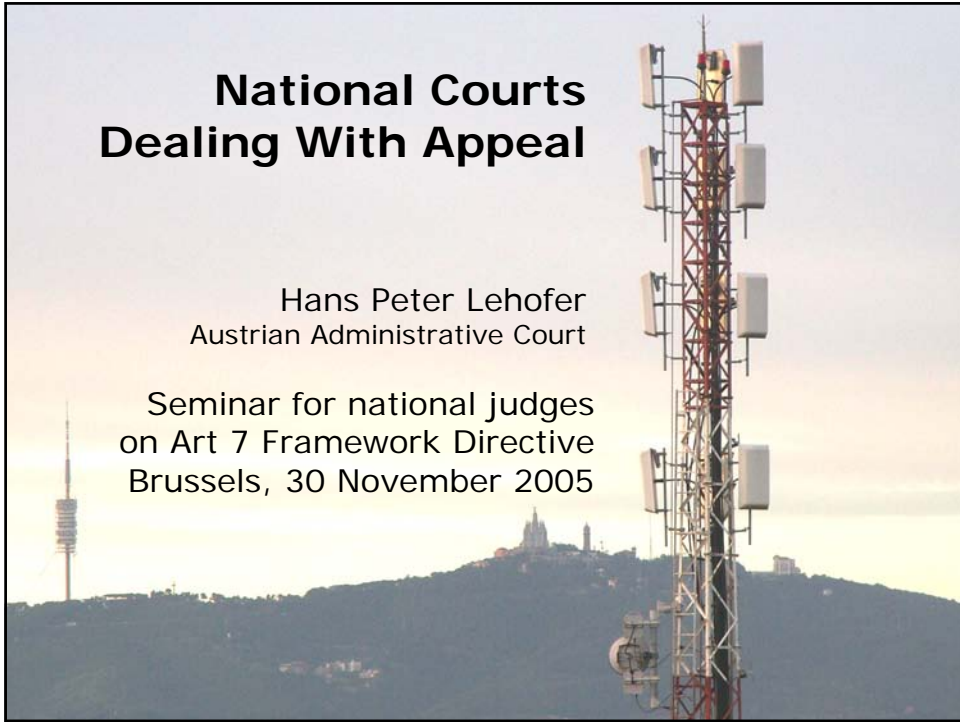


National Courts Dealing With Appeal

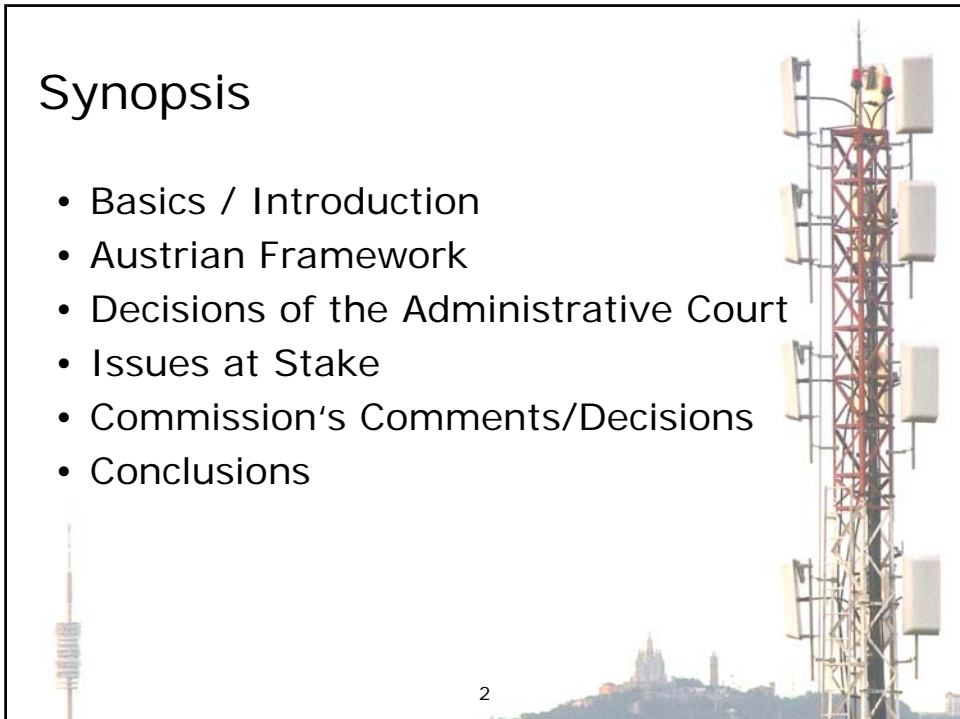
Hans Peter Lehofer
Austrian Administrative Court

