecutor in Cartel Matters has been set up within the Federal Ministry of Justice. The Public Prosecutor in Cartel Matters is in charge of representing public interests in competition affairs at the Supreme Court in Vienna. As such, the Public Prosecutor in Cartel Matters has power to take up and investigate competition cases. It receives instructions from the Ministry of Justice.

- **The Competition Court and Higher Competition Court**

These are the central decision-making authorities. Any company (including telcos) can file a case against a competitor at the Competition Court when it estimates that there has been an infraction against General Competition Law. The duration of a case can be very long. For instance, in December 1999, the competitors filed a case at the Competition Court to invalidate special winter tariffs of Telekom Austria for fixed telephony that had been approved by the RTR. These tariffs granted significant price reduction for Telekom Austria customers between December 1999 and February 2000. A decision against the competitors was taken mid 2001, and was appealed again at the Higher Competition Court. The case is still pending.

- **Competition Commission**

The Monopolies Commission acts as an advisory body on competition issues for the Federal Competition Authority. It is composed of 8 members appointed for a term of four years by the Ministry of Economics and Labor and who possess extensive expertise and experience in different fields such as economics, politics, law or technology. The Monopolies Commission is independent and its members cannot receive instructions. The tasks of the Monopolies Commission are to publish reports on general matters of competition, to make an annual proposition to the Federal Competition Authority on priority issues that it should deal with, and to respond to demands on particular topical issues. As a rule, the Federal Competition Authority is expected to follow the advice of the Monopolies Commission and if it does not, it has to duly justify the reasons why.

The whole competition control system is very young and has not played a significant role in telecommunications matters so far. The sector-specific regulator has been foreseen with extensive powers also in matters related to competition, and a shift of powers is unlikely to occur in the next two years. Although it is an objective of the European new regulatory package to transfer power from the sector-specific regulator to the national competition authorities, the inexperienced Austrian Competition Authority could not realistically take over the regulator's work for the time being.

4.4 Judiciary

Decisions by the Austrian regulator are either made by the TKK or KommAustria. The appeal proceedings follow different ways. Decisions by the TKK can only be appealed against by a complaint to the Constitutional Court *Verfassungsgerichtshof* (when there has been a violation of property rights or human rights) or the Administrative court *Verwaltungsgerichtshof*¹¹ (when an administrative procedure has been violated). Decisions

¹¹ See Figure 3: The RTR and its environment, page 12

by KommAustria can be appealed against by filing at the Federal Communications Senate (BKS) acting as a second instance. Decisions are made by a two-thirds majority, abstentions are not allowed. Appeal against a decision by the BKS can be filed at the higher courts.

In the telecommunications sector, there is no second instance; cases can only be appealed against in the federal higher courts. All major decisions of the TKK have been appealed since 1997 that is approximately 120, of which 50% were appealed against by the Telekom Austria and the other 50% by the alternative operators. These are cases against decisions made by the RTR, in which the higher court proves the consistency of work of the RTR. In a timeframe of 5 years, only 3 (!) decisions were issued, 2 of which were on number portability. All other cases are still pending. As appeals in the higher courts have no suspensory effect, one could say that in Austria, appealing against a decision taken by the RTR is quite useless. That means that every year, an average number of 40 decisions of the TKK became effective straight away.

One of the reasons why decisions took and take so long is that the higher courts in Austria, including also the Competition Court, have, for a long time, felt incompetent to deal with the complicated new cases of the telecommunications sector. More than once, they have requested advice from the European Court in Luxembourg thus lengthening the procedures by another 6 months to a year. It is possible that after 5 years of practice, the know-how acquired could speed up the process a little.

One of the requests of the competing operators to tackle the problem of the 'incompetent' higher courts is the set-up of a sector-specific, competent and independent second instance in the telecommunications sector that should make it possible for them to appeal against a decision made by the RTR without having to wait for years. For this appeal body they especially advocate personnel with sector knowledge and independence from the Ministry (which is not the case of the existing Federal Communications Senate that can receive instructions from the Ministry). It would be very difficult to obtain an institutional structure as it is against the Constitution to have two independent bodies acting as decision-maker and appeal body. As a matter of fact, the first draft of the new KIG did not mention the creation of a second-instance as requested, also because there are discussions at the regulatory level, on whether this would actually allow quicker legal certainty or block the whole process as it does in Germany¹².

4.5 Owner of the incumbent operator

The Austrian State's share in Telekom Austria is 47.2 % and is managed by the ÖIAG. The *Österreichische Industrieholding AG* is the holding and privatization agency of the Republic of Austria. ÖIAG has been given the task of managing to the best advantage the holdings transferred to it. Its objective is therefore to further the growth of the companies entrusted to it as much as possible and at the same time – depending on the instructions issued by the

¹² In Germany, decisions of the regulator can be brought before a court that can issue a temporary order, thus blocking the enforcement of the decision for 3 to 6 months.

Republic of Austria in each case – to find the best possible buyers for its holdings in the interests of the company in question, the Austrian economy, and the Austrian taxpayer.

As in every country where the state is still the major shareholder in the incumbent telecom operator, the question about the duality of political objectives arises. On the one hand, the state promotes competition and sets a legal framework for that purpose. On the other hand, one of the operators represents a financial interest for the state. Therefore, the question: Can the Austrian government intervene in the regulatory game and if yes, how?

The State has no formal means to influence the regulatory game in Austria, as the TKK cannot be given any instructions. This does not mean that there are no informal ways for the government to play a role in the regulatory scheme, especially with the drafting of legislation or the nomination of 2 out of 5 experts in the TKK. At a higher political level, some officials advocate a roll-back of ex-ante regulation in favor of Telekom Austria, but it is unlikely that the new KIG would go in that direction given the lack of structural competition on the Austrian telecom market.

According to available facts and opinions of representatives of the sector, there seems to be no inappropriate state intervention in the regulatory game in Austria. Of course, this is a sensitive statement to make, and it could probably find many opponents. Nevertheless, compared to other countries where state intervention is much more obvious, Germany and France for instance, the Austrian regulatory system seems to enjoy more independence.

4.6 Competing Operators

The Austrian competing operators are represented by two major professional organizations: The VAT (*Verband alternativer Telekom-Netzbetreiber*) founded in the summer of 1997 and representing all major fixed and mobile operators within the country and the ISPA (Internet Service Providers Austria) representing Austria's major ISPs. Both organizations were founded explicitly to defend the competing operators against the former monopolist Telekom Austria. The associations operate as lobbies and are part of the consultation process whenever there are changes made into the legislation.

Especially in the beginning of liberalization, the VAT also represented the competing operators during negotiations with the incumbent. Legally, the VAT cannot request a decision from the RTR (only companies can do so) or constitute a party but it coordinates joint requests from alternative operators. Of course, the VAT represents only the opinions that were unanimously agreed upon by its members. As elsewhere, it happens more and more often that a member of a telco association disagrees with the majority, in which case the companies defend their own specific point of view.

