

# Telecommunications Act 2003

## Telecommunications Act 2003 (TKG 2003)

Federal Act enacting the Telecommunications Act [Telekommunikationsgesetz] and amending the Federal Act on Labour Inspection for Transport [Bundesgesetz über die Verkehrs-Arbeitsinspektion] and the KommAustria Act [KommAustria-Gesetz]

Note: The TKG 2003 went into force on 20 August 2003. Until 19 August 2003 the TKG 1997 was in force.

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The seven amendments made to the TKG 2003 to date (Federal Law Gazette I No. 178/2004, Federal Law Gazette I No. 133/2005, Federal Law Gazette I No. 65/2009, Federal Law Gazette I No. 50/2010, Federal Law Gazette I No. 23/2011, Federal Law Gazette I No. 27/2011 and Federal Law Gazette. I No. 102/2011) have been inserted directly into this text.

Federal Act enacting the Austrian Telecommunications Act

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unofficial english translation

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\* Unofficial version; the table of contents was not adapted by the 2011 amendment to the TKG 2003.

## **Section 1**

### **General**

#### **Purpose**

**Article 1.** (1) The purpose of this Federal Act is to promote competition in the field of electronic communications so that the population and the economy can be provided with reliable, low-cost, high-quality and innovative communications services.

(2) The regulatory measures are designed to serve the following objectives:

1. to create a modern electronic communications infrastructure in order to promote high-level locational quality;
2. to ensure equal opportunities and operative competition in the provision of communications networks and communications services, including the provision of content, by
  - a) ensuring that all users derive maximum benefit in terms of choice, price and quality;
  - b) preventing distortion or restriction of competition;
  - c) promoting efficient infrastructure investments and innovations as well as safeguarding previous and future investments in communications networks and services by accounting for the costs and risks involved;

- d) ensuring efficient use and effective management of frequencies and numbering resources;
  - e) ensuring the efficient use of existing infrastructure;
3. to promote the interests of the population – with special attention to the interests of users with disabilities, elderly persons and persons with special social needs – by
- a) ensuring that all citizens have access to universal service;
  - b) ensuring protection for consumers, in particular by simple and inexpensive dispute resolution procedures as well as a high level of protection of personal data and privacy;
  - c) providing information, in particular in the form of transparent tariffs and general terms and conditions;
  - d) ensuring the integrity and security of public communications networks.

(2a) In pursuing the objectives listed in Par. 2, the regulatory authorities are to apply objective, transparent, non-discriminatory and proportionate regulatory principles by, inter alia:

1. promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods;
2. ensuring that, in similar circumstances, there is no discrimination in the treatment of operators and providers of communications networks and services;
3. safeguarding competition to the benefit of subscribers and, where appropriate, promoting infrastructure-based competition;
4. promoting efficient investment and innovation in new and enhanced infrastructures, including by ensuring that any access obligation takes appropriate account of the risk incurred by the investing undertakings and by permitting various cooperative arrangements between investors and parties seeking access to diversify the risk of investment, whilst ensuring that competition in the market and the principle of non-discrimination are preserved;
5. taking due account of the variety of conditions relating to competition and subscribers that exist in various geographic areas;
6. imposing ex-ante regulatory obligations only where there is no effective and sustainable competition and relaxing or lifting such obligations as soon as that condition is fulfilled.

(3) The measures listed in Par. 2 shall be technology neutral to the extent possible. Innovative technologies and services as well as newly emerging markets shall be subject to regulation only to the extent necessary to prevent distortion of competition and to achieve the objectives of this Act.

(4) The following Directives of the European Community have been transposed by this Federal Act:

1. Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108 of 24 April 2002, p. 33, as last amended by Directive 2009/140/EC, OJ L 337 of 18 December 2009, p. 37;
2. Directive 2002/20/EC on the authorisation of electronic communications networks and services (Authorisation Directive), OJ L 108 of 24 April 2002, p. 21, as last amended by Directive 2009/140/EC, OJ L 337 of 18 December 2009, p. 37;
3. Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108 of 24 April 2002, p. 51, as last amended by Directive 2009/136/EC, OJ L 337 of 18 December 2009, p. 11;

4. Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ L 108 of 24 April 2002, p. 7, as last amended by Directive 2009/140/EC, OJ L 337 of 18 December 2009, p. 37;
5. Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on Privacy and Electronic Communications), OJ L 201 of 31 July 2002, p. 37, as last amended by Directive 2009/136/EC, OJ L 337 of 18 December 2009, p. 11;
6. Directive 2002/77/EC on competition on the markets for electronic communications networks and services, OJ L 249 of 19 September 2002, p. 21; and
7. Directive 2006/24/EC on the storage of data generated or processed in the provision of publicly available electronic communications services or in the operation of public communications networks, and amending Directive 2002/58/EC, OJ L 105 of 13 April 2006, p. 54.

### **Exceptions from the scope of application**

**Article 2.** (1) This Federal Act shall not apply to communications equipment (such as, in particular, radio systems and telecommunications terminal equipment) set up and operated exclusively for the purposes of national defence. However, frequency usage shall be defined in agreement with the Federal Ministry of Transport, Innovation and Technology.

(2) This Federal Act shall not apply to communications equipment (such as, in particular, radio systems and telecommunications terminal equipment) set up and operated exclusively for the purposes of the telecommunications authorities.

(3) The Industrial Code 1994 [Gewerbeordnung], Federal Law Gazette No. 194/1994, shall not apply to the provision of communications services and the operation of communications networks.

(4) The competences of the Cartel Court [Kartellgericht], the Federal Public Attorney for Cartel Matters [Bundeskartellanwalt] as well as the Federal Competition Authority [Wettbewerbsbehörde] shall remain unaffected.

### **Definitions**

**Article 3.** Within the meaning of this Federal Act

1. removed (Federal Law Gazette I No. 102/2011)
2. "communications network provider" means an undertaking which constructs, operates, controls or makes available a communications network;
3. "communications service operator" means an undertaking which exercises legal control over the functions in their entirety that are needed to provide the respective communications service and which offers the service to others;
4. "communications network operator" means an undertaking which exercises legal and actual control over the network functions in their entirety. Operation of a communications network within the meaning of this Act shall not be the case if the connection to other public communications networks is exclusively effected via the interfaces generally used for the local

loop;

5. "end-user" means a user not providing public communications networks or publicly available communications services;

6. "radio system" means a product, or relevant component thereof, capable of communication by means of the emission and/or reception of radio waves utilising the spectrum allocated to terrestrial/space radio communication; electrical systems which are designed to prevent radio communications by means of radio waves are also considered radio systems;

7. "harmful interference" means interference which endangers the functioning of a radionavigation service or of other safety services or which otherwise seriously degrades, obstructs or repeatedly interrupts a radiocommunications service operating in accordance with the applicable Community or national regulations;

7a. "spectrum allocation" means the designation of a given frequency band for use by one or more types of radio communications services, where appropriate, under specified conditions;

8. "geographic number" means a number where part of its digit structure contains geographic significance used for routing calls to the physical location of the network termination point;

8a. "BEREC" refers to the Body of European Regulators for Electronic Communications established under Regulation (EC) No. 1211/2009;

9. "communications service" means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using communications networks and services; it does not include information society services, as defined in Article 1 Par. 1 No. 2 of the Notification Act [Notifikationsgesetz], Federal Law Gazette I No. 183/1999, which do not consist wholly or mainly in the conveyance of signals on communications networks;

10. "communications line" means underground or overhead transmission paths (communications systems), including the associated switching, amplification or branching equipment, power supplies, building wiring, masts, antennas, towers and other supporting constructions, ducts, conduits, cable shafts, manholes and cabinets;

11. "communications network" means transmission systems and, where applicable, switching or routing equipment and other resources – including inactive network elements – which permit the electronic conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

12. "leased lines" means the facilities which provide for transparent transmission capacity between network termination points and which do not include on-demand switching (switching functions which the user can control as part of the leased line provision);

13. "network termination point" (NTP) means the physical point, including the corresponding technical specifications, at which a subscriber is provided with access to a public communications network; in the case of networks involving switching or routing, the NTP is identified by means of a specific network address, which may be linked to a subscriber number or name;

14. "user" means a natural person or legal entity using or requesting a publicly available communications service;

15. "public pay telephone" means a telephone available to the general public, for the use of which the means of payment may include coins and/or credit/debit cards and/or pre-payment cards, including cards for use with dialling codes;
16. "publicly available telephone service" means a service available to the public for originating and receiving national and international calls and access to emergency services through a number or numbers in a national or international telephone numbering plan;
17. "public communications network" means a communications network used wholly or mainly for the provision of publicly available communications services;
18. "public telephone network" means a communications network which is used to provide publicly available telephone services;
19. "subscriber" means any natural person or legal entity who or which is party to a contract with a provider for the supply of such services;
20. "local loop" means the physical circuit connecting the network termination point to a distribution frame or equivalent facility in the fixed public communications network;
21. "telecommunications service" means a communications service with the exception of radio and television broadcasting;
22. "telecommunications terminal equipment" means a product enabling communication or a relevant component thereof which is intended to be connected directly or indirectly by any means whatsoever to interfaces of public telecommunications networks;
23. "access" means the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing communications services, including when they are used for the delivery of information society services or broadcast content services. It covers inter alia: access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services over the local loop); access to physical infrastructure including buildings, ducts and masts; access to relevant software systems including operational support systems; access to information systems or databases for pre-ordering, provisioning, ordering, maintaining and repair requests, and billing; access to number translation or systems offering equivalent functionality; access to fixed and mobile networks, in particular for roaming; access to conditional access systems for digital television services and access to virtual network services;
- 23a. "associated services" means those services associated with a communications network or a communications service which enable or support the provision of services via that network or service or have the potential to do so and include, inter alia, number translation or systems offering equivalent functionality, conditional access systems and electronic programme guides, as well as other services such as identity, location and presence service;
24. "associated facilities" means those facilities associated with a communications network and/or a communications service which enable and/or support the provision of services via that network and/or service;
25. "interconnection" means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public communications network operators.