Seminar for national judges
on Art 7 Framework Directive
Brussels, 30 November 2005



Synopsis

- Basics / Introduction
- Austrian Framework
- Decisions of the Administrative Court
- Issues at Stake
- Commission's Comments/Decisions
- Conclusions



New Regulatory Framework

- NRA undertakes market definition and analysis and imposes, maintains, amends, or withdraws specific regulatory obligations („remedies“)
- Market Definition - Art 15 FW-D
- Market Analysis - Art 16 FW-D
- Remedies - Art 16/2 FW-D -
(Art 16-19 Access-D, Art 7-8 US-D)

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NRF / Community law A two-tiered obligation:

- MS have to transpose NRF
- NRF itself refers to other Community law instruments
 - NRAs „should act in accordance with Community law and take into the utmost account the Commission guidelines“
 - SMP-definition used in FW-D „is equivalent to the concept of dominance as defined in the case law“ of ECJ/CFI
 - Art 7 FW-D for consolidation

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Art 7 Framework-Directive: Consolidating the internal market

- NRA takes „utmost account“ of NRF-objectives (Art 8 FW-D)
- NRAs to cooperate with each other and the Commission (cf ERG)
- NRAs to notify certain measures to other NRAs and Commission
- Market definition and SMP-decision subject to the Commission's „veto“ according to Art 16/4 FW-D

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Art 4 Framework-Directive: Right of Appeal

- Effective mechanisms
- Undertaking affected by a decision
- Independent appeal body, „which may be a court“
- If appeal body is not judicial in character: review by a court or tribunal within the meaning of Art 234

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Interim Conclusion

- NRAs apply Community law (transposed directives and case law on dominance)
- National courts have to judge whether (Community) law is correctly applied to the factual situation; this includes
 - Community competition case law
 - (transposed) directives, including the obligations to take into account certain guidelines and objectives, and to follow consultation and consolidation procedures

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Austrian Framework

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Legal framework/NRA-decisions

- NRF transposed by Aug 2003:
Telecommunications Act 2003
- Market definition Oct 2003*
- Market analysis and remedies:
all NRA-decisions taken except
 - Market 10: Transit (Commission Veto)
 - Market 12: Wholesale Broadband Access
 - Market 17: Roaming
 - Market 18: Broadcasting transmission

*Market 18: Jan 2004,
Market 12: May 2005

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Major controversial cases:

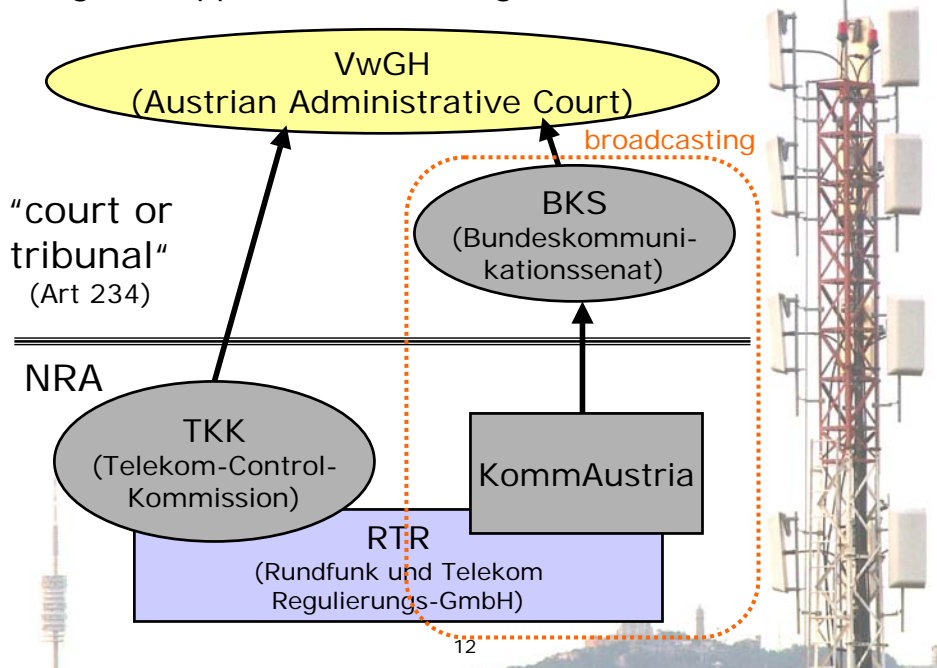
- Call Termination in individual fixed networks
- Voice call termination in individual mobile networks
- PATS at a fixed location
- Transit services in fixed networks
- (Interconnection) dispute resolution (Art 20 FW-D), including MNP
- *not yet decided: Broadband Access*

Austrian NRAs

- RTR (Rundfunk und Telekom Regulierungs-GmbH):
 - Market Definition (Telecom)
- Telekom-Control-Kommission
 - Market Analysis and Remedies (Telecom)
 - Dispute Resolution (Art 20 FW-D) (Telecom)
- KommAustria
 - Market Definition, Analysis and Remedies, Dispute Resolution (Broadcasting Services)

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Right of appeal - national organisational structure



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Looking back: ECJ 22 May 2003 C-462/99 (Connect Austria)

- MS' responsibility to ensure that rights are effectively protected
- a right of appeal limited to infringements of a constitutionally guaranteed right is no suitable mechanism (acc. to Art 5a(3) Dir. 90/387)
- when applying national law, the national court must interpret it, as far as possible, in the light of the wording and the purpose of the directive
- Where application of national law in acc. w/ the dir. is not possible, the national court must fully apply Community law, if necessary disapplying any provision which would lead to a result contrary to that directive

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VwGH - Administrative Court

- VwGH has decided some 200 cases under the former regulatory framework
- Major issues were SMP-determination, interconnection disputes and spectrum assignments
- Reference for preliminary ruling in the Connect Austria-Case ECJ C-462/99
- Direct application of Community law e.g. to decide on competence of NRA (case 99/03/0423)

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Administrative Court / Competition Authorities

- General enforcement of competition law: Competition Authority and Cartel Court
- Sector-specific competition rules for e-communication networks and services: NRA and appeal to Administrative Court
- Decisions of Admin. Court and Cartel Court: infringement of sector-specific regulation not necessarily also abuse of dominant position in comp. law and v.v.
- Competition Cases e.g.: „preselection override“, „predatory pricing“

Decisions of the VwGH (Administrative Court)

VwGH-Decisions under the NRF

- The VwGH has decided on a number of cases under the NRF, including i.a.
 - Access to Telephone Directory-Data (Art 25 Universal Service-Directive)
 - Interconnection Issues with regard to Mobile Number Portability (Art 30(2) Universal Service-Directive)
 - Rights of Way (Art 11 and 12 FW-D)
 - Market Analysis and Remedies (see following slides)
- Art 7-Procedures were relevant in Market-Analysis and MNP

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Termination in fixed networks

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Selected issues: Market analysis Wholesale Markets

- Call Termination in fixed networks
- Two relatively small (CaTV-)operators were designated as having SMP in their individual networks
- Remedy: Price control (Art 13 Access-D) „benchmarking“
- Appeal of operators failed (VwGH 6 Sept 2005, 2005/03/0088 and 0089)
- (Mobile termination cases still pending)

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(Modified) Greenfield approach

Selected issues: Market analysis wholesale (2)