As a representative of the competing operators, the VAT's main concern is of course to promote further competition in the Austrian telecommunications market and in the particular Austrian case, that would mean strengthen the RTR and the TKK, improve the enforcement of decisions through effective sanction power and reduce the timeframes for appealing, in particular through the establishment of a sector competent 2nd instance.

5. Regulatory functions

5.1 Allocation of scarce resources

5.1.1 Frequencies

According to TKG § 49, frequencies are assigned by the Federal Ministry for Transportation, Innovation and Technology and allocated by the Telekom Control Commission. The convergence regulator makes sure that frequencies are allocated with regards to the specific Federal States interests in matters of broadcasting. There is no frequency shortage in Austria, and the latest auctions organized by the regulator encountered very little response from operators. Frequency trading is not possible in Austria, although several mobile operators have shown interest in this possibility¹³. Austria's geographic situation obliges the Austrian government to make agreements with all of its 9 neighboring countries¹⁴.

5.1.2 Rights of way

The management of rights of way is slightly problematic in Austria because of the large autonomy of the Laender on their physical territory. It is impossible for the Federal State to grant an operator the right to use roads, buildings or other public places without reaching an agreement with the concerned Land first. Authorizations are thus longer and more tiresome to obtain than in other European countries.

5.2 Enhancing competition

5.2.1 Licensing

New entrants must either in written notify the regulatory body or apply for a license depending on the services they intend to offer. Between 1998 and the end of 2001, the TTK has issued 190 licenses for fixed and mobile telephony and leased lines altogether.

The TTK allocates licenses in 3 different categories:

- Fixed network services
- Mobile network services
- Leased lines

It is easy to obtain a license in Austria, and license fees for fixed operators and leased lines providers are kept low to encourage market entry for new companies (one time flat fee of 5,087.10 € for a license). For the deliverance of a license in the mobile telephony market, there are public tenders following the auctioning model.

¹³ Annex to 8th implementation report UE

¹⁴ Austria is landlocked and has 9 neighboring countries with the following border lengths: Czech Republic 362 km, Germany 784 km, Hungary 366 km, Italy 430 km, Liechtenstein 35 km, Slovakia 91 km, Slovenia 330 km, Switzerland 164 km

The auction for UMTS licenses occurred in November 2000 and resulted in 6 successful bids by Austria's four existing GSM mobile operators and the two newcomers on the Austrian market Telefónica (by the means of its Austrian daughter company European Telecom) and Hutchison Whampoa. The Auction yielded 706 million € altogether, which is low in international comparison. It is not sure anymore whether Telefónica will actually roll out a UMTS network, as it is currently in the phase of withdrawing from the Austrian market.

At least once a year, the RTR publishes a list with licensed and notified operators and their services offered. Only operators providing mere resale of telecommunications services do not need to notify to the RTR.

5.2.2 Granting access to infrastructures to new companies

- **Interconnection rates and agreements**

The figure below presents the interconnection tariffs for the fixed network, exclusive of VAT as of September 2002. Tariffs are applicable until end September 2003. Tariffs are calculated according to the FL-LRAIC bottom-up model approved on September 6, 2001 by the Administrative Court.

Table 9: Interconnection rates in Austria

Fixed network		Peak time (8 -18)	Off-peak
Termination	Local	0.85 € per min.	0.50 € per min.
	Regional	1.30 € per min.	0.72 € per min.
	National	2.25 € per min.	0.87 € per min.
Transit	Regional	0.29 € per min.	0.15 € per min.
	National	0.62 € per min.	0.32 € per min.
Origination	Local	0.85 € per min.	0.50 € per min.
	Regional	1.30 € per min.	0.72 € per min.
	National	2.90 € per min.	1.10 € per min.

Source: RTR, end 2002

According to Telekom Austria, these interconnection charges are too low and discourage alternative operators from building their own networks. They prefer using Telekom Austria's network for a 'cheap' fee. From the competitor's point of view on the other hand, interconnection rates are too high and not-cost oriented. Numerous appeals have been filed at the higher courts against interconnection rates decided as early as 1999. Given the slowness of the higher courts, none of these appeals has received an answer yet.

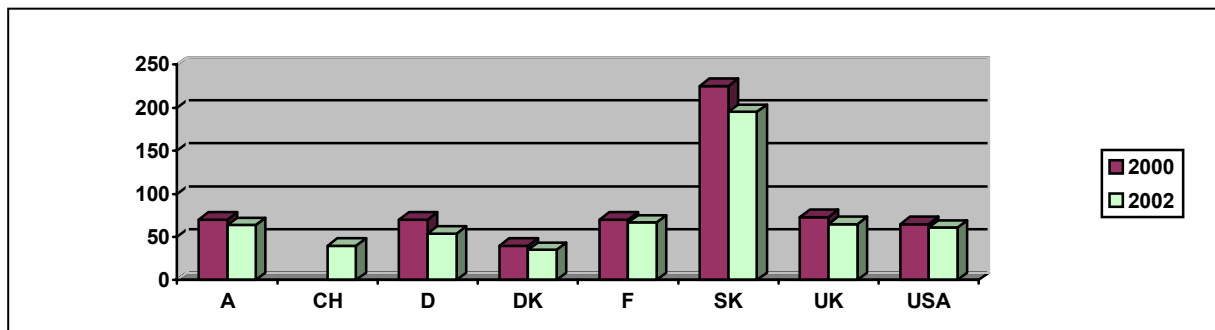
For mobile telephony, termination and interconnection charges are lower in Austria as in most other European countries, which explains the low prices of mobile telephony in the country and indirectly, the high penetration rate.

- **Leased lines**

Telekom Austria has been designated as having significant market power on the leased lines market and as such, is obliged to respect the principles of cost-orientation and non-discrimination. Until mid 2002, Telekom Austria provided more than 90% of the leased lines with a traffic speed of up to 2 Mbit/s but only 20% of the lines with traffic speed above that threshold¹⁵. The prices for the incumbent's national leased lines were approved on September 1, 2001 by the NRA. Compared to 2000 there was a 46% reduction in the prices for digital transmission paths in local circuits whereas the charges for longer circuits were increased by 9% compared to prices in 2000. Telekom Austria has not submitted its charges for international leased lines in spite of RTR's repeated requests.

In international comparison, the prices for leased lines in Austria are average.

Figure 4: Price index of Leased lines, basket of national leased lines of 2 Mbps, OECD average 100



Source OECD

- **Unbundling**

Table 10: Monthly rent for a fully unbundled line in Austria

Monthly rent for a fully unbundled line	11.63 €
EU average	13.2 €
Cheapest in EU (Denmark)	8.2 €
Most expensive in Europe (Norway)	21 €

Source: Local loop unbundling and broadband development in Europe, Marc Fossier, France Télécom, 8 July 2002, Brussels Public Hearing

In the whole European Union, the recommended cost-calculation model for the monthly rental price of a fully unbundled local loop is the FL-LRAIC method. The cost-accounting system actually in place in Austria for unbundling by SMP operators is the Fully Distributed Costs method (FDC).