## **Exceptional authorisation**

**Article 4.** (1) The Federal Minister of Transport, Innovation and Technology may grant an authorisation for the installation and operation of radio systems for the purposes of technical testing on request if there are no objections from a technical point of view, in particular, if interference with other communications equipment is not to be expected. Such an authorisation shall be subject to a corresponding time limit.

(2) The Austrian Federal Minister of Transport, Innovation and Technology is responsible for frequency licenses granted by way of exceptional authorisation and for changes in and revocations of such frequency licenses. Before the assignment of frequencies which are also designated for broadcasting (as defined in the Federal Constitutional Broadcasting Act [BVG-Rundfunk]) in the frequency usage plan (Article 52 Par. 2), under an authorisation pursuant to Par. 1, and before any changes in such assignments, it is necessary to obtain an opinion from KommAustria. Before the assignment of frequencies as specified in Article 51 Par. 3, an opinion is to be obtained from the regulatory authority.

## **Section 2**

### **Wayleave rights and rights of joint use**

#### **Wayleave rights**

**Article 5.** (1) Without prejudice to the obligations under other legal regulations, wayleave rights shall comprise the right

1. to install and maintain communication lines, with the exception of the construction of antenna masts pursuant to Article 8 Par. 6,
2. to construct and maintain line supports, switching equipment and other line objects or other accessories,
3. to insert, conduct and route cable lines (especially fibre optic and wire lines), and to maintain such lines, in and through buildings, parts of buildings (especially cable shafts and other facilities for the laying of cable) and other structures;
4. to operate, expand and upgrade the facilities listed in Nos. 1, 2 and 3, as long as such activities are carried out without permanent physical intervention; and
5. to prune which is understood to be the removal of obstructive tree plantings and the felling of individual trees, and to cut through woodland.

The subject matter of the respective wayleave right shall be the result of the agreement or of the decision by the regulatory authority.

(2) The persons in charge of constructing and maintaining the systems set out in Par. 1 Nos. 1, 2 or 3 shall be permitted to enter the inside of buildings only in the daytime, except for emergencies, after making an appointment with the owner of the building or his representative, and only to the extent not prohibited by other legal regulations.

(3) Providers of a communications network shall be entitled under this Act to exercise wayleave rights on public property, such as streets, footpaths, public places and the airspace above, free of

charge and without special authorisation. The term “free of charge” as defined in this provision shall not affect the legal bases for the collection of charges in existence already on 1 August 1997.

(4) Providers of public communication networks shall have the right to claim wayleave rights to private property unless public considerations stand in the way of such rights and if

1. the designated use of the property is not (or is only marginally) limited by the exercise of such rights; and
2. the sharing of systems, lines or other facilities pursuant to Article 8 Par. 1, 1c or 2 is not possible or practicable.

(5) The owner of a servient property pursuant to Par. 4 shall receive compensation corresponding to the loss in value.

### **Exercise of and compensation for wayleave rights**

**Article 6.** (1) In cases where a communications network provider makes use of wayleave rights pursuant to Article 5 Par. 3, the provider shall be obliged to notify the planned project to the administrator of public property verifiably and in writing, enclosing a sketch of the planned project. Should the administrator of public property find reason to object to the project, the administrator shall be required to communicate the reasons for its objection(s) to the network provider within four weeks after receiving the notification and to provide an alternative proposal; otherwise the provider may commence construction.

(2) In cases where wayleave rights are exercised in cases not governed by Par. 1, the person entitled to erect the line shall notify the property owners of the structures to be installed on their properties verifiably and in writing, enclosing a sketch, and offer compensation pursuant to Article 5 Par. 5. If other systems exist on the properties, their operators shall be treated in the same way.

(3) If no agreement is reached between the person obliged under Article 5 Par. 4 and the person entitled under Article 5 Par. 3 on the wayleave right on private properties or one-off compensation within a period of six weeks of receipt of the inquiry, either party involved may call upon the regulatory authority for a decision.

(4) removed (Federal Law Gazette I No. 102/2011)

(5) removed (Federal Law Gazette I No. 102/2011)

(6) removed (Federal Law Gazette I No. 102/2011)

### **Right to use lines or systems secured by right**

**Article 7.** (1) If on a property a line or system secured by right is used by the owner of the line or system also for the installation, operation, expansion or replacement of communications lines, this shall be tolerated by the owner of the property unless additional restrictions are permanently

imposed on the dedicated use of the property by the installation, operation, expansion or replacement of the communications line. The owner or other authorised user shall be paid an appropriate compensation unless such has already been paid for use for communications purposes.

(2) In agreement with representatives of the parties involved, the regulatory authority shall issue an ordinance defining a uniform nationwide reference rate for reasonable one-off compensation.

(3) As soon as the property owner is presented with an offer of compensation in accordance with the uniform reference rate, or if such compensation has already been paid for use for communication lines, the use of the property for the purposes specified in Par. 1 shall not be obstructed. Should no agreement on the exercise of usage rights arise between the party entitled under Par. 1 and the property owner within a period of four weeks after the offer of compensation is submitted, then either party involved may call upon the regulatory authority for a decision.

### **Rights of joint use**

**Article 8.** (1) A person who makes use of a right of way, wayleave right or usage right pursuant to this Act or other federal or provincial laws on the basis of an official decision or an agreement with the person entitled must permit joint use of those rights, of buildings, parts of buildings or other structures constructed or installed on the basis of those rights, systems, lines or facilities which can be used for communications lines such as entries to buildings, building wiring, masts, antennas, towers and other supporting constructions, ducts, conduits, manholes, and cabinets, or parts thereof, for communications lines to the extent that joint use is economically reasonable and technically feasible.

(1a) Under the same economic and technical prerequisites, owners of cable shafts, conduit or parts thereof are also required to allow joint use for communications lines.

(1b) In the exercise of rights pursuant to Par. 1 and 1c, the use of existing facilities as well as future technical advances which require line, conduit and duct capacity to be kept available must also be taken into account.

(1c) Owners of buildings, parts of buildings, or other structures must permit joint use of the wiring within those structures (or up to the first concentration or distribution point in cases where it is located outside the building, part of a building, or other structure) by providers of public communications networks for communications lines to the extent that joint use is economically reasonable and technically feasible for the owners and where duplication of such infrastructure would be economically inefficient or physically impracticable.

(2) Owners or other authorised users of an antenna mast or a high-voltage mast must permit providers of a public communications network, fire brigades, rescue services as well as police authorities the joint use if this is economically reasonable and technically feasible, in particular in terms of frequencies. The owner or other authorised user shall perform technical modifications required for this purpose or have them performed if the modifications are slight and the person

seeking joint use pays the costs. The right of joint use shall also include joint use of the infrastructure necessary for operation. The owner or other authorised user must not use his power of disposal of the system to the disadvantage of the joint user.

(3) If a facility exists on a property whose owner or other authorised user is obliged to permit joint use under Par. 1, 1a, 1c or 2, the owner or other authorised user of the property shall tolerate also such joint use unless additional restrictions are permanently imposed on the dedicated use of the property by joint use. If an increased physical burden of the property because of such additional joint use cannot be ruled out beyond doubt, the owner or authorised user of the property shall have a right to consent.

(4) The person required to tolerate joint use shall be paid appropriate compensation in monetary terms; in any case, such compensation shall adequately account for the costs of constructing the systems subject to joint use, including acquisition costs, current operating costs, and other costs arising from joint use as well as the levels of compensation customary on the market.

(5) High-voltage masts shall be structures together with foundations, groundings, insulators, accessories and fittings used to carry lines or line systems with an operating voltage of 110 kV or higher for the transmission of electrical energy.

(6) Antenna masts are masts or other structures which are erected for the purpose of supporting antennas (i.e. that part of a radio system which is used directly for the transmission or reception of electromagnetic waves) or which are actually used for that purpose.

### **Granting of rights of joint use**

**Article 9.** (1) Every person obliged under Article 8 Par. 1, 1a and 1c must make an offer for joint use to providers of a public communications network on request. Every person obliged under Article 8 Par. 2 must make an offer for joint use to providers of a public communications network as well as to fire brigades, rescue services and police authorities on request. In this connection, all parties involved shall strive to enable and facilitate joint use.

(2) If no agreement is reached between the person obliged under Article 8 Par. 1 or 2 and the person entitled under Article 5 Par. 3 on the right of joint use or one-off compensation within a period of six weeks of receipt of the inquiry, either party involved may call upon the regulatory authority for a decision.

(3) Providers of a public communications network are obliged to draw up framework agreements for joint use of the antenna masts used by them.

(4) Framework agreements pursuant to Par. 3 are to be submitted to the regulatory authority, which is in turn required to publish those agreements. Agreements on rights of joint use pursuant to Article 8 are to be submitted to the regulatory authority at its substantiated request.

### **Exercise of rights pursuant to Article 5, Article 7 and Article 8**

**Article 10.** (1) In the exercise of rights pursuant to Article 5, Article 7 and Article 8, utmost care shall be taken of the properties, buildings, parts of buildings or structures as well as the systems, lines or other facilities used, and the rights of third parties in a manner that is as little disturbing as possible. In particular, the person entitled under Article 5 Par. 3 shall make sure that, while the work is performed, the intended use of the property, buildings, parts of buildings or structures as well as the systems, lines or other facilities used is maintained at his expense and a state without complaint is restored as quickly as possible after termination of the work. Consideration shall be also shown for other existing or authorised work.

(2) Pruning may be demanded only to the extent absolutely essential for the installation, maintenance, operation, expansion or replacement of the systems, lines or facilities set out in Article 5 Par. 1 Nos. 1, 2 or 3. The person entitled under Article 5 Par. 3 may demand trees to be felled in closed woodlands only if there is no other efficient way to conduct a line and the maintenance and proper cultivation of the forest is not endangered.

