

VAT-Input for the 10th Implementation Report for the telecommunication sector

1) Transparency of regulatory practice:

Due to the implementation of the new regulatory framework, the scope of discretion of the National Regulatory Authority (NRA) has been extended wide ranged. So the transparency and traceability of the decisions of the NRA is essential and a precondition for a widely accepted regulatory practice.

This is also stated in Art 3 framework directive:

3. Member States shall ensure that national regulatory authorities exercise their powers impartially and transparently.

Our daily experience shows another picture of the regulatory approach: on the one hand it seems that the findings of consultations are barely considered by the NRA or totally neglected (e.g. no changes are made in the final document in comparison to the document which has been consulted) and on the other hand essential changes are made in consulted documents so that these essential changes have not been issued in the consultation (e.g. numbering ordinance).

Beside this we have concerns regarding proceedings to find a decision about remedies resulting from the “old” ONP framework and their continuation under the new framework: due to the fact that only the incumbent is a party in such a proceeding, no other interested operator that is affected by such a decision – and this is each operator who makes business in the relevant market - has the possibility to be engaged in this proceeding and gets all relevant information. Therefore an eye has to be kept on such proceedings, otherwise adverse decisions for all markets are feared.

2) Mobile Number Portability

Due to the lack of any implementation period in European or Austrian law and the consequence of missing legal competence of the NRA to decide on mobile number portability in advance, the planned launch date of mobile number portability is regarded as very ambitious by the operators.

3) Bitstream Access Market

The Austrian NRA still has not defined the bitstream access market as a relevant market for Austria. Background is that the geographic dimension of this market – due to very strong cable operators offering broadband services - has to be analysed before a decision regarding the definition of this market is taken.

From our point of view it is essential to define this market as a national, homogenous market, because:

- The Austrian incumbent has chosen to apply a uniform pricing strategy throughout Austria. Telekom Austria AG's prices for its xDSL internet access as well as for its xDSL resale products are geographically uniform throughout Austria. In those areas where substitutes for its products are available, Telekom Austria AG does not set different prices but rather takes switching behaviour in those areas into account when setting its prices. Accordingly, actual or potential competitors face a geographically uniform, common pricing constraint throughout the entire territory of Austria. So only a national wholesale offer of the incumbent enables competition in this market.
- Various regional SMP operators increase the costs of competitors, as a wholesale contract has to be agreed with each of these operators. Of course each connection with such an operator causes costs (one time and recurring).
- A mix of technologies (cable and xDSL) increases costs and complicates to offer a homogenous product.
- xDSL is offered via copperlines. Therefore the geographic coverage of xDSL services is more widespread because the incumbent is obliged to provide copperlines to customers as a part of universal service obligations.

4) Leased Lines

The trunk segment market consists of 28 trunk segment towns and was defined according to the high capacity transmission network of the incumbent (Pols for voice). In 5 of these trunk segment towns, only the incumbent is present with POPs, in 6 more towns, only two operators are present with POPs. The trunk segment market was deemed to have effective competition and therefore no operator was declared to have SMP status. This decision fosters ineffective competition, where the incumbent has multiple advantages (time to market, economy of scale,...).

Assuming a tender for a customer project in which trunk segments are included, and for which the incumbent is one of the competitors, all ANO's must

- look whether a trunk segment is generally offered by the incumbent (while the incumbent has no obligation at all to make an offer) (time to market disadvantage),
- start negotiations, if the trunk segment is not covered by the new entrant's own network (time to market disadvantage),
- dig for fibres (if feasible), or searching for potential dark fibres, (economy of scale disadvantage),
- invest in HW for a comparatively small capacity (economy of scale disadvantage).
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All bullet points mentioned above have no impact on the incumbent. On the contrary, the incumbent takes advantages out of them.

From our point of view, the new regulatory framework enables to create a new type of asymmetric regulation, by establishing competitive disadvantages for new entrants and competitive advantages for the incumbent.

Facing a situation with multiple disadvantages for ANO's the VAT cannot understand why EC has not made any objection against the intended decision of NRA during the European Consultation Process. From our point of view, this situation could have been easily avoided by either defining the Trunk Segment market in a different way or by declaring that only a subset of the current Trunk Segment towns do belong to the Trunk Segment market.

5) Retail Price Control

5.1 History and Status

The retail prices and rebates of Telekom Austria are according to Sec. 18 TKG 1997 and – until the contrary order of the regulatory authority – Sec. 133 (7) TKG 2003 up to now subject to the approval of the TTK. As recently the approval is based on an expertise conducted by the RTR. Alternative operators still do not have the rights of a legal party in the proceedings for the approval of TA's retail prices.

With decree dated 21.7.2003, file no. G 07/03-19 TTK approved new tariffs of TA and subsequently the abolition of the "Minimumtarif", whereby as the cheapest subscription fee a tariff option (TikTak Privat) including free calls and special prices was approved. Customers of the "Minimumtarif" - and therefore primarily customers using this subscription fee in combination with call-by-call and carrier-preselection services of alternative operators - were automatically transferred to the more expensive "Standardtarif".