Unbundling was first introduced in Austria by the decision of the TTK on Unbundling of the Local Loop dated July 2, 1999. With this decision raw copper unbundling for entrant operators was made possible and these copper loops were also made available for the

¹⁵ 8th Implementation report EU, annex, Case Austria

transmission of high bit rate services (xDSL services). The first ULL was set in operation by the end of February 2000. Austria was thus ahead of European legislation; when the member states were requested to comment on the European Directives on Unbundling of the Local Loop (Regulation (EC) No. 2887/2000) Austrian operators were already conditioning the collocation facilities and building the links from the collocation facilities to their core networks. The European Directive became effective on January 2, 2001.

In spite of the ULL, Telekom Austria still has a quasi-monopoly in the subscriber line market, with a market share over 95%. This means that the competitors altogether own less than 5% of the subscriber lines in Austria, and this is including the market shares of the cable operators who offer this service mostly in big cities. The ULL solution seems to be rather unpopular in Austria where out of 3 million lines, only 10,000 have been unbundled¹⁶. One reason for the poor success of ULL is that collaboration with Telekom Austria can be difficult.

At the same time, it is undeniable that the possibility to subscribe to another operator than the Incumbent is little known to the public who, on the other hand, makes intensive use of CPS and CbC in all markets whether local, regional or international.

The current Austrian regulatory scheme is focused on competition on the service level. It is not very favorable to companies whose business strategy relies on the deployment of new infrastructures. This has been a major issue for the past year with great criticism from companies that have and build infrastructures. The Ministry has duly addressed this question in the framework of the TKG revision, in which it puts the focus on the protection of investments.

With the revision of the TKG, the telecommunications regulatory institutions have also discussed the mere pertinence of continued promotion of the ULL. Timid results in Austria and in many other countries have shown that ULL is not the only way and maybe not even the best way for a company to get commercial access to the end-users. As a result, the regulatory institutions weighed out the importance of ULL against other competition promoting mechanism such as lowering the interconnections tariffs or making wholesale offers more attractive.

5.2.3 Facilitating access to end-users for new companies

- **Carrier pre-selection and call-by-call selection**

Carrier selection was first introduced in 1998 with the Numbering Ordinance for long-distance and international calls. For the first two years of liberalization, CPS and CbC accounted almost exclusively for the market shares of the competitors. CPS and CbC carrier selection put significant pressure on Telekom Austria's prices for traffic and resulted in a consequent drop of prices for the end-users. Since the end of 2000, CPS and CbC are available in all

¹⁶ Source Telekom Austria, December 2002.

markets whether long distance, international or local. By March 2002, 775,000 of the incumbent's clients used CPS¹⁷.

Whereas customers appreciate the possibility to choose their carrier, there is a discussion at the political level instigated by Telekom Austria, on the lack of incentives to maintain, upgrade, and deploy infrastructures in the presence of CbC and CPS. Of course, the argument is as old as CbC and CPS themselves, but the threatening attitude of Telekom Austria has obligated the legislator to tackle the question with the new KIG. How the question will be solved is not certain yet, but the KIG will probably put more attention on the promotion and the protection of infrastructure development.

- **Number portability**

Number portability was made available in 1998 with the Numbering Ordinance, and allows geographically limited number portability on the fixed net. According to Telekom Austria, number portability in the fixed market has been a complete (and expensive) failure as by end 2002, only 5,000 customers out of 3 million subscriber lines had used this feature.

On the mobile market number portability has not been introduced yet and raises great debate in the country because of the very disparate charges for calls within a same network or to another network. Some mobile providers offer very cheap conversation minutes in some of their offers (duo-pack for instance) that can be as low as 0.01 € per minute. With the difference, a call to another network can thus be absolutely prohibitive, which is why the Ministry is currently deciding on accompanying measures. In the near future, Austria will have to introduce mobile number portability, to assure compliance with the EU Directives, and will probably do so in the second half of 2003.

5.2.4 Guaranty of stable and fair market conditions

- **Legal and planning certainty**

One of the regulators most important tasks is to shape a stable legal environment for companies to make their business decisions and have clear signals on their options. Legal certainty depends mainly on the regulator's ability to enforce its decisions. In Austria, from a formal point of view, there is legal uncertainty. However in practice, Austria provides a relatively good degree of legal certainty. This state of fact is due to the immediate enforcement of the TKK's decisions and the practical impossibility to appeal these decisions in a relevant timeframe. Indeed, the timeframe between the filing of a case by a company and the decision of the court are very long; many cases have been pending since the actual liberalization of the market in 1998. According to many people in the sector, the learning curve of the higher courts with regards to telecom-specific knowledge and experience accounts for a great part of this situation. With the time, the necessity to refer to the European Court should decrease and higher courts should become more competent to deal with telecommunications cases. Nevertheless, while all of the TKK's most important decisions are pending in court, the telecom sector goes forward without putting too much expectation

¹⁷ 8th Implementation report EU, annex, Case Austria

on possible overruling. The legal framework shaped by the TKK can thus be considered as relatively secure and definite although there is no 100% legal certainty, which gives reasons for complaints by the operators.

One opportunity to secure more legal certainty is to tackle the heart of the problem i.e. the Austrian courts. There are two options: Improve the quality of courts themselves (difficult task) or try and do without them. The bmvit chose the second option. Indeed, the bmvit seeks to diminish the number of cases brought to court with the new KIG. The law will enforce a mediation mechanism that should allow more cases to be settled out of court. Example was mainly taken from the Scandinavian countries. The operators are slightly skeptical about the mediation procedures, as they believe that in many cases, it is impossible for competing companies to reach an agreement when their economic interests are challenged. They think that the compulsory mediation procedure will only add time to the dispute settling mechanism, on top of the time they already need under current law for a dispute settling. Time will prove whether this new feature will have a successful impact on legal certainty in Austria.

- **Control of predatory pricing**

The RTR has often been incapable to stop predatory pricing by the incumbent, which is explicitly forbidden by the Austrian Law. As a result, in several cases, the competing operators have de facto been eliminated from certain portions of the market. This has happened for instance with some of Telekom Austria's special seasonal offers, against which the competitors have filed complaints that are still pending. One of the reasons why the RTR has been incapable to intervene is the lack of transparency of Telekom Austria's cost-calculations. In the context of seasonal or special offers and packages such as TikTak, it is often impossible for the RTR to determine whether Telekom Austria is actually operating prices below costs or offering end-user prices that are below interconnection costs. Lack of transparency is not the only issue, the enforcement of decisions can also bring along problems.

- **Sanction power**

The sanction power of the RTR is indeed very weak, when an operator does not comply with a decision of the RTR, the RTR can oblige the incumbent to pay a fine of maximum 10,000 ÖS, or 700 € which is hardly dissuasive. Moreover, the enforcement of penal provisions under the TKG is not directly dealt with by the RTR, but has to transit via the so-called *Fernmeldbüros*, established within the Ministry, who make a decision that can be appealed at the Independent Administrative Senate (*Unabhängige Verwaltungssenat*). Very few sanctions have been enforced and their result was negligible on the industry.