(3) Unless an agreement is reached between the parties involved, the pruning and felling of trees shall be carried out within a reasonable period of time by the tolerating person (manager of the public property used or owner of the private property used) at the request of the person entitled under Article 5 Par. 3; upon failure to observe the time limit or in case of imminent danger the pruning may be performed by the person entitled under Article 5 Par. 3.

(4) The costs of the pruning and the felling of trees shall be borne by the person entitled under Article 5 Par. 3.

(5) With the exception of the case pursuant to Article 7, the persons entitled under Article 5 Par. 3 shall be obliged to lay their communications lines in the ground, subject to technical feasibility and considering the economic conditions where the owner of the property (authorised user) objects to the laying of lines in the airspace above his property.

### **Right of disposal by tolerating persons**

**Article 11.** (1) The rights pursuant to Article 5, Article 7 and Article 8 shall not hinder the tolerating persons from freely disposing of their properties, buildings, parts of buildings or structures and the systems, lines or other facilities used (modification, building structures, improvements or other measures which make use appear inadmissible pursuant to Article 5, Article 7 and Article 8). If such disposal requires the removal or modification of the system of a person entitled under Article 5 Par. 3 or if it may cause damage to it, the tolerating person shall notify the person entitled under Article 5 Par. 3 thereof within reasonable time before the work is started. The person entitled under Article 5 Par. 3 shall take the required precautions in time and, where necessary, also remove or relocate his system at his own expense. The person entitled may submit an alternative proposal to the person required to tolerate joint use. The persons involved shall make efforts to find a mutually agreed, cost-effective solution.

(2) If the party obliged to perform notification has failed to notify the other party in time and the system or its operation has been damaged by the measures taken by the party obliged to perform notification, he shall be liable to pay damages.

(3) Furthermore, the tolerating party shall be liable for damages if he intentionally caused the removal or relocation of a system by a false notification or if the person entitled under Article 5 Par. 3, within two weeks of receipt of the notification, suggested to carry out the intended modification in a different way where the system could have remained unmodified without affecting the intended purpose and offered to bear any extra costs which the tolerating party would have incurred and the tolerating party did not accept this offer without good cause.

(4) Where the tolerating person and the person entitled are unable to reach an agreement on the termination or modification of the right pursuant to Article 5, Article 7 or Article 8 or the associated legal consequences within a period of four weeks after receipt of the notification pursuant to Par. 1, then either of the parties involved may call upon the regulatory authority for a decision.

### **Transmission of rights pursuant to Article 5, Article 7 and Article 8**

**Article 12.** (1) Rights (toleration obligations) pursuant to Article 5, Article 7 and Article 8 together with the associated obligations shall pass, by virtue of law, to the respective owner of the systems, lines, other facilities or communications lines erected on the basis of those rights, and to the respective owner or authorised user of the antenna mast or high-voltage mast.

(2) Such rights shall be effective against every owner of the properties, buildings, parts of buildings or structures used, or of the systems, lines or other facilities or communications lines used.

(3) The wayleave rights shall not be subject to registration in the land register, their exercise shall not constitute any title of prescription or limitation.

(4) Notwithstanding other necessary authorisations and permissions, the provider of a public communications network shall be entitled to transfer, in full or in part, the rights arising from Articles 5, 7 and 8 to third parties for the construction, maintenance, operation, expansion and replacement of the communications network.

### **Procedure for granting wayleave rights and rights of joint use**

**Article 12a.** (1) If the regulatory authority is called upon in accordance with Article 6, 7, 9 or 11, the regulatory authority will verifiably provide the counterparty in the procedure, in writing and without delay, with an opportunity to raise objections to the request within two weeks. In the case of a substantiated request, the regulatory authority may postpone the deadline if necessary. In its decisions, the regulatory authority may only account for objections received prior to the deadline. This legal consequence is to be pointed out explicitly in the request for comments.

(2) The regulatory authority shall take a decision on the petition – possibly by issuing an interim official decision – without delay, but at the latest within six weeks after receiving comments from the counterparty or after the expiration of the period allowed for the submission of comments. The regulatory authority's order shall replace the agreement which could not be reached.

(3) Without prejudice to Article 7 Par. 3, construction of the project may not begin until the regulatory authority's decision takes legal effect.

(4) The costs arising from any fees to be paid to a non-official expert shall be borne by the entitled party. These costs may be shared in an appropriate proportion if equitable.

## **Expropriation**

**Article 13.** (1) If the installation of a communications line or a public pay telephone is in the public interest and if the exercise of the rights pursuant to Article 5, Article 7 or Article 8 does not achieve the desired objective at all or only by disproportionate means, expropriation shall be permitted.

(2) The installation of a communications line or a public pay telephone by the provider of a public communications network shall be considered, in any case, as lying in the public interest.

(3) Expropriation shall be achieved using the appropriate mildest means. If expropriation makes the dedicated use of the property impossible or unreasonable, ownership of the area to be encumbered shall be transferred to the expropriator at the request of the property owner against payment of adequate compensation.

(4) If the property would lose its practical usability for the owner by expropriation of part of the property, the entire property shall be compensated at his request.

(5) The regulatory authority shall apply the provisions of the Federal Roads Act 1971 [Bundesstraßengesetz], Federal Law Gazette No. 286/1971, correspondingly to the expropriation and the calculation of the compensation to be paid by the expropriator. The expropriation of properties serving for public railway or air traffic shall require the consent of the railway or aviation authorities.

## **Inventory of infrastructure**

**Article 13a.** (1) The regulatory authority is to establish and maintain a detailed inventory of the nature, availability and geographical location of any existing and newly constructed systems, lines or other facilities, such as entries to buildings, building wiring, masts, antennas, towers and other supporting constructions, ducts, conduits, cable shafts, manholes, and cabinets, which can be used for communications lines. The inventory is to be maintained to the extent specified in Par. 2 and 3.

(2) The regulatory authority is to request the data necessary for the establishment and ongoing maintenance of the infrastructure inventory to the extent described in Par. 5 by way of administrative cooperation procedures ( Article 22 B-VG).

(3) In addition, infrastructure as defined Par. 1 shall also be included in the inventory in cases where it is the object of decisions pursuant to Articles 6, 7 and Article 9 Par. 2. To that extent, the inclusion of infrastructure in the inventory is to be tolerated by the parties involved.

(4) The data in the infrastructure inventory collected pursuant to Par. 2 and 3 must be protected from unauthorised access using state-of-the-art technology.

(5) Upon request, the regulatory authority is to provide information from the infrastructure inventory to providers of communications networks to the extent that the party requesting the information provides the regulatory authority with credible evidence that it requires such information for a specific project. This also applies to those parties who provide credible evidence of the intention to commence such activities. The provision of such information is to be limited to the extent necessary for the realisation of the specific project for which credible evidence is submitted. Upon request, refusals to provide information are to be issued by the regulatory authority in the form of an official decision.

(6) Providers of communications networks about whose networks information is provided from the infrastructure inventory are to be informed about the provision of such information and the scope of the query within a reasonable period of time, at the latest within one month after the query.

### **Section 3**

#### **Communications services, communications networks**

##### **Provision of communications networks and services**

**Article 14.** Any person shall be entitled to provide communications networks and services in compliance with the statutory provisions.

##### **Notification obligation**

**Article 15.** (1) The intended provision of a public communications network or service as well as its modifications and its termination shall be notified to the regulatory authority prior to the start of operation, modification or termination.

(2) Notification shall be in writing and shall provide the following information:

1. name and address of the provider,
2. legal structure of the undertaking, where appropriate,
3. short description of the network or service,
4. anticipated date of the start of operation, modification or termination of the service.

(3) The regulatory authority shall acknowledge receipt of the notification within a week of receiving the complete notification. This certificate shall also point out the rights and obligations resulting from this Federal Act.

(4) If the regulatory authority has reason to assume, on the basis of the complete notification, that there is no provision of a public communications network or service, it shall inform the notifier of this fact within one week and carry out further investigation. If such further investigation shows that there is no provision of a public communications network or service, a declaratory

notice shall be issued, at the party's request, within four weeks of receipt of the complete notification or the procedure shall be discontinued. Otherwise, a certificate pursuant to Par. 3 shall be issued.

(5) The regulatory authority shall publish the certificates issued under Par. 3 as well as the notices issued under Par. 4.

(6) The provisions of Articles 17, 18, 19, 22, 23, 24, 24a, 25, 25a, 25b, 25c, 25d, 70, 71 and 72 are not applicable to providers of communications services who provide the entire scope of their services to end-users exclusively on their own business premises unless the services fall under Article 26 Par. 2.

### **Installation and operation of communications networks**

**Article 16.** (1) The installation and operation of infrastructure facilities and communications networks shall not require an authorisation. The provisions on the use of frequencies and communications parameters, on compliance with the technical requirements and the interface descriptions of radio systems and telecommunications terminal equipment as well as Article 15 shall remain unaffected.

(2) The architecture and functionality of the infrastructure facilities and communications networks that are designed for interconnection with public communications networks or for the provision of a public communications service shall correspond to the state of the art in respect of the

1. security of network operation,
2. maintenance of network integrity,
3. interoperability of services and
4. compliance with the interface descriptions published pursuant to Article 5 of the Federal Act on Radio Systems and Telecommunications Terminal Equipment [Bundesgesetz über Funkanlagen und Telekommunikationsendeinrichtungen], Federal Law Gazette I No. 134/2001.

(3) removed (Federal Law Gazette I No. 102/2011)

(4) The Federal Chancellor, in agreement with the Federal Minister of Transport, Innovation and Technology, may define, according to the state of the art, the measures required to ensure the availability of public fixed telephone networks and publicly available telephone services at fixed locations even in the case of complete failure of the public fixed telephone network or in cases of force majeure.

(5) removed (Federal Law Gazette I No. 102/2011)

### **Security and integrity**

**Article 16a.** (1) Operators of public communications networks are to take appropriate steps to guarantee the integrity of their networks and to ensure the continuous availability of the services provided over those networks.

(2) Operators of public communications networks or services are to take reasonable technical and organisational measures with due attention to the technological state of the art in order to ensure a level of security appropriate for controlling risks to network security. In particular, these measures must be suitable for the purpose of preventing and minimising the impact of security incidents on users and interconnected networks.