- VwGH quotes SMP-guidelines: „market analysis will have to be based mainly on a prospective assessment“; „forward looking, structural evaluation of the relevant market, based on existing market conditions.“
- EC-„veto“ decisions FI/2003/0024, 27 and DE/2005/0144 are also quoted
- NRA has to take into account, whether there is sustainable competition or the absence of SMP is just the result of existing obligations
- No need for reference for preliminary ruling: no doubts concerning modified greenfield approach (cf EC-decision DE/2005/0144)

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Countervailing buying power

Selected issues: Market analysis wholesale (3)

- Obligations on other operators (on other markets) which will presumably be maintained also have to be taken into account
- Incumbent operator with SMP on the market for termination in its individual network is subject to price control based on FL-LRAIC - so it cannot charge excessive ic-fees (or refuse to interconnect)
- interconnection obligations on incumbent SMPO limit its (countervailing) buying power (cf explanatory memorandum to markets-recommendation)

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Proportionality

Selected issues: Market analysis wholesale (4)

- Appellant argued that even if it had SMP, price control was not proportionate - there should be no specific obligation at all
- VwGH: if the NRA designates an undertaking as having SMP, it has to impose a remedy
- The appeal did not specify on which grounds other remedies would be more appropriate
- Since NRA had argued conclusively on the need for price control, whereas appellant did not object specifically to these considerations, the NRA-decision was upheld

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PATS at fixed location

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Selected issues: Market analysis Retail Markets

- PATS (publicly available telephone services) provided at a fixed location for non-residential customers, internat'l/national
- NRA-decision:
 - Incumbent Operator with 60% market share (in both markets) designated as SMPO
 - Remedies: cost orientation for retail tariff
 - Withdrawal of old framework-obligations
- VwGH-decisions 22 Nov 2005, 2005/03/0109, 112 – NRA decisions repealed, NRA will have to decide again

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SMP

Selected issues: Market analysis retail (2)

- SMP / dominance: application of Community competition case law
- „prospective assessment“, „forward looking, structural evaluation“ of market
- evaluation of „standard“ SMP-criteria (cf. nr. 72-85 of the SMP-guidelines)
- market share of 60 % indicative for SMP
- drop in market share after liberalisation (down from 100%) is not in itself an indicator of effective competition (market share of 60% was held throughout last 21 months)

SMP

Selected issues: Market analysis retail (3)

- Volatility of turnover is not relevant, when market share constant
- No major countervailing buying power of retail customers (largest customer accounts for less than 3% of turnover)
- potential competition (expected merger of competitors): no indications for effective competition *within the timeframe of market analysis* (2 years)
- same for technical innovations (VoIP)

SMP

Selected issues: Market analysis retail (4)

- Barriers to entry:
 - sunk costs - even if „only in advertising“ - can constitute barrier to entry
 - market saturation
 - barriers to change (including loyalty of customers and [perceived] higher quality) could deter new entrant
- Possible significant market entries
- Combination of criteria/overall evaluation
- On the whole: „applied case law“ - no specific interpretative problems

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SMP

Selected issues: Market analysis retail (5)

- Relevance of decisions by other NRAs:
 - Appellant referred to a decision of an NRA from another MS; was considered irrelevant (ia because of significant factual differences)
 - however, the Court expressly states the fact that there were no comments of other NRAs in the Art 7-procedure, which would have to be taken into account
 - the Court has held (in an earlier case) that the NRA may take decisions of other NRAs into account (provided it fully explains the reasoning for that)

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Remedies

Selected issues: Market analysis retail (6)

- Relevance of ERG-Remedies-Paper?
The „4 principles“ are no substitute for legal reasoning with regard to the specific provisions of law
- In addition to the concept of proportionality, remedies on retail markets are subject to the principle of subsidiarity to wholesale remedies and carrier selection (CbC/CPS)
- Art 17 (1) US-D

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Remedies

Selected issues: Market analysis retail (7)

- NRA has to make a prospective assessment of the effects of wholesale-regulation (and carrier selection) on the relevant retail market
- This requires an examination of *all* available wholesale remedies - the NRA's failure to do so leads to repeal of the NRA-decision

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Market Analysis: Affected Parties

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Right of appeal - affected party