5.3 Guaranty of public service

5.3.1 Universal service

The definition of the concept of universal service, the content of USO and minimum quality standards are defined in §§ 24 and 25 of the TKG. Telekom Austria is currently required to

provide universal service § 125(8) TKG until 2008, but a public tender will be held after that. Universal service is a largely debated topic in Austria, where the specific topography could create a digital divide if strong regulation were not maintained in this respect. The coverage and quality of services in poorly inhabited areas such as the Alps is under scrutiny in the framework of the new Telecommunications Act. For instance, there has been a discussion as to whether broadband technology should be made available on a nationwide level. Arguments in favor of such an initiative are based on the fact that outside Vienna and a few other cities, it becomes very hard to find decent broadband offers and that, according to the principle of universal service, the government should provide nationwide access opportunities. Arguments against the inclusion of broadband in USO stress the fact that there is no high demand for broadband yet and that it would raise the costs of universal service too much. In the new KIG, broadband has not been included in the USO, but there could be initiatives to change that in the near future.

The financing of US follows a set of specific rules: First of all, there may be no claim for financial compensation if the company providing US has a market share exceeding 80%. This line was crossed in 1999 for the first time, when Telekom Austria's market share dropped below 80% for fixed and mobile markets combined. Secondly, financial compensation can only be requested if there is evidence showing that the provision of US is unprofitable. In December 2001, Telekom Austria claimed reimbursement of the cost incurred by universal service in 1999. However, later on, the company withdrew its claim. Telekom Austria has also claimed reimbursement of its US activities for 2000 and 2001 and those cases are still pending. As there is no time limit to request refund of universal service, Telekom Austria could potentially ask for compensation at any moment for any year after 1999. This means a certain level of financial insecurity for companies obliged to contribute to the US fund.

As in all other countries, the cost calculation for US is a major pitfall for NRAs. Pursuant to §§ 29 and 30 of the TKG on the funding of the US, the regulatory authority calculates the financial compensation to be paid from a US fund. Cost calculation is based on the Interconnection Directive 97/33 and the Commission Communication 96/608. The Austrian financing mechanism for US relies on a fund financed by operators having a minimum annual turnover of € 18,168,208.

There are a few special services that do not fall under the regime of universal service but still aim at fulfilling the objectives of certain social or regional public policies. These services called 'Special tasks of service provision' are funded by the Ministry (TKG§ 27). Following this rule, the bmvit can oblige an operator to provide such services against compensation by the Ministry. A certain amount of competition exists in the provision of services in the general Interest, i.e. the exemption of payment of tariffs (§ 125 TKG), that allows certain poor groups of the population to access telephony services by means of a grant accorded by the bmvit. Three operators concluded agreements with the bmvit to offer this service, one in the fixed network (Telekom Austria) and two for prepaid mobile services (T-Mobile and Connect).

5.3.2 Consumer protection and quality control

The RTR offers consumer protection through its arbitration body. The arbitration body is aimed at mediating disputes between providers and end-users. The number of complaints has increased disproportionately in the year 2001, with an increase of 158.6% compared to 2000. Most complaints are about individual bills and specifically the costs for value-added services over the Internet. The arbitration body seeks to reach an agreement between the customers and the operator without having to activate substantial proceedings. These only occur when the customer and the operator fail to reach an agreement in due time. In most cases, there is no need for formal proceedings, as the parties reach an agreement or the complaint was found unjustified.

As far as information to the consumers is concerned, the RTR gives information on the prices of all operators on its website www.rtr.at. It does not have a ranking of the cheapest operator for each type of phone call; it is up to the consumer to find the best deal. A few private websites offer this facility but as a general rule, it is rather difficult for the Austrian consumer to find out how much he pays and could pay for his telecommunications usage. As in most countries, price differences between the incumbent and the alternative operators have evened over the years.

6. Evaluation of the regulatory system

6.1 Assessment of the NRA

6.1.1 Resources and expertise

Globally speaking, the NRA is considered as having adequate resources and expertise to fulfill its tasks. From the inside, and more importantly from the outside, the regulator is considered as being competent and generally speaking, there is surprisingly little criticism on the quality of the regulator itself. Staff is rather young and qualified and there is little turnover, which is a positive indicator especially since the regulator has gone through its first learning curve and can now count on experienced staff.

6.1.2 Independence vis-à-vis political interests and transparency

As Telekom Austria still partly belongs to the Austrian state, one could expect that there is a certain degree of political intervention within the regulatory system aimed to protect the interests of Telekom Austria. Surprisingly, this is not something the competitors complain about, they seem to think that the regulator is quite consistent with the law. Of course, whether one can derive there from that the Austrian regulator is totally independent and transparent is an open question. At least, the case seems rather different from Germany where criticism is much more virulent against the regulator and its apparent porosity towards political influence.

6.1.3 Efficacy and Credibility

In several respects, the Austrian regulator can be considered as being effective. First of all, its decisions are taken in an independent and timely manner, and second, its decisions are

enforced straight away, as there is no suspensory effect on appealing and appeal procedure take such a long time that they actually never invalidate the regulator's decision.

Although, the regulator enjoys a high degree of credibility among the industry, one shall not forget that all major decisions of the RTR have been appealed against in court, where they are still pending. This does not mean per se that the regulator's decisions are considered inconsistent with the legislation but rather that companies see room to contest the practical application of the law in fields such as interconnection, ULL, number portability etc.

6.2 Flexibility of the whole system

When operators are asked whether there has been an improvement over the years within the regulatory system, they all tend to answer positively. Most of them believe that the regulator and the other institutions involved in telecom regulation successfully went through their learning curve. According to the operators, the RTR (former TK) and the TTK have been able to address all questions that have arisen during the past years in a timely and competent manner, and the main defaults that have come to light within the system are rather concentrated on the inability of the juridical power to guarantee legal stability. Periodic evaluations of the progress of liberalization have further militated in favor of the preservation of asymmetric ex-ante regulation.

With the KIG, the legislative power seeks to eliminate certain deficiencies of the current system, i.e. in the field of dispute settlement, but competing operators complain that several well-known problems are not (sufficiently) addressed in the new law. In particular, the operators claim that little is done to ensure faster appeal possibilities, that the regulators powers and resources should be enhanced, i.e. in the fields of sanction power, decision enforcement, ex ante intervention, and price control. It is not sure yet whether the second version of the KIG will take competing operators wishes into account.

7. Outcome performance indicators

7.1 Competition

- **Number of operators on the market**

The number of competitors on each of the different service markets in Austria is similar to most European countries. As in most countries, where liberalization was introduced in the late '90s, the Austrian telecommunications market is currently undergoing a consolidation wave in which the numerous insolvent companies disappear from the market or are merged with bigger more solid companies. A Market entry is not very easy in the Austrian telecommunications market, not so much because of regulatory obstacles but because of market saturation, especially in the mobile market. Several operators are active in all business segments (Telekom Austria, Tele.ring, and UPC Cable) and offer bundled packages that could lead to a more restricted number of operators in the future.