(3) Upon request, operators of public communications networks or services are obliged to provide the regulatory authority (acting within the scope of its legally assigned duties) with the information necessary to assess the security or integrity of their services and networks, including documented security policies.

(4) In performing its legally assigned duties, the regulatory authority may, in cases where specific indications of a violation of this provision are identified, require operators of public communications networks and services to submit to a security audit by the regulatory authority or by a qualified, independent body commissioned by the regulatory authority at the operator's expense.

(5) Operators of public communications networks or services are to notify the regulatory authority of security breaches or losses of integrity in the form prescribed by the regulatory authority in cases where the incident has a significant impact on the operation of networks or services.

(6) The regulatory authority may inform the regulatory authorities of other EU member states or the European Network and Information Security Agency (ENISA) about notifications received pursuant to Par. 5 where required for the purpose of performing their assigned duties.

(7) In cases where disclosing the breach is in the public interest, the regulatory authority may itself inform the public in an appropriate manner or require the operator in question to do so.

(8) Each year, the regulatory authority shall submit to the European Commission and to ENISA a summary report of all notifications received pursuant to Par. 5 and of the actions taken. The report for a given year is to be submitted by 31 March of the following year.

(9) After consultation with the regulatory authority and with due attention to the relevant international regulations, to the type of network or service, to the technical possibilities, to the protection of personal data and to other user interests worth protecting, the Austrian Federal Minister of Transport, Innovation and Technology may issue an ordinance implementing Articles 16 and 16a and stipulating provisions on:

1. the security of network operation;
2. the maintenance of network integrity;
3. the interoperability of services;
4. preventive security measures;
5. the specification of security policies, especially identity and access administration; and
6. procedures for operators of public communications networks or services in the case of security breaches.

(10) With regard to broadcasting networks and the transmission of broadcasting signals, an ordinance pursuant to Par. 9 is to be issued by KommAustria.

(11) In cases which lie within the competence of the Austrian Data Protection Commission, the regulatory authority shall coordinate and exchange any collected information with the Data Protection Commission.

(12) These provisions are without prejudice to Article 95a and of the Data Protection Act (Federal Law Gazette I No. 165/1999).

### **Service quality**

**Article 17.** (1) Operators of public communications services shall publish comparable, adequate and up-to-date information about the quality of their services and on the measures taken to ensure equivalence in access to publicly available telecommunications services for users with disabilities, and provide the regulatory authority with this information at its request prior to publishing.

(2) The Federal Minister of Transport, Innovation and Technology may issue an ordinance specifying detailed provisions relating to the form, extent, content and time frame of publishing as well as the parameters describing service quality (at least including those stipulated in Article 27 Par. 1), with due attention to international commitments, the technological state of the art, economic conditions as well as the fact that the information must be comparable, adequate in extent and up to date, and must serve the end-user. In particular, appropriate quality certification mechanisms may be prescribed. With due attention to the needs of users with disabilities and to the applicable legal requirements, the ordinance may also prescribe suitable measures to enable users with disabilities to use telecommunications services to the same extent as users without disabilities.

(3) The regulatory authority may issue an ordinance imposing minimum quality of service requirements on operators of public communications networks, in particular in order to prevent a degradation of service and a hindering or slowing down of traffic over networks. In issuing this ordinance, the regulatory authority shall account in particular for the technological state of the art and economic conditions. A draft of this ordinance along with the underlying reasons is to be submitted to the European Commission as well as BEREC. In cases where the European Commission submits comments on the ordinance in due time, the regulatory authority shall take utmost account of these comments in issuing the ordinance.

(4) The regulatory authority shall be entitled to undertake, or have undertaken, independent reviews of the performance benchmarks to be able to check the accuracy and comparability of the information provided. The regulatory authority may publish the information provided as well as the results of the performance benchmark reviews.

(5) The regulatory authority shall be entitled to offer instruments and review mechanisms which enable subscribers to review the information pursuant to Article 25 Par. 4 Nos. 2, 3 and 4.

## **Subscriber directory and directory enquiry service**

**Article 18.** (1) Operators of a publicly available telephone service shall

1. maintain a directory of their subscribers to be kept up-to-date, which may be designed in printed form (book), as a telephone directory enquiry service, as an electronic data carrier or in any other technical form of communication and, in any case, shall contain the data compiled pursuant to Article 69 Par. 3; this provision is also being complied with if the provider guarantees that such a subscriber directory will be published;
2. maintain a telephone directory enquiry service on the contents of their subscriber directory; this provision is also being complied with if the provider guarantees that a different telephone directory enquiry service will provide this information;
3. grant their subscribers access to telephone directory enquiry services of other providers and to the telephone directory enquiry service as defined in Article 28 Par. 2;
4. provide other providers of a publicly available telephone service, at their request, with their subscriber directory containing the data pursuant to Article 69 Par. 3 as well as provide publishers of inter-operator subscriber directories or inter-operator directory enquiry services with their subscriber directory containing the data pursuant to Article 69 Par. 3 and 4 online or at least weekly in electronically readable form against a cost-oriented charge; and
5. provide access to operator and help services.

(2) Operators that provide services via carrier networks shall not be subject to the obligations under Par. 1 Nos. 1, 2 and 4 in respect of these services.

(3) If no agreement is reached between the operator and the parties entitled under Par. 1 No. 4 on the provision of the data as defined in Article 69 Par. 3 and 4 within six weeks of receipt of the inquiry, either party involved may call upon the regulatory authority. An order shall replace an agreement to be reached.

(4) If a subscriber does not want the data relating to him included in the subscriber directory, this data shall not be passed on to third parties either, except in the cases specified in Article 90 Par. 6 and Article 98.

## **Additional facilities**

**Article 19.** Operators of a public telephone network shall make available to end-users DTMF (dual-tone multi-frequency operation) as well as presentation of calling-line identification, subject to technical feasibility.

## **Emergency calls**

**Article 20.** (1) Operators of public telephone networks or operators which provide a communications service which includes outgoing calls to telephone numbers under the Austrian numbering plan must ensure that users with disabilities are also able to make calls to all emergency numbers (Article 17 Par. 2).

(2) Operators pursuant to Par. 1 are to ensure that end-users are able to call all emergency telephone numbers free of charge.

(3) Operators pursuant to Par. 1 shall make sure that the number of the calling line is available to the respective emergency service for identification purposes.

(4) Operators pursuant to Par. 1 are to inform subscribers of any change in access to emergency call services or in caller location information in the service to which they have subscribed.

(5) In accordance with any ordinances issued pursuant to Article 17 Par. 2, operators of emergency call services are to ensure that users with disabilities have access to services which is equivalent to that of the majority of other end-users.

### **Accounting separation, financial reports**

**Article 21.** (1) Operators of public communications networks or services

1. who have special or exclusive rights for the provision of services in other sectors within the European Economic Area and

2. whose annual turnover in activities associated with communications networks and services in the federal territory is at least Euro 50 million shall have structural separation for the activities associated with the provision of communications networks or services or keep separate accounts for the activities associated with the provision of communications networks or services, to the extent that would be required if these activities were carried out by legally independent companies, so as to identify all elements of cost and revenue, with the basis of their calculation and the detailed attribution methods used, including an itemised breakdown of fixed assets and structural costs.

(2) The regulatory authority shall request operators of public communications networks or services, who are not obliged to submit their financial reports to an independent audit according to other statutory or European Community regulation, to submit their financial reports to independent auditing and publication.

### **Interoperability**

**Article 22.** (1) Operators of public telephone networks or services are to ensure interoperability between the subscribers of all public telephone networks or services.

(2) Where technically and economically feasible, operators of public telephone networks or services are to ensure interoperability for:

1. calls to all telephone numbers in EEA member countries and Switzerland; and

2. calls to the European Telephone Numbering Space and to Universal International Freephone Numbers (UIFNs), unless the called subscriber has restricted calls from certain geographical areas.

(3) Upon request, operators pursuant to Par. 1 and 2 are to agree on appropriate charges for establishing and ensuring interoperability in cases where an obligation pursuant to Article 48 does not exist.

### **Number portability**

**Article 23.** (1) Operators of publicly available telephone services shall ensure that their subscribers may change the provider of the telephone service, retaining their numbers without any change in the usage type specific to the respective number range and, in the case of geographic numbers, change the location within the geographic area defined for the number range.

(1a) In cases where the contractual relationship between the subscriber and the recipient operator comes to an end without the subscriber submitting a request for number porting, and where no request for a transfer of the telephone line to another subscriber has been submitted, the recipient operator must return the telephone number within one month. The telephone number is to be returned to the operator to which the number was originally assigned or to which the relevant number block has been transferred in the meantime. In other cases, the telephone number is to be returned to the regulatory authority.

(2) Operators shall fix the amount of the charge due for the porting of a number in a cost-oriented way. The porting subscriber shall not be requested to pay a deterrent charge for the porting of the number.

(3) The regulatory authority shall issue an ordinance specifying detailed provisions with regard to number porting between mobile networks. In this ordinance, the regulatory authority shall account for international agreements, the technical possibilities, the necessary investments as well as the need to ensure that the functionality of ported numbers is maintained even in cases where the relevant subscriber network ceases to exist, and that the porting subscriber's number must be activated in the recipient operator's network as quickly as possible, at the latest one business day after the porting agreement is concluded.

(4) Number porting is not permissible without the subscriber's consent, at least in electronic form.

(5) For the duration of a procedure pursuant to Article 68 Par. 2 No. 3, the subscriber shall not have the right to port a telephone number used in cases where the telephone number is the subject of a pending procedure.

### **Tariff transparency**

**Article 24.** (1) The regulatory authority shall, by way of ordinance, specify detailed provisions on

1. tariffs that may be charged for the provision of telecommunications services in number ranges with regulated fee limits;
2. numbers subject to event tariffing;

3. the procedures for the communication of amounts charged for the provision of services where special pricing applies to those services or where users have a special need for increased tariff transparency;

4. the type of tariff calculation.

