Austrian Cases: Spectrum Refarming, Mobile Termination

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Refarming

- Decision of the National Regulatory Authority to liberalise conditions of spectrum usage of MNO (not only GSM or UMTS/3G), also for coverage requirements
- Joint hearings of the NRA with all competitors
- NRA assessed effects on competing MNOs
- But individual decisions – competitors were denied standing
MNO appealed the decisions addressed to its competitors
Federal Adm. Court dismissed appeal due to lack of standing
differentiating from CJEU judgments *Tele2* (C-426/05) and *T-Mobile Austria* (C-282/13): refarming did not affect the rights of competitors, and there was no change in relative amount of spectrum of the operators
Supreme Administrative Court reversed Fed. Admin. Court
Art. 14 (1), Art. 5 (2) and (8) Authorisation Directive,
Art. 8 (2) b) and d), Art 9 (2) Framework Directive
Art. 4 Framework Directive – why is competitor „affected“?
– Proceedings served i.a. to protect competition
– As the NRA had established, refarming could have impact on relative position of competitors in the market
– NRA had responsibility to treat all competitors in an equitable manner, there has to be a possibility to review the outcome
Mobile Termination Rates

- NRA set mobile termination rates using BU-LRIC method, following the Commission Recommendation
- SMP operator appealed
  - Pure LRIC compatible with Art. 13 Access Directive?
  - Change from LRAIC zu pure LRIC led to 60% decrease in MTRs: what about the principle of promoting regulatory predictability, consistent regulatory approach?
First, Supreme Administrative Court suspended proceedings to wait for the judgment of the CJEU in the Dutch case *Koninklijke KPN NV (C-28/15)*

After the CJEU judgment (15 September 2016), proceedings were resumed and the appeal was dismissed

- NRA has to follow, as a rule, the guidance in the Recommendation; exception: when pure BU-LRIC is not appropriate to the circumstances, assessed by the NRA
- Operator wanting to depart from pure BU-LRIC has to prove the special circumstances
- Regulatory predictability does not stand in the way of even disruptive change if suited to remedy competition problem