As far as regulatory intervention is concerned, everything has been done to guarantee access to the market in terms of legal and planning certainty, the presence of features favorable to competition such as carrier selection, unbundled local loop or number portability, control of abusive practices by the incumbent, and the determination of realistic wholesale prices. In all of these elements, the regulator has a certain intervention power that can be measured in terms of pro-activity, market knowledge, and expertise as well as rapidity of intervention and decision. The main weak point in the whole system is that it is nearly impossible for the regulator to get accurate and up-to-date data about the market shares of the different operators. Without this data, it is difficult for the regulator to foresee market tendencies that could lead to the eviction of certain market players. Access to this kind of

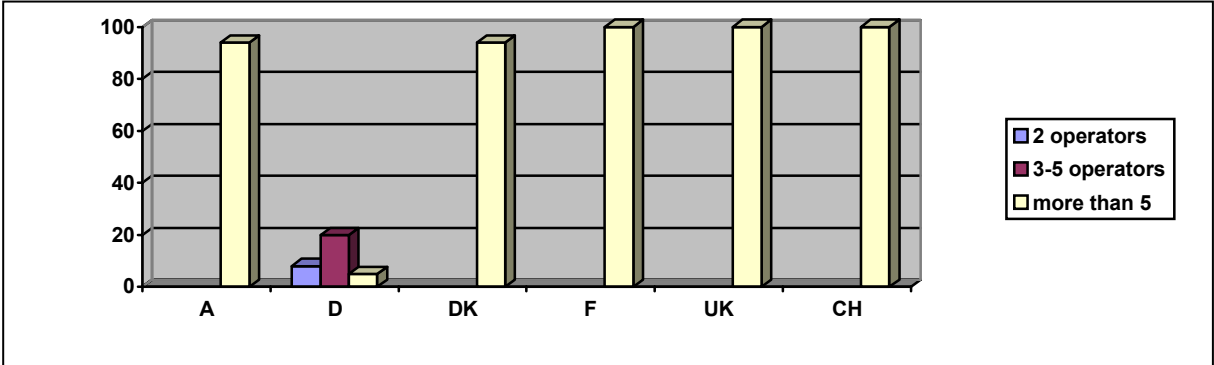
information requires a change in the telecom legislation, and lies outside the scope of the regulator itself.

As a result, there is little that the regulator can do to make sure that the number of operators remains coherent with the government's policy to have competition in each market, apart from the guaranty of fair and stable market conditions.

- **Choice for the consumers in terms of operators/technologies**

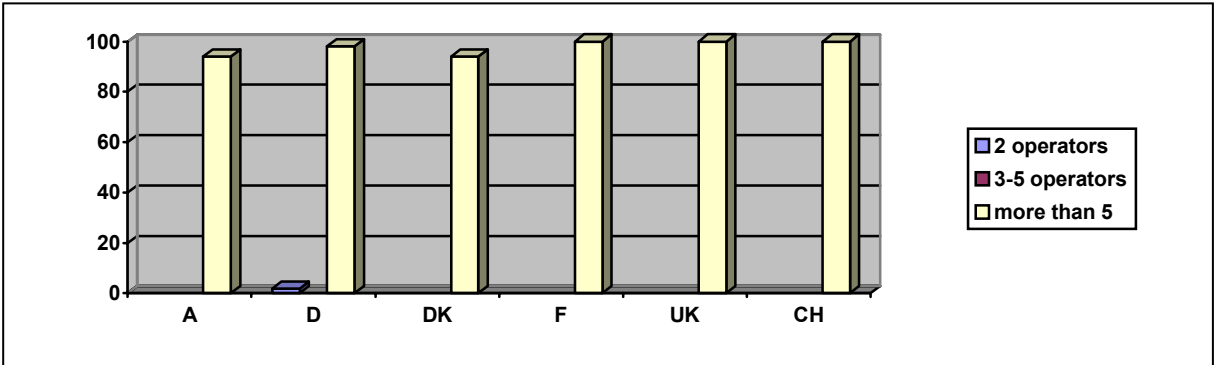
In Austria, most consumers can choose between several operators for each common telecom product, as shown in the graphs below.

Figure 5: Percentage of population that can choose between different operators for fixed local calls



Source: WIK Consult Auszug aus dem 8. Implementation Report der EU -erweitert um die Schweiz, 2003

Figure 6: Percentage of population that can choose between different operators for fixed telephony domestic long distance and international



Source: WIK Consult Auszug aus dem 8. Implementation Report der EU -erweitert um die Schweiz, 2003

The choice is essentially due to carrier selection and the relatively broad offers of cable operators who have packages including voice and Internet. Although penetration rates for those services are not really high yet (UPC, the main cable operator announced 144,800 subscribers for telephony over cable and 163,000 subscribers for Internet via cable mode), they offer a serious alternative to Telekom Austria. Powerline is under testing in several urban centers and could also signify enhance competition in the fixed market. In the mobile

market, there are 4 operators for 2nd generation telephony and there will be another one or two operators for UMTS.

The regulator's role behind the choice for consumers is essentially linked with its functions as a market watchdog and expertise consultant for the government. These include creating conditions to stimulate long-term investments by all operators, including cable companies, to ensure effective infrastructure competition between different broadband technologies and deployment strategies. The more pro-active the regulator, the more chances that competitors remain on the market and that alternative technologies are developed. Here again, the fact that the RTR does not have detailed information about market shares (except for mobile telephony) hinders its' activities as a market watchdog.

By providing information to the consumer about the different products and technologies available, the RTR can also stimulate the demand side and ensure that the consumers actually benefit from the choices that are offered to them. A limited amount of information is available online on the RTR's website.