In issuing this ordinance, the regulatory authority must account for the end-users' interests worth protecting, the transparency of charges for subscribers, the easy recognisability of charges on the basis of the telephone number used in the case of number-addressed services, the technical possibilities and the need for end-users to control their expenditure.

(2) The regulatory authority shall specify, by way of ordinance, detailed rules on the provision of time-based and event-based value-added services in a transparent manner and in compliance with appropriate user protection. This may comprise, in particular, access controls in terms of specific user groups, provisions on advertisements, time limits for connections to value-added services, rules on dialler programmes and tariff information, price limits and charge calculation methods if they are not covered by an ordinance under Par. 1. In this respect, special consideration shall be given, in particular, to end-users' interests worth protecting, to technical possibilities as well as to the fact that end-users can control their expenditure. In the report pursuant to Article 34 Par. 2, the regulatory authority shall provide annual information on unfair practices and the corresponding steps taken.

(3) The regulatory authority shall maintain a directory of value-added services numbers that also gives the name and the address of the provider of the value-added service. The regulatory authority shall publish this directory and provide information on its contents on request.

### **Measures to combat abuse of value-added services**

**Article 24a.** (1) Where there is reason to suspect a violation of the ordinance pursuant to Article 24 Par. 1 or 2 and imminent danger, the regulatory authority may issue an official decision pursuant to Article 57 General Administrative Procedures Act [Allgemeines Verwaltungsverfahrensgesetz, AVG] ordering the operators of communications networks through which the telephone number is routed not to pay out any amounts for the given telephone number to its user or to upstream interconnection partners. In this official decision, payment may be prohibited for a maximum of three months. At the same time, the regulatory authority is to proceed in accordance with Article 91a. In cases where a civil-law procedure has not yet been completed, the period specified in the official decision may be extended by three additional months.

(2) In cases where the regulatory authority issues an official decision identifying a violation of the ordinance provision pursuant to Article 24 Par. 1 or 2, the subscriber shall not be required to pay a charge for the provision of the value-added service. In such cases, the operator of the network in which the telephone number is operated shall not be obliged to pay the charge to the operator of the value-added service or to upstream connection partners. Unless a refund is requested, the subscriber's operator is to account for any charges paid after the adoption of an official decision pursuant to Par. 1 as a credit on the next bill to the customer.

### **Provisions in force until 20th February 2012: "Terms and conditions as well as tariffs**

**Article 25.** (1) Operators of communications networks or services shall issue general terms and conditions which shall also comprise a description of the services, as well as define the relevant tariff conditions. General terms and conditions as well as tariffs shall be notified to the regulatory authority before provision of the service is started and shall be promulgated in an appropriate form.

(2) Changes in general terms and conditions as well as in tariffs shall be notified to the regulatory authority before they take effect and shall be promulgated in an appropriate form. Changes not exclusively favourable for the subscriber shall be subject to a promulgation and notification period of two months. The provisions of the Consumer Protection Act [Konsumentenschutzgesetz], Federal Law Gazette No. 140/1979, as well as the General Civil Code [ABGB] shall remain unaffected.

(3) The essential information about changes that are not exclusively favourable shall be communicated to the subscriber in an appropriate form at least one month before the change takes effect, e.g. by printing it on a periodically drawn up bill. At the same time, the subscriber shall be advised of the time of entry into force of the changes as well as of the fact that he shall be entitled to terminate the contract until that time free of charge. The full text of the changes shall be sent to the subscribers at their request.

(4) General terms and conditions between operators of communications services and end-users shall contain at least:

1. operator name and address;
2. description of services comprising, at least, the services offered, the quality of the services offered, the time until first connection or first activation as well as the types of maintenance services offered;
3. term of the contract, conditions for renewal and termination of the provision of the services and the contractual relationship;
4. provisions on compensation and reimbursement upon non-compliance with the contractually agreed service quality;
5. reference to the possibility of instituting dispute settlement proceedings pursuant to Article 122 as well as a short description thereof;
6. provisions on the intervals of periodical billing which must not exceed three months;
7. information about the existence of the uniform European emergency number 112.

5) Tariff provisions shall contain at least:

1. details about one-off, periodical and variable tariffs including the start and end times of tariffing of connections and the type of tariffing;
2. reference as to how the end-user may obtain information about operator's current tariffs;
3. discounts, where applicable.

(6) The regulatory authority may object within eight weeks to the general terms and conditions notified under Par. 1 and 2 if they contravene this Federal Act or the ordinances issued under this Act or Article 879 and Article 864a General Civil Code [ABGB] or Article 6 and Article 9 Consumer Protection Act [Konsumentenschutzgesetz]. The competences for review of the general terms and conditions according to other legal provisions shall remain unaffected.

(7) Operators of communications networks or services shall submit to the regulatory authority the general terms and conditions and the tariffs as well as any changes thereof in an electronic format as specified by the regulatory authority. The regulatory authority shall publish this information as well as information on universal service, in particular on the facilities and services listed in Article 29 Par. 2.

(8) With the exception of Par. 4 Nos. 1 to 5, this provision shall not apply to operators of broadcasting networks and operators who provide transmission of broadcasting signals. Par. 4 No. 7 shall apply exclusively to operators of publicly available telephone services.”

### **Provisions in force from 21st February 2012 onward: Terms and conditions as well as tariffs**

**Article 25.** (1) Operators of communications networks or services shall issue general terms and conditions which shall also comprise a description of the services, as well as define the relevant tariff conditions. General terms and conditions as well as tariffs shall be notified to the regulatory authority before provision of the service is started and shall be promulgated in an appropriate form.

(2) Changes in general terms and conditions as well as in tariffs shall be notified to the regulatory authority before they take effect and shall be promulgated in an appropriate form. Changes not exclusively favourable for the subscriber shall be subject to a promulgation and notification period of two months. Other provisions of the Consumer Protection Act [Konsumentenschutzgesetz], Federal Law Gazette No. 140/1979, as well as the General Civil Code [ABGB] shall remain unaffected.

(3) The essential information about changes that are not exclusively favourable shall be communicated to the subscriber in written form at least one month before the change takes effect, e.g. by printing it on a periodically drawn up bill. At the same time, the subscriber shall be advised of the time of entry into force of the changes as well as of the fact that he shall be entitled to terminate the contract until that time free of charge. The full text of the changes shall be sent to the subscribers at their request. The regulatory authority may issue an ordinance defining the level of detail, content and form of communication to the subscriber. In this ordinance, the regulatory authority must take into account that the communication must be transparent to the subscriber. Changes in communications network or service operators' general terms and conditions as well as tariff conditions which become necessary solely due to an ordinance issued by the regulatory authority on the basis of this provision and which are not exclusively favourable shall not entitle the subscriber to cancel the contract free of charge.

(4) Wherever possible according to the type of services provided, the general terms and conditions between operators of communications services and end-users must at least contain the following information:

1. the identity and address of the operator;
2. the services provided, including in particular:
  - a) information on access to emergency call services pursuant to Article 20;
  - b) information on restrictions with regard to access to or use of services;

c) the contractually agreed quality of service as well as any other service quality parameters defined by the

regulatory authority under Article 17;

d) the time until the initial connection;

e) general information on the procedures put in place by the undertaking to measure and shape traffic in order

to avoid filling or overfilling a network link, including information on how those procedures could impact

service quality, as well as information on where the subscriber can easily access detailed information in this

regard;

f) the types of maintenance service offered and customer support services provided, as well as the means of

contacting these services;

g) any restrictions imposed by the operator on the use of terminal equipment supplied;

2a. where an obligation pursuant to Article 69 Par. 2 exists, the subscriber's options as to whether or not to include his or her personal data in a directory, and the data concerned;

2b. the payment methods offered and any differences in costs due to payment method;

3. the duration of the contract and the conditions for renewal and termination of services and of the contract, including:

a) any minimum usage or duration required to benefit from promotional terms;

b) any charges due on termination of the contract, including any cost recovery with respect to terminal

equipment;

4. any compensation and the refund arrangements which apply if contracted service quality levels are not met;

5. reference to the possibility of instituting dispute settlement proceedings pursuant to Article 122 as well as a short description thereof;

6. provisions on the intervals of periodical billing which must not exceed three months;

7. information about the existence of the uniform European emergency number 112;

8. general information on the type of action the provider might take in case of security or integrity incidents, threats or vulnerabilities, as well as information on where the subscriber can easily access detailed information in this regard;

9. information on the possibilities of presenting calling line identification and preventing such presentation pursuant to Article 104.

(5) Tariff provisions shall contain at least:

1. details about one-off, periodical and variable tariffs including the start and end times of tariffing of connections and the type of tariffing;

2. information on the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained;

3. discounts, where applicable;

4. any charges related to the portability of numbers and other identifiers.

(6) The regulatory authority may object within eight weeks to the general terms and conditions and tariff conditions notified under Par. 1 and 2, but not to the amount of the latter, if they

contravene this Federal Act or the ordinances issued under this Act or Article 879 and Article 864a General Civil Code [ABGB] or Articles 6 and 9 Consumer Protection Act [Konsumentenschutzgesetz]. In all cases, such an objection shall have the effect of prohibiting the further use of the general terms and conditions or tariff conditions. This provision is without prejudice to competences for review of the general terms and conditions and tariff conditions according to other legal provisions.

(7) Operators of communications networks or services shall submit to the regulatory authority the general terms and conditions and tariff conditions as well as any changes thereof in an electronic format as specified by the regulatory authority. The regulatory authority shall publish this information as well as information on universal service, in particular on the facilities and services listed in Article 29 Par. 2.

(8) Par. 6 shall not apply to operators of broadcasting networks and operators which provide transmission of broadcasting signals. Par. 4 No. 7 shall apply exclusively to operators of publicly available telephone services.”

### **Limitation of costs**

**Article 25a.** (1) The regulatory authority may issue an ordinance obliging operators to provide their subscribers with mechanisms which enable them to review their current costs in cases where such mechanisms are not offered on the market to a sufficient extent and where a need for increased cost transparency can be identified on the part of the subscribers.