On the initiative complaint of COLT, eTel, Tele2 and UTA on 5.9.2003 the Federal Competition Authority ex officio opened a legal proceeding against TA at the Cartel Court for the abuse of its dominant position by practicing the approved tariff system. COLT, eTel Tele2 and UTA followed on 5.3.2004 with a separate filing. With decision dated 28.3.2004 the Cartel Court found that the tariff system approved by TTK was an anti-competitive abuse of a dominant market position and directed TA to cease this abuse.

The Cartel Court ruled that it was an abuse of a dominant market position offering, applying or conceding as cheapest tariff for the access service (cheapest "subscription fee") a tariff, whereby customers are also granted call services without additional charges ("free call minutes") or a free "international package"; and generally offering, applying or conceding tariffs for the access service ("subscription fee tariffs"), whereby customers are also granted call services without additional charges ("free call minutes") or a free "international package", if these subscription fee tariffs – adjusted for the value of any call services or benefits in connection with call services which are associated with such subscription fee tariff – are below the

cheapest pure subscription fee tariff (not associated with any such call services/benefits in connection with call services) offered by TA.

With decree dated 10.5.2003, file no. G 30/04-13, TKK again approved a new tariff system of TA, this time including a cheapest pure subscription fee not associated to any free calls or special call discounts. Still the compliance of TA's new tariffs with competition law is questionable.

In the course of the proceeding TKK examines whether the applied rates are cost-oriented according to Sec. 18 (6) TKG 1997 in association with Sec. 133 (7) TKG 2003. But TKK examines only if the sum of costs of TA's access network is covered by the sum of access network revenues and the sum of revenues from call charges in one tariff-zone (local, regional, national, international or mobile) complies with the sum of costs of this specific zone. If a particular subscription fee tariff or a particular call rate is costcovering oder cross-subsidised by revenues of other subscription fee options or call options is not being reviewed by the TKK.

An examination of the effects of this cross-subsidisation on competition has in general been not conducted by TKK in the approval proceedings and was not carried out for the last approval, file no. G 30/04-13. Though there are some considerations on the possibilities for alternative operators to compete in call services there are no considerations at all regarding the ability to offer competitive access services on the retail market.

As in previous decisions also in decree file no. G 30/04-13 TKK has only examined that the total costs of the access-network are covered by the revenues deriving from the access-network. It has not been considered that consequently particular subscription fee options are not cost covering and that these tariffs therefore establish an entry barrier for alternative operators to the access market (price squeeze). Also the former transfer of customers of the "Minimumtarif" to the more expensive "Standardtarif" has not been revised although a new and cheaper "pure" subscription fee (TikTak Privat new) was approved.

5.2. VAT-Position

The RTR's expertise about the Austrian fixed-line-market dated May 2004 and conducted according to the new Framework states that

- on the retail markets for access to the public telephony network at a fixed location TA "...mainly due to the monopolistic market structure characteristics still has substantial and sustainable market power."
- on the retail markets for publicly available local and/or national telephone services provided at a fixed location TA "...in particular as a result of specific market structure characteristics, [...], as well as in general also for national calls not negligible market barriers has significant market power."
- the residential market for publicly available international telephone services provided at a fixed location shows effective competition, whereas the market for non-residentials does not.

Without the ex-ante approval of retail prices TA would be in the position to inflict irreversible damage upon its competitors by massive changes in retail prices. Through predatory pricing and margin squeeze TA could swamp its competitors out of the market and raise its prices afterwards to generate revenues as a monopolist.

With respect to the rapid changes and developments on the telecommunication market ex-post measures are currently not sufficient to prevent such practices. The VAT therefore requests the imposition of ex-ante approval of the TA's retail prices as a remedy in order to prevent anti-competitive cross-subsidisation (also between wholesale- and retail markets), bundling, predatory pricing and price-squeeze. At the same time the obligations of cost recovery and retail price control, transparency and accounting separation shall be imposed in order to provide and control a due and fair proportion between wholesale and retail prices.

6) Wholesale Line Rental

6.1. History and Status

Following the failure of negotiations on wholesale line rental services between Telekom Austria and Tele2, on 5 April 2002 Tele2 applied to the Austrian NRA Telekom-Control-Kommission for an order against Telekom Austria based on Sec. 34 Telecommunications Act 1997. Telekom-Control-Kommission, however, refused to recognise Tele2's status as a party and therefore dismissed the application with decision dated 3 June 2002, file no. W 2/02-11. Tele2 filed a complaint against this decision with the Supreme Administrative Court.

With decision dated 16 October 2002, file no. W 3/02, Telekom-Control-Kommission decided *ex officio* that by refusing to provide such wholesale line rental services Telekom Austria had abused its dominant market position and thus directed TA to submit an offer for the provision of such services.