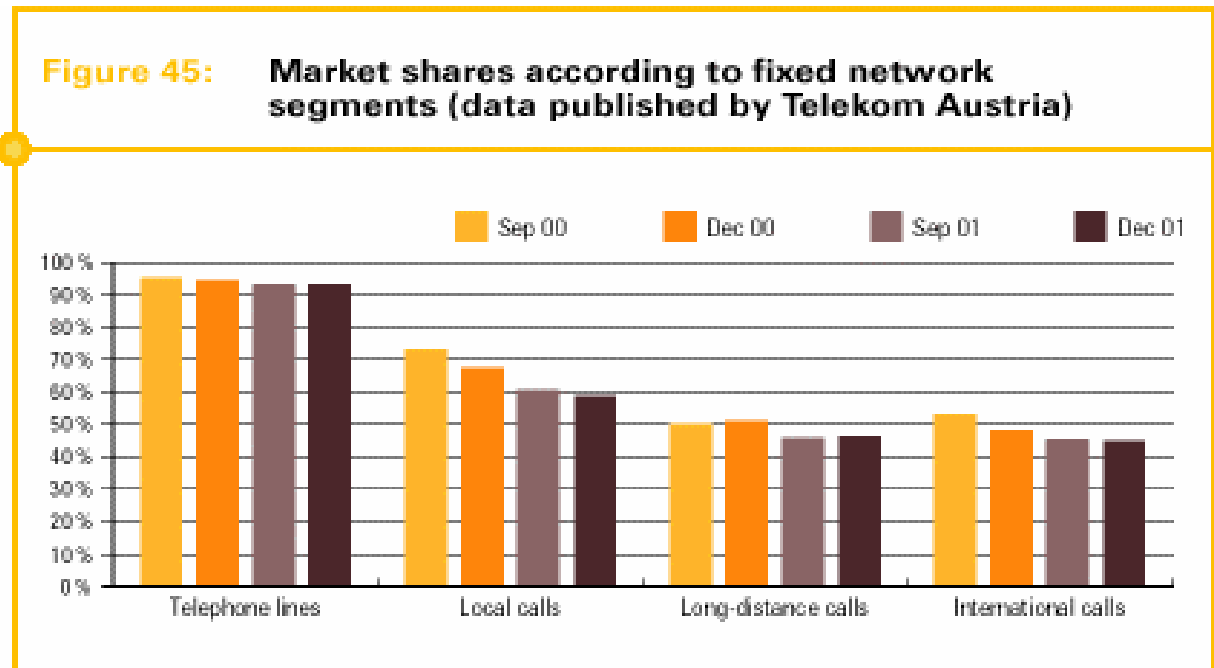
- **Market shares of the incumbent**

The mobile telephony market is the most competitive in Austria as Mobilkom Austria, Telekom Austria's mobile subsidiary, has approximately the same market share as the second mobile operator T-Mobile (Deutsche Telekom) that has 40%. The Hirschman-Herfindahl Index¹⁸ shows that market concentration is decreasing, and this is indeed reflected in the growing market shares of the two smaller mobile operators and the declining market shares of the two biggest. The RTR does monthly monitoring of the market shares of mobile operators, but apart from that, the market is competitive enough to make regulatory intervention redundant. During the past two years, the four competitors have been in a permanent price-war. Now that Austrian consumers claim that they would no longer change just because of minor price differences, the mobile operators put more focus on services diversification, customer services, and customer loyalty.

The situation is quite different in the fixed voice telephony market: Telekom Austria still has a comfortable advantage on its competitors and has actually been consolidating its position in the past two years, i.a. thanks to its very attractive TikTak tariff.

¹⁸ See RTR Communications Report, 2001

Figure 7: TA's market shares for fixed telephony. Source RTR Communications report, 2001



The relative drop of TA's market shares in the international and long-distance markets is essentially the result of call-by-call carrier selection and pre-selection. In spite of the relatively good position of the competitors in these markets, there is still no structural competition in the fixed market in Austria, especially in the subscriber line segment on the local calls market. Further promotion of the ULL and the deployment of alternative technologies such as telephony over cable could contribute to breach Telekom Austria's quasi-monopoly on this market segment. Telekom Austria's services seem to encounter a high degree of satisfaction among the population both in terms of quality and affordability thus making it harder for competitors to conquer Telekom Austria's subscriber line clients.

Therefore, the question: What can the RTR do to boost the market shares of the competitors? CbC, CPS, ULL and NP have already been implemented a while ago and will probably not lead to spectacular results any more, unless the RTR launched a public campaign to further promote these features. Control of possible price-dumping tactics from the incumbent is also a way to prevent tendencies towards re-monopolization, but so far, there have been no major cases against Telekom Austria. The competitors however ask for tighter price-control in order to avoid cross-subsidizing, which, according to the competitors, is currently occurring in the ADSL market. Competitors also want the RTR to exert more power and control over the incumbent's (non) compliance with the provision of pre-products at reasonable prices, good quality, and in due time. Globally, the competitors want the regulator to have more powers and to be more pro-active in order to prevent re-monopolization of certain market segments.

- **End-user prices**

Prices for telecom services in Austria generally correspond to the European average, except for mobile telephony, where charges are lower. The Austrian mobile market is indeed an example of a very dynamic and competitive market, where the penetration rate is very high (over 82%) due i.e. to very attractive offers on the market. The four mobile operators are in a constant price-war and in this particular market, the Austrian end-users have demonstrated responsiveness to prices, at least in the early years of mobile telephony. At some point, a tariff of 1 Austrian Schilling/minute was introduced, allowing customers from a same network to call each other almost for free under certain conditions. According to a study commissioned by the RTR, the behavior of the Austrian mobile user has changed over the past years. It seems that people do not feel the need to change operators any more because they are satisfied with their own operator and feel that possible savings would not compensate the efforts to change operators. As a consequence, the Austrian mobile market could be considered as an achieved competitive market in which customers are satisfied with the quality of services offered by their providers and where price differences have evened to a level where it becomes uninteresting to switch operators.

7.2 Public service

- **Availability of services throughout Austria**

The Availability of services is good in Austria, although there is a small digital gap between the urban centers and the more alpine and rural areas of the country.

ADSL 80%, urban coverage 98%	Leased lines n.d.
ISDN n.d.	Voice telephony over cable: Available
Cable modem available (Penetration rate CATV 32%)	Voice telephony over powerline: Available in certain cities (Linz) many pilot projects underway
FWA availability n.d.	

Sources operators, RTR, RegTP German regulator

It is not easy to report about the availability of services in Austria, as the RTR does not collect precise data and companies provide only partial information. Globally, availability of services in Austria is similar to that of most European countries that are neither at the forefront of technological innovation nor lagging behind. The RTR will have to make sure though that the digital gap does not widen in the future with the advent of new technologies such as powerline communications.

To our knowledge, there is no national strategy or target setting for the rollout of new technologies. Responsibility for innovation is left to the companies and driven by consumer demand, not by regulation. The RTR does not intervene on consumer demand either, by advertising new features for instance. The regulator relies essentially on the customer to find out about (new) products and on the companies to advertise these.

The role of the RTR is thus limited to the technical aspects of technological innovation, by setting standards and allowing test-phases. The limited pro-activeness of the regulator is essentially due to the regulatory framework that does not foresee intervention on this level.

- **Quality of services (QoS) throughout the country**

The quality of Austrian telecom services is good, but probably not very different from most other OECD countries. Intensive regulatory pressure on the quality of services is a positive contribution though and ensures that quality remains high. The Austrian regulatory regime foresees the definition of quality standards for USO but not for the services of other telcos. Additional to SMP, only fixed voice telephony providers who have provided that service for more than 18 months are required to deliver information about the quality of their services upon request from the RTR.

Given that it is the Ministry who sets quality standards for USO, the regulator's tasks is limited to the periodic surveillance of quality levels. The regulator can also intervene as a dispute settlement body between consumers and providers, when consumers have complaints about the quality of the services. The RTR does not provide information on quality of telecom services to the consumers, and there is no best status lists. It is the opinion of the RTR, shared by many other NRAs that regulators shall not make statements about quality of services and let consumers decide for themselves.