(2) In this ordinance, the regulatory authority may specify the level of detail and form of the mechanisms prescribed under Par. 1 as well as cost threshold amounts above which action must be taken. The regulatory authority may stipulate that users must be able to take advantage of specific cost control mechanisms such as free-of-charge alerts or free-of-charge service barring in the case of abnormal or excessive consumption patterns. In this ordinance, the regulatory authority shall consider the type of subscriber relationship and the type of service, the technical options and the protection of personal data, and shall take account of the fact that subscribers must be able to control their expenses and be protected from incurring excessively high charges.

### **Provisions in force from 21st February 2012 onward: "Special information obligations**

**Article 25b.** (1) Prior to the conclusion of contracts, operators of public communications services are to make information on the essential features specified in Article 25 Par. 4 and 5 easily accessible in a clear form.

(2) The regulatory authority may issue an ordinance defining the specific content, the level of detail and the form of the information pursuant to Par. 1. In such an ordinance, the regulatory authority must in particular account for the type of subscriber relationship, the comparability of services, the ease of comprehension, clarity and importance of the information for the usability of the service."

### **Tariff comparisons**

**Article 25c.** (1) The regulatory authority may offer an interactive electronic tariff comparison mechanism which enables end-users to assess alternative service offerings if such a tariff comparison is not offered on the market free of charge or at a reasonable price. The comparison may also include essential contractual clauses accompanying the various offers.

(2) Third parties are entitled to use information published by operators free of charge for the purpose of providing interactive guides or comparable technologies.

#### **Provisions in force from 21st February 2012 onward: “Minimum contract duration**

**Article 25d.** (1) Contracts for communications services between operators and consumers as defined under the Austrian Consumer Protection Act [Konsumentenschutzgesetz] may not exceed an initial minimum contract duration of 24 months. Every subscriber must have the option of concluding a contract of no more than 12 months‘ minimum duration for each communications service.

(2) Without prejudice to any provisions regarding minimum contract duration, contracts with undertakings which provide communications services must not contain any conditions or contract termination procedures which function as a disincentive for subscribers to switch operators."

### **Section 4**

#### **Universal service**

##### **Definition and scope**

**Article 26.** (1) Universal service is the provision of a minimum set of public services to all users at an affordable price regardless of their place of residence or work.

(2) In any event, universal service shall comprise the following services:

1. access to a publicly available communications network and to a publicly available telephone service via which facsimile equipment can also be operated, including the transmission of data at data rates that are sufficient for functional Internet access;
2. the provision of an inter-operator directory enquiry service in accordance with the criteria specified under Article 28 Par. 2;
3. the preparation of an inter-operator subscriber directory including subscribers to publicly available telephone services as well as access to this directory in accordance with the criteria pursuant to Article 28 Par. 1;
4. coverage with public pay telephones on a nationwide basis at general and readily accessible locations.

(3) The terms and conditions of universal services provided by an undertaking subject to universal service obligations must be notified to the regulatory authority. Tariffs and changes in tariffs for universal services provided by an undertaking subject to universal service obligations may be reviewed by the regulatory authority in cases where there is reason to suspect that those

tariffs are not in line with the principle of affordability or other provisions of this Federal Act. This provision is without prejudice to Article 25.

(4) In addition to the information stipulated in Article 25, the general terms and conditions for the provision of universal service stipulated by the operator obliged to provide this service pursuant to Par. 2 No. 1 shall also comprise information on facilities and services for the control of expenditure (Article 29 Par. 2) as well as on additional facilities (Article 19).

## **Quality**

**Article 27.** (1) Universal service shall be available on a nationwide basis at an affordable price and in a certain quality. The Federal Minister of Transport, Innovation and Technology, in accordance with the relevant international commitments and considering the state of the art and the economic conditions, shall define, by way of ordinance, the quality criteria and the target values. The following may be specified:

1. supply time for initial connection,
2. fault rate,
3. fault repair time,
4. successful call ratio,
5. call setup time,
6. response times for directory enquiry services,
7. removed (Federal Law Gazette I No. 102/2011)
8. proportion of public pay telephones in working order and the equipment of public pay telephones and
9. proportion of bill correctness complaints.

(2) In an ordinance pursuant to Par. 1, the share of public pay telephones in working order is also to be aligned with the needs of end-users, including users with disabilities, with attention to geographical coverage and the use of mobile communications services.

(3) Should the regulatory authority determine that universal services are not or not entirely provided under competitive conditions on a sustainable basis, the regulatory authority shall notify the Federal Minister of Transport, Innovation and Technology without delay.

(4) removed (Federal Law Gazette I No. 102/2011)

(5) removed (Federal Law Gazette I No. 102/2011)

## **Inter-operator subscriber directory**

**Article 28.** (1) In the provision of an inter-operator subscriber directory, it shall be ensured that a uniform overall directory of all subscribers pursuant to Article 69 is available in printed form in any case and is updated regularly, at least once per year. This shall also apply to a subscriber directory arranged by trades (professional groups) subject to the available data. In addition, a subscriber directory in electronically readable form may be provided. In cases where a subscriber

requests that the subscriber directory not be delivered once or on a permanent basis, no fee may be charged.

(2) In the provision of an inter-operator subscriber directory, it shall be ensured that a generally accessible directory enquiry service is available which responds to queries of the data contained in the subscriber directory pursuant to Par. 1.

(3) The data made available for the overall directory and the directory enquiry service shall be processed and presented in accordance with the principle of non-discrimination.

### **Control of expenditure**

**Article 29.** (1) Undertakings obliged to provide universal service shall establish their tariffs and terms and conditions in such a way that in the provision of facilities or services beyond the scope of the provision of universal service the subscriber is not obliged to pay for facilities or services which are not necessary or not required for the respective service.

Provisions in force until 20th May 2012: “(2) Providers of public telecommunications services shall bar outgoing calls to premium-rate services once a year free of charge at the request of their subscribers.”

Provisions in force from 21st May 2012 onward: "(2) Without prejudice to the right to bar services for security reasons, operators of public communications services shall offer to bar outgoing calls to premium-rate services and data services once a year free of charge at the request of their subscribers where such services are subject to consumption-based charges. In this respect, special consideration shall be given, in particular, to end-users' interests worth protecting, to technical possibilities as well as to the fact that end-users can control their expenditure.”

(3) Providers of universal service shall also provide to their subscribers the following facilities and services:

1. means to pay for access to the public telephone network and use of publicly available telephone services on pre-paid terms;
2. means to pay for access to the public telephone network in instalments.

(4) The Federal Minister of Transport, Innovation and Technology may suspend these obligations, by way of ordinance, in full or in part. In this respect, it shall be considered whether these facilities are already widely available and that the subscribers can monitor and control their expenditure.

### **Provider**

**Article 30.** (1) With the assistance of the regulatory authority, the Federal Minister of Transport, Innovation and Technology shall review whether universal services are provided by the market under competitive conditions; in all cases, this review is to be carried out every five years. Where services are provided by the market under competitive conditions, any parties previously obliged

to provide those services are to be relieved of this obligation by way of an official decision. Where services are not provided by the market under competitive conditions, the relevant universal service is to be put out to public tender and the contract is to be awarded in accordance with procedural regulations on the procurement of services. In the process, the Federal Minister of Transport, Innovation and Technology may make use of the regulatory authority. Tenders may be handled separately according to service/product or regional aspects. However, the call for tenders may be omitted in cases where only one undertaking fulfils the operational requirements for the provision of universal service and ensures the provision of universal service by that undertaking until the next call for tenders. The award shall consider, above all, who will require the lowest contribution to the costs of providing the service. If several providers are commissioned to provide services that are differentiated according to service/product or regional aspects, it shall be taken into account that the total amount of payments under Article 31 is as low as possible. An undertaking which is obliged to provide universal service through a public call for tenders shall remain subject to this obligation until it is imposed on another party or until the undertaking is relieved of the obligation to provide universal service by way of an official decision.

(2) The call for tenders shall be published at least in the “Amtsblatt zur Wiener Zeitung“, specifying a reasonable tendering period and the area to be covered as well as the type of service to be provided.

(3) In cases where no offers for the provision of the service put out to tender are submitted within the tendering period, the Austrian Federal Minister of Transport, Innovation and Technology may oblige the most suitable provider to provide this service in accordance with the conditions defined in this Federal Act, in any ordinances issued on the basis of this Federal Act, and in the terms and conditions of the call for tenders.

(4) If, despite the existence of competitive conditions pursuant to Par. 1, no operator provides the services pursuant to Article 26 Par. 2 No. 1 at the request of an actual potential subscriber, the Federal Minister of Transport, Innovation and Technology shall issue an official decision obliging the operator previously relieved of its obligation pursuant to Par. 1 at the relevant location to provide the service for the subscriber.

### **Financial compensation**

**Article 31.** (1) The provider of universal service shall be compensated, at his request, for the established costs incurred by the provision of the service that are unrecoverable despite efficient management if these costs constitute an unreasonable burden. The application shall be filed with the regulatory authority within one year of expiry of the business year of the universal service provider; otherwise the claim to compensation will be lost. The regulatory authority shall base the calculation upon the costs attributable to

1. elements of the services which can only be provided at a loss or provided under cost conditions falling outside normal commercial standards and
2. specific end-users who can only be served at a loss or under cost conditions falling outside normal commercial standards and shall consider the market benefits accrued to the universal service provider.

(2) If the universal service provider has a share in the turnover on the relevant market that is greater than 80%, no compensation shall be claimed.

(3) In the proceedings regarding the determination of the amount of the compensation, the parties under the obligation to pay a universal service charge shall be parties to a joint procedure.

(4) The universal service provider shall present to the regulatory authority appropriate documentation upon submission of the application, enabling it to review the information in relation to the costs claimed. For this purpose, it may inspect the books and records either itself or commission an auditor, make comparisons to other operators as well as take other steps to achieve the required objective that correspond to the principle of proportionality. In justified cases, the regulatory authority may also determine an amount that is lower than the amount requested. The regulatory authority shall publish the results of the review.