The terms of the offer tabled by Telekom Austria in October 2002, however, were discriminatory with wholesale fees by far exceeding retail fees. Following further unsuccessful bilateral negotiations, Tele2 complained to Telekom-Control-Kommission on 21 May 2003; the alternative operators eTel and UTA subsequently declared their support for this complaint.

On 10 June 2003, Telekom-Control-Kommission ordered RTR staff members to prepare an expert opinion on the technical and economic terms for wholesale access to line rental services. In September 2003, RTR submitted a partial expert opinion covering certain economic issues only. Contrary to the Telekom-Control-Kommission resolution, however, the RTR experts did not provide an opinion on the technical issues, in particular the method of implementation of wholesale line rental.

The partial expert opinion submitted concluded that the wholesale margin was at € 2.00, the costs of Telekom Austria for wholesale line rental were € 12.37 per month

and per line. Implementation costs were calculated at € 8.53 per WLR customer. In August 2003, Tele2 on the other hand submitted an expert opinion from Prof. Dr. Stepan and Dr. Sögner according to which a cost-oriented wholesale margin should be between € 4.20 and € 4.36 per month.

Following negotiations between RTR and Telekom Austria, which were conducted without the knowledge and participation of eTel, UTA and Tele2, on 21 October 2003 and again on 10 December 2003 TA submitted a revised offer for wholesale line rental services. Although the terms of the last offer deviated substantially from RTR's own expert opinion with a wholesale line rental price of € 12.70 per month and with implementation fees of € 750.000 as one-off fee plus €11.32 per customer, Telekom-Control-Kommission on this basis terminated the proceedings against Telekom Austria with decision dated 15 December 2003.

With telefax dated 19 December 2003, TA withdrew its offer for wholesale line rental services with immediate effect. In a statement to the press TA explained this withdrawal with the fact that the Austrian regulator had not approved "more competitive" retail fees.

With judgment dated 25 February 2004, the Supreme Administrative Court repealed the decision of Telekom-Control-Kommission to dismiss Tele2's application of 5 April 2002 and confirmed that Tele2 had the status of a legal party. As a consequence, Telekom-Control-Kommission re-opened its proceedings against Telekom Austria based on Sec. 34 Telecommunications Act 1997 and granted Tele2, UTA and eTel the status as parties to the proceedings. Alternative operators were granted access to the file and the possibility to submit their comments (in case of Tele2 until 10 May 2004).

Nevertheless, on 11 May 2004 Telekom-Control-Kommission ordered Telekom Austria to repeat its offer for wholesale line rental services dated 10 December 2003.

6.2. Open Issues

To date, the following issues remain unresolved:

- The technical expertise on the implementation of wholesale line rental was not finalised. On 19 April 2004 Telekom-Control-Kommission repealed its resolution of 10 June 2003 ordering RTR staff to prepare a technical expert opinion.
- Therefore, the most cost-effective method for the technical implementation of wholesale line rental remains unresolved, although this question is decisive for the amount of the implementation costs.
- The amount of the upfront payment demanded by Telekom Austria (€ 32m) has never been reviewed by RTR experts.
- The costs of transfers of customers with existing lines to alternative operators has not been calculated by RTR experts.
- The contradiction of retail rebates approved by Telekom-Control-Kommission (up to 17%) with a monthly wholesale line rental fee of € 12.70 has not been resolved.

- Telekom-Control-Kommission's decision of 11 May 2004 to order TA to repeat its wholesale offer of 10 December 2003 with a monthly fee of € 12.70 deviates from RTR's own expert opinion (€ 12.37).

6.3. VAT Position

VAT has adopted a position on the fixed-line access market and agreed on the following requirements for a subscription fee system for Telekom Austria:

- Establishing transparency and cost-orientation of subscription fees through accounting separation for the last mile in order to avoid cross-subsidization.
- Enabling alternative operators to use unbundled access to the local loop in a cost-covering manner.
- Establishing wholesale line rental with an appropriate wholesale margin to end the existing discrimination regarding access to the customer.

7) Predatory Pricing

The New Regulatory Framework has the intention to deregulate, whenever effective competition has been established. This paradigm could be fine, as long as side effects are avoided.

A dramatic side effect can be predatory pricing of the incumbent in a competitive (SMP-free) market, to escape from e.g. wholesale and/or retail price control obligations in a neighbour market, by issuing bundled offers where assets from two or more markets are included. An example could be the Trunk Segment market in conjunction with the Termination Segment market because nearly all customer projects contain trunk and termination segments. So, the incumbent now has the possibility to charge almost nothing for a trunk segment while escaping from a price control of the termination segments by offering a bundled price for all segments included in the project.

8) Implementation of NRF / Review of the Market Recommendation

Even the review of the market recommendation was postponed by the European Commission an ongoing review seems to be important to reduce operator's costs in the future.