- **Information to the public**

The Austrian regulatory regime assigns certain responsibilities to the RTR in terms of information to the public. For instance, there has to be a consumer services which is able to answer the questions of telecom users within a respectable time. Furthermore, legal information and information about the work of the RTR is also made public and put online together with tips for the Austrian telecom user. Recently, the RTR has published a very comprehensive and understandable document entitled the Communications Report that informs about the current state of telecom regulation, the market, the work and structure of the regulator etc. Although very useful and interesting, the document is not designed for the mass public, but to those who are involved or interested in Austrian telecom regulation.

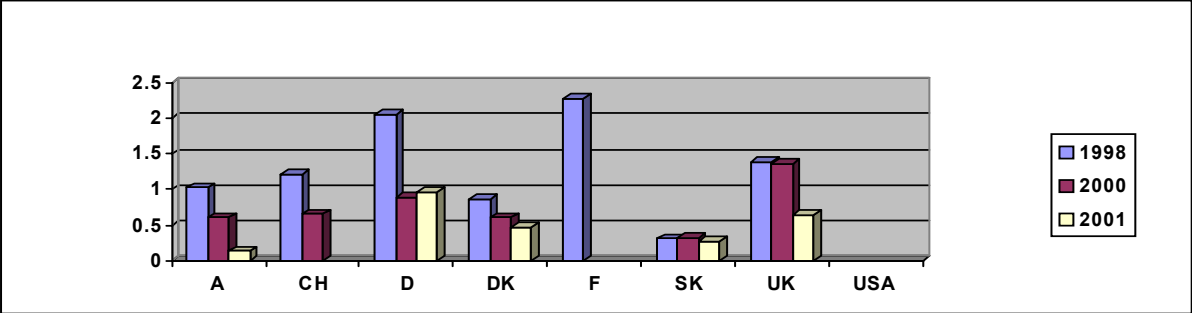
Austrian consumers who want to know about prices and packages have to refer directly to the operators themselves or can use the free services of online companies who analyze the different offers existing on the market (www.tarifcheck.at for instance). As a general rule, the regulator relies on the telcos to exploit the possibilities of advertising new technical or commercial features, and on the Austrian consumers to make their own choices. For instance, when call-by-call carrier selection was introduced, the regulator did not organize an information campaign but let the operators present their own offers to the customers.

The RTR has recently mandated a social research institute to carry out a study about consumer behavior in Austria and in particular the link between consumer behavior and research for information¹⁹. The study shows that many consumers in Austria find it useless

¹⁹ RTR, *Endbericht zum Projekt 'Nachfrageseitige Behebung'*, 2002

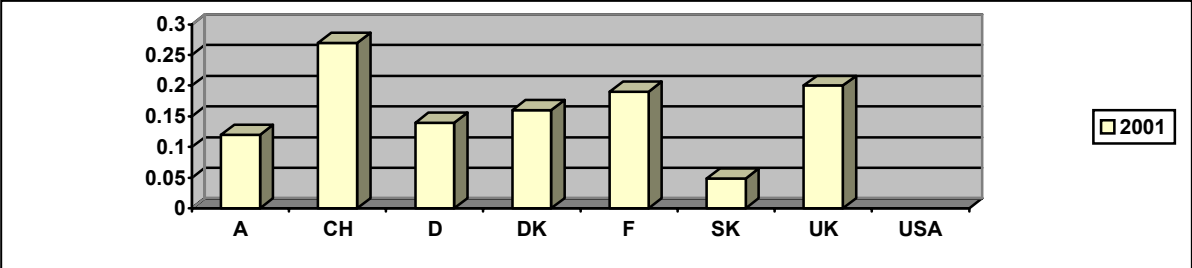
and time-consuming to look for information on the different offers and as result, stay with the same operator. In many cases, consumers also find that the prices they pay for telecommunications are so low that they do not justify the effort to go and look up the offers of competing operators. The regulator could interpret this in two different ways: Either it considers that it is vain to dedicate too much effort in providing information (as the Austrians do not seem to matter), or that there is a need for more and clearer information prepared by the RTR.

Figure 8: Mobile telephony, 3 minute local call, average charge in PPP €. Source ITU



In the case of Austria, there is a clear link between low end-user prices and low interconnection charges for mobile telephony, as shown in the graph below.

Figure 9: Interconnection charges, termination in mobile network for SMP operators in €



Source: WIK Consult, *Stand der Schweizer Telekommunikationsmarktes im internationalen Vergleich, 2002* and World market research Center, *Telecoms country report Korea, 2003*

Prices for fixed network services are in the average, for fixed telephony as well as for Internet access as shown in the graphs below.

Figure 10: Fixed voice telephony, 3 minute local call, average charge in PPP €. Source ITU

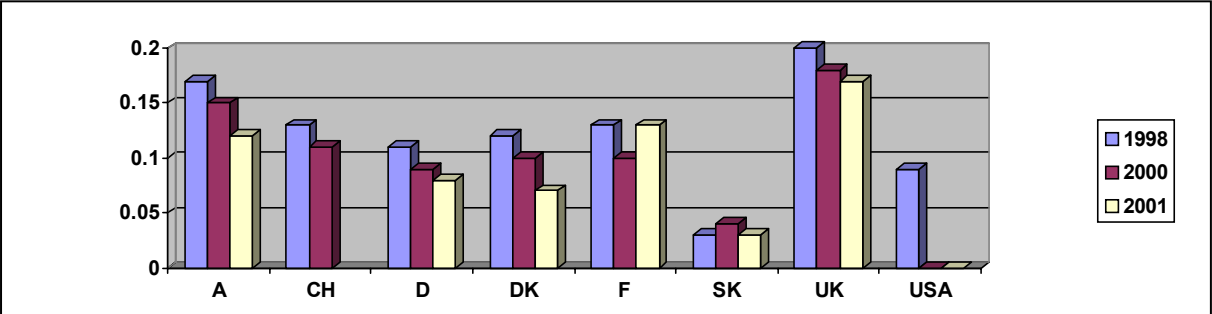
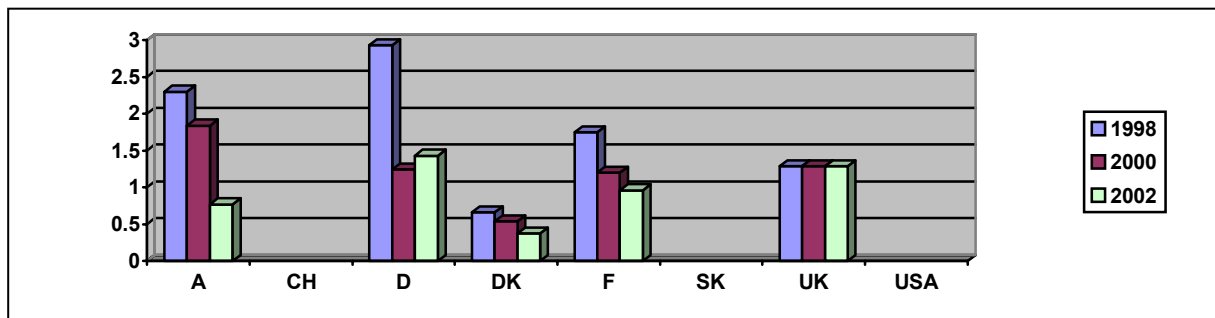
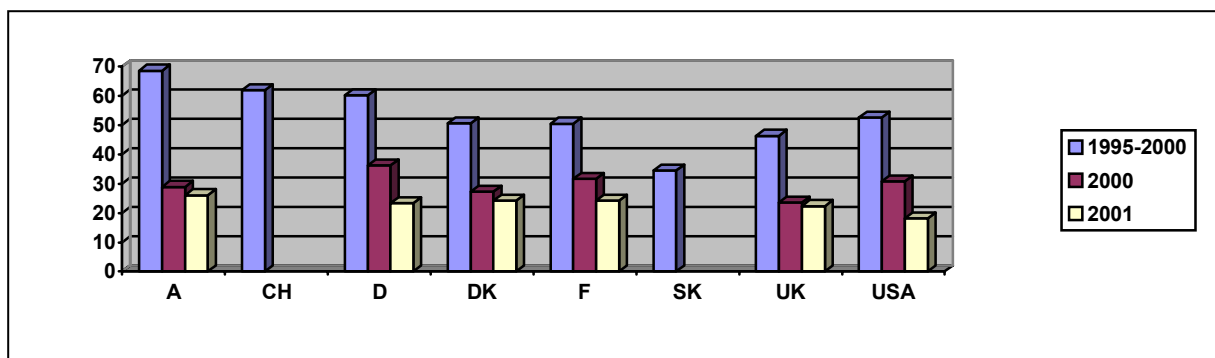