(5) In the case of a call for tenders pursuant to Article 30, the regulatory authority, however, shall grant a compensation which at most corresponds to the result of the tender.

### **Universal Service Fund**

**Article 32.** (1) If required, the regulatory authority shall set up and administer a Universal Service Fund for the financing of universal service (Article 31 Par. 1). The Fund shall publish an annual report on its activities and achievements, in which the net costs are presented taking into account market benefits and the shares attributable to the individual undertakings assessed as liable to contribute.

(2) Operators of telecommunications services with an annual turnover greater than Euro 5,000,000 from these activities shall contribute to the financing of the Universal Service Fund and to the financing of the fund administration in proportion of their market shares (universal service charge). The share shall be determined according to the proportion of their turnover to the total turnover of the companies assessed as liable to contribute on the respective market of service/product relevance.

(3) Upon completion of the procedure under Par. 1, the regulatory authority shall determine the shares of the parties contributing to this Fund and shall notify the parties concerned thereof. In calculating the amount of the shares the regulatory authority shall consider that the least distortion is caused to competition and to user demand.

(4) The operators contributing to the Fund pursuant to Article 31 shall pay to the regulatory authority within three months the shares determined by the regulatory authority and attributable to them. The period shall start on the day of receipt of the notification referred to in Par. 3.

(5) If a party assessed as liable to contribute is in arrears with payment for more than four weeks, the regulatory authority shall issue a notice relating to the contributions in arrears and collect them.

### **Turnover reports**

**Article 33.** In procedures pursuant to Article 31 and Article 32, operators that are operative on the respective market for the specific telecommunications service shall, on request, notify their turnovers for the relevant service to the regulatory authority on an annual basis, if required, also retroactively. Otherwise, the regulatory authority may inspect the books and records itself or commission an auditor, or carry out an estimate.

## **Section 5**

### **Regulation of competition**

#### **Regulatory objectives**

**Article 34.** (1) The regulatory authority shall achieve the objectives of Article 1 Par. 2 and 2a by means of the measures set out in this section. In this respect, the regulatory authority shall, in particular, comply with the principle of proportionality.

(2) The regulatory authority shall keep monitoring the achievement of the regulatory objectives. In its annual Communications Report (Article 19 KOG), the regulatory authority is to report on the extent to which the objectives under Article 1 Par. 2 and 2a were attained and on any changes compared to previous years. Also, proposals to improve or adapt the provisions of this Act or the ordinances issued under this Act may be submitted.

(3) In enforcing this Federal Act the regulatory authority shall consider the recommendations of the European Commission on the harmonised implementation of the directives transposed by this Federal Act. If the regulatory authority deviates from one of these recommendations, it shall notify the European Commission giving reasons.

(4) In the case of investments in new and enhanced infrastructure, the specific risk associated with each investment and the distribution of risk are to be taken into account in the calculation of a reasonable rate of return.

#### **Undertakings with significant market power**

**Article 35.** (1) An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

(2) In making an assessment of significant market power of an undertaking the regulatory authority shall consider, in particular, the following criteria:

1. overall size of the undertaking, its size in relation to that of the relevant market as well as the changes in the relative positions of the market players in the course of time,
2. high barriers to entry as well as the resulting extent of potential competition,
3. extent of countervailing buying power,
4. extent of elasticity of demand and supply,
5. the respective market phase,

6. technological advantages,
7. any advantages in the distribution and sales networks,
8. economies of scale, economies of scope and density,
9. extent of vertical integration,
10. extent of product differentiation,
11. access to financial resources,
12. control of infrastructure not easily duplicated,
13. general behaviour on the market, such as pricing, marketing policy, bundled products and services or establishment of barriers.

(3) Two or more undertakings may be found to be in a joint dominant position if, even in the absence of structural or other links between them, they operate in a market the structure of which is considered to be conducive to coordinated behaviour.

(4) In making an assessment of joint dominance of two or more undertakings the regulatory authority shall use, in particular, the following criteria:

1. extent of market concentration, the distribution of the market shares and their change in the course of time,
2. barriers to market entry, the resulting extent of potential competition,
3. extent of countervailing buying power,
4. existing market transparency,
5. the respective market phase,
6. homogeneous products,
7. underlying cost structures,
8. extent of elasticity of demand and supply,
9. extent of technological innovation and degree of maturity of the technology,
10. absence of excess capacity,
11. informal or other links between the market players,
12. retaliatory mechanisms,
13. extent of incentives for price competition.
14. vertical integration with collective refusal to supply.

(5) Where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a horizontally and vertically or geographically related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking.

### **Market definition and market analysis procedure**

**Article 36.** (1) The purpose of this procedure is to identify the relevant markets subject to sector-specific regulation and to determine whether one or more undertakings have significant market power or effective competition prevails on those markets, and whether specific obligations are to be withdrawn, maintained, amended or imposed.

(2) In procedures pursuant to Par. 1, the regulatory authority shall, by virtue of office, issue official decisions identifying the relevant markets subject to sector-specific regulation according to national circumstances and in accordance with the principles of general competition law, with due attention to any special geographical circumstances regarding the competitive situation and to the requirements of sector-specific regulation.

(3) The regulatory authority shall identify the relevant markets with due attention to the provisions of the European Union. These procedures shall apply only to those markets which are characterised by significant and persistent structural or legal barriers to market access, which do not tend toward effective competition in the long term, and on which the application of general competition law alone is not sufficient to remedy the relevant market failure.

(4) In cases where the regulatory authority intends to define markets of service/product or geographical relevance that differ from those defined in the Commission Recommendation on relevant product and service markets within the electronic communications sector, it shall follow the procedures referred to in Article 128 and Article 129.

(5) In procedures pursuant to Par. 1, the regulatory authority shall also carry out an analysis of the markets pursuant to Par. 2 with due attention to the provisions of the European Union.

(6) The procedure pursuant to Par. 1 is to be initiated within three years after the adoption of a previous measure in connection with the market in question. This period may be extended by three additional years in cases where the regulatory authority submits a reasoned proposal for extension to the European Commission and where the European Commission does not object to this request within one month of its submission.

(7) For markets not previously notified to the European Commission pursuant to Article 129 TKG 2003, a procedure is to be initiated within two years after the adoption of a revised Commission Recommendation on relevant product and service markets within the electronic communications sector.

(8) Once the time limits stipulated in Par. 6 and 7 have passed, the regulatory authority may request that BEREC provide assistance in the analysis of the specific market and the specific obligations to be imposed. In such cases, the draft measure is to be coordinated in accordance with Article 129 within six months.

### **Imposition of specific obligations**

**Article 37.** (1) In cases where the regulatory authority identifies one or more undertakings as having significant market power on the relevant market in the procedure pursuant to Article 36 Par. 1 and therefore concludes that effective competition does not prevail on that market, the regulatory authority shall impose appropriate specific obligations pursuant to Articles 38 to 46 or pursuant to Article 47 Par. 1 on such undertakings, taking adequate account of any competition between different markets and any specific geographical circumstances regarding the competitive situation in line with the principle of proportionality. According to the results of the procedure, specific obligations on undertakings already imposed for the relevant market or

special geographical areas are to be withdrawn, maintained, amended or re-imposed by the regulatory authority with due attention to its regulatory objectives.

(2) If the regulatory authority determines on the basis of the procedure pursuant to Article 36 Par. 1 that a market previously defined as subject to sector-specific regulation is no longer a relevant market, or that such a relevant market is effectively competitive and therefore no undertaking has significant market power, it must not impose obligations under Par. 1, with the exception of Article 47 Par. 2; in this case, the regulatory authority shall issue an official decision stating that effective competition prevails on the relevant market. Where undertakings are still subject to specific obligations on this market, they are to be withdrawn by way of an official decision. The official decision shall also specify a reasonable period not exceeding six months after which the withdrawal shall take effect.

(3) In the case of transnational markets identified by a decision of the European Commission, the national regulatory authorities concerned shall conduct the market analysis in close cooperation, taking account of the guidelines on market analysis and assessment of significant market power, and decide in a concerted fashion whether one or more undertakings have significant market power or whether there is, in fact, effective competition. Article 36 Par. 5 as well as Article 37 Par. 1 and 2 are to be applied correspondingly.

(4) removed (Federal Law Gazette I No. 102/2011)

(5) removed (Federal Law Gazette I No. 102/2011)

(6) removed (Federal Law Gazette I No. 102/2011)

(7) removed (Federal Law Gazette I No. 102/2011)

(8) removed (Federal Law Gazette I No. 102/2011)

(9) removed (Federal Law Gazette I No. 102/2011)

(10) removed (Federal Law Gazette I No. 102/2011)

(11) removed (Federal Law Gazette I No. 102/2011)

### **Fundamentals of procedures**

**Article 37a.** (1) In the course of procedures pursuant to Articles 36 and 37, the Cartel Court [Kartellgericht], the Higher Cartel Court [Kartellobergericht], the Public Attorney for Cartel Matters [Bundeskartellanwalt] and the Federal Competition Authority [Bundeswettbewerbsbehörde] are to be given the opportunity to submit comments and opinions on draft measures (Article 128) within four weeks.

(2) In procedures pursuant to Articles 36 and 37, the undertaking on which specific obligations are maintained, imposed, amended or withdrawn shall be a party to the procedure in any case.

(3) In procedures pursuant to Article 36 and 37, parties who provide credible evidence that they are affected by the procedure in accordance with Article 40 Par. 2 KommAustria Act shall also be parties to the procedure.

(4) In cases where the regulatory authority schedules a hearing by way of a decree, the decree must contain the information stipulated under Article 44d Par. 2 General Administrative Procedures Act [Allgemeines Verwaltungsverfahrensgesetz, AVG] as well as an indication of legal consequences pursuant to Article 42 Par. 1 AVG.