- Competitor of (hitherto) SMP-operator applied to participate in market analysis-procedure in which - according to the Austrian Telecommunications Act - only the operator, on whom remedies are imposed (amended, maintained, withdrawn) has legal standing
- NRA denied competitor the right to intervene
- Competitor appealed this decision

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Right of appeal - affected party (2)

- In Austrian administrative procedure there can be no right of appeal without the right to intervene in the case (to be a „party“ in the procedure)
- Decision of VwGH in pending case is dependant on interpretation of Art 4 and 16 FW-D
- Reference for a preliminary ruling to ECJ (VwGH-decision of 22 Nov 2005, EU 2005/0003)

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Right of appeal - affected party (3)

- Art 4 FW-D: „any user or undertaking ... who is affected by a decision of a national regulatory authority has the right of appeal“
- Art 16 (3) FW-D: „In cases where sector specific regulatory obligations already exist, [the NRA] shall withdraw such obligations placed on undertakings in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.“
- Consideration 12: „party who is the subject of a decision by [an NRA] should have the right to appeal“

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Right of appeal - affected party (4)

- The questions* are:
 - Is Art 4 FW-D to be interpreted in such a way that undertakings „affected by a decision“ include competitors on the relevant market on whom remedies are not imposed (amended, maintained, withdrawn)?
 - Is a national provision, according to which only the undertaking on whom remedies are imposed (amended, maintained, withdrawn) is party to a market analysis-procedure compatible with Art 4 FW-D?

*Att: this is not an official or literal translation³⁵

Commission's Comments and Decisions

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Relevance of the Commission's Decisions in Art 7-Procedure

- Just an answer?
 - In its decision on a reference for a preliminary ruling by the Austrian NRA, the ECJ said:
„la Commission na fait que répondre à l'autorité nationale.“*
(6 Oct 2005, C-256/05, Telekom Austria)
 - This seems to contrast with the wording of Art 7(4): „the Commission may [...] **take a decision** requiring the national regulatory authority concerned to withdraw the draft measure.“

*English translation not yet available on ECJ's website

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Relevance of the Commission's Decisions in Art 7-Procedure (2)

- „The job of the [NRAs] is primarily a managerial one, which they have taken over from central government. [...] They [...] have no judicial function.“
(Adv. General Geelhoed in his opinion in case C-462/99)
- NRA cannot request preliminary ruling
- If there are doubts concerning the validity and interpretation of the Commission's decision, they can (and have) to be referred to the ECJ by the appeals body (tribunal or court)

Relevance of the Commission's Comments in Art 7-Procedure

- The parties have a right to the Art 7 procedure; failure to notify may lead to invalidation of NRA's decision
- „take the utmost account“: more than just an obligation on the NRA to deal with the comments in the reasons for the decision?
- What are the implications of „no comments“ (or „off topic-comments“) especially in the appeals procedure?

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Conclusions

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Conclusions (1)

- Objectives of NRF include the contribution to the development of the internal market, (i.a.)
„by consistent regulatory practice and the consistent application of this Directive and the Specific Directives“
- NRAs and Commission have to cooperate
- Commission has to watch over compatibility with Community law and indicate possible problems

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Conclusions (2)

- Art 7 is not intended to be „ULTRA* through the back door“
- The immediate application of Community law on the factual situation of a specific case is the task of the NRAs (and, on appeal, of the national courts)
- National courts dealing with appeals have to weigh Commission's comments and decisions as part of the facts of the case before them


*Union Level Telecommunications
Regulatory Authority

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Conclusions (3)

- In a contested case, the Commission's comments and decisions will most likely indicate relevant questions of Community law (which may require the courts to request a preliminary ruling, unless the ECJ has already ruled on the point or unless the correct interpretation is obvious)
- Harmonized application is a guiding principle of the NRF and the courts - within their remit - have to contribute to that aim

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Thank you for your attention!

Hans Peter Lehofer
Austrian Administrative Court

Judenplatz 11
A-1010 Wien, Austria
Tel: ++43-1-53111-292
mail: hanspeter.lehofer@vwgh.gv.at