Figure 11: Fixed voice telephony, 10 minute domestic long-distance call, average charge in PPP €.



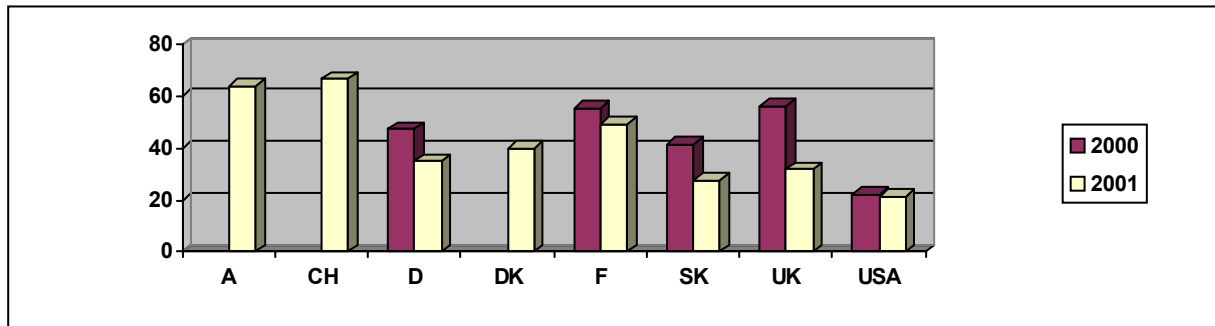
Eurostat

Figure 12: Average price for 20 hours Internet access, in €



Source OECD

Figure 13: Average price for 40 hours Internet access peak times, in €



Source OECD

Although price drops in the fixed market do not rank among the lowest in the world, competition has led to very significant price drops on the Austrian market itself and this is considered as a major success of liberalization.

In the fixed telephony market, the regulator has encouraged price drops by regulating interconnection tariffs and allowing CbC and CPS from early on, including at local level. However, the regulator has not done active end-user price regulation. The regulator's only impact on price-regulation is in the setting of prices for operators with SMP, and even there the RTR can only approve or disapprove the charges proposed by operators with SMP and not set them by itself. Today, the role of the RTR with regard to end-user prices is rather

limited, only subsequent drops of interconnection prices could further stimulate a decrease of end-user prices.

8. Conclusion

The Austrian regulator represents an interesting case for Switzerland, as both regulators are converged and subordinated to two different decision-making bodies. The Austrian case is further interesting because of the numerous similarities between the two countries, in terms of population and topography, as well as a certain amount of cultural and institutional resemblance.

In Austria, the RTR and its two decision making bodies enjoy a rather good reputation both with the incumbent and with the competing operators. The RTR generally respects the timeframes for its decision making and is viewed as a competent and independent reliable body. As mentioned before, the RTR has put in place most features pertaining competition and its role is now to maintain and promote further asymmetric regulation and to fulfill its task as an expertise body to the Ministry.

The main problems with telecom regulation in Austria seem not to be imputable to the RTR but to the work of other actors involved in the system, in particular the appeal courts (here again, there is a similarity with the Swiss regulatory system, although with different consequences).

Indeed, appeal procedures are incredibly slow in Austria. Out of 120 cases appealed at the higher courts, only three decisions have been issued. Austrian telcos have learned to live with a certain amount of legal uncertainty and adapted their business plans according to the information available at the present moment. As a matter of fact, if the Administrative Court or the Constitutional Court suddenly decided on a significant amount of pending cases, it could be that the whole foundation of Austrian telecom regulation shattered into pieces. For example, it could be decided in 2003 that the interconnection tariffs decided by the TKK and applied since 1998 were false, in which case either the incumbent or the alternative operators would face major financial concern. It is not in the scope of the higher courts to make a decision in place of the RTR, they can only invalidate one. The RTR would have to make a new decision which could also be appealed. Given the absurdity of the situation, the current status quo is unlikely to change.

Operators still continue to appeal in court though, because they obviously have an interest in using all legal means to defend their company. As they undergo pressure from the shareholders, they look for financial compensation whenever possible; they want final legal certainty or want to express their disagreement with the decision made.

The Ministry has addressed the problem in the new KIG and hopes to:

1. Shorten the legal procedures and appeals.

2. Minimize the number of cases brought to court thanks to a mediation procedure. The mediation procedure was inspired from the Scandinavian example such as the Danish case, in which mediation procedures have proved to contribute well to the decrease of settlements in court.

Another particularity of the Austrian telecommunications regulatory system is the weakness of the competition control system both in terms of powers and in terms of telecom-specific competencies. Whereas in other European countries, the competition authority is responsible for detecting market dominance and abuse, in the Austrian case, competition control and intervention lays in the hands of the sector-specific regulator. The whole competition control regime has been restructured very recently to rebalance the power in favor of the competition authority. However, for the upcoming years, it will be the RTR's mission to do market analysis, SMP definition and decide on sanctions against abuses in the telecommunications sector. In Austria, it will take some time to implement the Commission's strategy to give back the regulatory powers to general competition institutions.

The accompanying projected progressive replacement of ex-ante regulation by ex-post regulation is very much criticized by the competitors, who believe that there is an incompatibility between the Austrian regulatory regime and ex-post regulation. If ex post regulation became the rule in Austria all cases would have to be dealt with in court, which, given the bad record of Austrian Courts so far, could mean the freezing of any regulation at all.

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