(5) The regulatory authority shall publish official decisions issued under Article 36 Par. 2 and 5 as well as Article 37 Par. 1 and 2 and submit a copy of those decisions to the European Commission.

### **Obligation of non-discrimination**

**Article 38.** (1) The regulatory authority may impose obligations of non-discrimination related to access on undertakings with significant market power.

(2) Obligations of non-discrimination shall ensure, in particular, that an undertaking with significant market power applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of affiliated or third-party undertakings; this provision shall be without prejudice to the conclusion of risk-sharing agreements for the purpose of sharing the investment risk for new and enhanced infrastructure as long as such agreements do not have an adverse effect on competition.

(3) The regulatory authority may require an undertaking with significant market power to publish a reference offer. The undertaking shall provide in the reference offer sufficiently unbundled subservices, break down the relevant offerings into components according to market needs and state the associated terms and conditions including prices.

(3a) In cases where an obligation pursuant to Article 41 regarding physical access to network infrastructure at the wholesale level is imposed on an undertaking with significant market power, the regulatory authority shall also impose an obligation pursuant to Par. 3 with an indication of the minimum content of such an offer.

(4) The national regulatory authority may impose changes to reference offers to give effect to obligations imposed under Article 37 Par. 1.

### **Obligation of transparency**

**Article 39.** (1) The regulatory authority may impose obligations for transparency related to access on undertakings with significant market power.

(2) Notwithstanding the provisions of Article 90, for this purpose the regulatory authority may, in addition, impose on undertakings with significant market power the obligations to make public

the following information:

1. accounting information;
2. technical specifications;
3. network characteristics;
4. terms and conditions for supply and use;
5. prices including discounts; and
6. any terms or conditions which restrict access to services and applications or their use.

(3) The regulatory authority may define the specific information to be published by the undertaking with significant market power, including the target group, the level of detail and the manner of publication.

### **Accounting separation**

**Article 40.** (1) The regulatory authority may require undertakings with significant market power to break down the costs for specific activities related to access in order to prevent unfair cross-subsidising.

(2) For this purpose, in particular a vertically integrated company may be required to make transparent and reproducible its wholesale prices and its internal transfer prices. The regulatory authority may specify the format and the accounting methodology to be used, including the level of detail and the manner in which the information shall be made available.

(3) If the regulatory authority has imposed specific obligations pursuant to Article 38, 39 or 40 Par. 1 and 2, it may demand, notwithstanding the provisions of Article 90, that accounting records, including all associated information and documents, are provided on request in the manner and format prescribed. The regulatory authority may publish this information, as far as this is required to promote competition.

(4) The regulatory authority shall review the breakdown of costs on a yearly basis and publish the results of such reviews.

### **Access to network facilities and network functions**

**Article 41.** (1) The regulatory authority may impose the obligation on undertakings with significant market power to meet requests for access to, and use of, network elements and associated facilities.

(2) In particular, the obligation pursuant to Par. 1 may include the following:

1. the obligation to grant access to the network, to specific network elements or network facilities, including access to inactive network elements, and the obligation to grant unbundled access to the local loop in order to, inter alia, allow carrier selection, carrier preselection or subscriber line resale offers;
2. the obligation to provide specified services on a wholesale basis for resale by third parties;
3. the obligation not to withdraw access to facilities already granted;
4. the obligation to negotiate in good faith with undertakings requesting access;

5. the obligation to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;
6. the obligation to provide co-location or other forms of facility sharing;
7. the obligation to create the conditions needed to ensure interoperability of end-to-end services, including facilities for intelligent network services or roaming on mobile networks;
8. the obligation to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;
9. the obligation to interconnect networks or network facilities; and
10. the obligation to provide access to associated services such as identity, location and presence service.

(3) In imposing the obligations under Par. 2 the regulatory authority shall take particular account of:

1. the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and access involved, including the viability of other upstream access products such as access to ducts;
2. the feasibility of providing the access proposed, in relation to the capacity available;
3. investments in new and enhanced infrastructure, with due attention to any public investments made and to the investment risks involved;
4. the need to safeguard competition in the long term, with particular attention to economically efficient infrastructure-based competition;
5. any relevant intellectual property rights;
6. the provision of pan-European services.

(4) In cases where an operator is subjected to the obligation to provide access pursuant to Par. 1, technical or operational conditions may be imposed on the operator and/or beneficiaries of such access where necessary to ensure normal operation of the network.

### **Price control and cost accounting for access**

**Article 42.** (1) If the regulatory authority identifies, in the procedure pursuant to Article 36, that an undertaking with significant market power might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users, the regulatory authority may impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices. In the process, the regulatory authority shall take into account the investment made by the operator and allow him a reasonable rate of return on capital employed, taking into account the risks involved and future market development; the operator shall also be allowed to conclude risk-sharing agreements and cooperation agreements. In addition, the costs and risks associated with investments in new and enhanced infrastructure must be given special consideration, and undertakings with significant market power may be subjected to requirements with regard to cost accounting methods.

(2) Where an undertaking with significant market power has an obligation relating to the cost orientation of its prices, the burden of proof that charges are derived from costs including a reasonable rate of return on investment shall lie with the undertaking concerned. For the purpose

of calculating the costs of efficient service provision, the regulatory authority may use cost accounting methods independent of those used by the undertaking concerned, with attention to the costs and risks associated with investments in communications networks and to any competition between different markets. The regulatory authority may require an undertaking with significant market power to provide full justification for its prices, and may, where appropriate, order price adjustments. In this respect, the regulatory authority may also take account of prices available in comparable competitive markets.

(3) The regulatory authority shall ensure that, where implementation of a cost accounting system by an undertaking with significant market power is mandated, a description of the cost accounting system is made publicly available, showing the main categories under which costs are grouped and the rules used for the allocation of costs. The regulatory authority or a qualified independent body commissioned by the regulatory authority shall verify compliance with the cost accounting system on an annual basis. The regulatory authority shall publish a statement concerning compliance.

### **Regulatory controls on retail services**

**Article 43.** (1) If the regulatory authority has identified in a market analysis procedure that

1. the relevant retail market is not effectively competitive; and
2. specific obligations pursuant to Articles 38 to 42 would not result in the achievement of the objectives set out in Article 1 Par. 2 and 2a; it shall impose specific obligations pursuant to Par. 2 or 3 on undertakings having significant market power on a retail market.

(2) Specific obligations under Par. 1 may include requirements, in particular, that this undertaking shall not

1. charge excessive prices;
2. inhibit entry of new market players;
3. set predatory prices to restrict competition;
4. show undue preference to specific end-users; or
5. unreasonably bundle services.

(3) Specific obligations under Par. 1 may also stipulate that the regulatory authority shall apply to this undertaking

1. appropriate retail price cap measures; or
2. measures to control individual tariffs as regards cost oriented tariffs or prices on comparable markets.

(4) Undertakings subject to specific obligations under the foregoing paragraph shall use cost accounting systems for this purpose the format and accounting methodology of which may be specified by the regulatory authority. The regulatory authority or a qualified independent body commissioned by the regulatory authority shall verify compliance with the cost accounting system. The regulatory authority shall ensure that a statement concerning compliance with these regulations is published once a year.

### **Provision of leased lines**

**Article 44.** removed (Federal Law Gazette I No. 102/2011)

### **Obligations of undertakings with significant market power as to retail tariffs**

**Article 45.** (1) If an operator of communications services or networks which is obliged to have its tariffs and general terms and conditions approved pursuant to Article 43 files an application for approval of tariffs or general terms and conditions, the regulatory authority shall decide on this application within eight weeks. Only the applicant shall have the status of a party to this procedure.

(2) If the regulatory authority does not give a decision within this period, the tariffs or general terms and conditions applied for shall be deemed to have been approved. The running of the period shall be suspended as long as the required documentation and supporting documents are not submitted by the applicant. The regulatory authority shall inform the applicant within three weeks of filing the application whether any and, where applicable, which documents required for assessing cost-orientation shall be submitted.

(3) The decision on the tariffs submitted for approval is to be taken with due attention to the measures imposed in accordance with Article 43 Par. 2 and 3.

(4) The regulatory authority may approve tariffs also in the form of price caps; it also may provide special tariffs.

(5) As far as it is required to achieve effective competition, tariff approval may comprise, in particular, the following incidental provisions:

1. a reasonable time limit,
2. the obligation to provide information on specific data pursuant to Article 90,
3. obligations relating to the time of introducing approved tariffs,
4. a condition subsequent in the event that a different tariff is introduced or changed after approval has been granted,
5. obligations for the adjustment of approved tariffs in case of changed wholesale prices.

(6) The general terms and conditions shall not be approved if they do not comply with provisions of this Federal Act or the ordinances issued under this Act or Articles 879 and 864a General Civil Code [ABGB] or Articles 6 and 9 Consumer Protection Act [Konsumentenschutzgesetz]. The competences for review of the general terms and conditions according to other legal provisions shall remain unaffected.

### **Carrier selection and carrier pre-selection**

**Article 46.** removed (Federal Law Gazette I No. 102/2011)

### **Further obligations and procedural rules**

**Article 47.** (1) In exceptional circumstances, the regulatory authority may impose obligations for access other than those specified in Article 38 to Article 42 on undertakings with significant

market power. In this case, the regulatory authority shall make a corresponding application to the European Commission. The decision by the European Commission shall serve as a basis for the decision by the regulatory authority.

(2) The regulatory authority may impose the following obligations under Articles 38 to 42 on undertakings that do not have significant market power:

1. the obligations of an operator of communications networks or services who has been granted rights of use for frequencies in a procedure pursuant to Article 55;
2. technical conditions may be imposed on operators of communications networks or services who have been granted access, as far as this is required to ensure normal operation of the network;
3. obligations required for compliance with international commitments.

### **Functional separation**

**Article 47a.** (1) Should the regulatory authority conclude in a procedure pursuant to Articles 36 to 37a that the regulatory obligations imposed pursuant to Articles 38 to 42 or Article 47 Par. 1 have failed to bring about effective competition and that significant competition problems or market failures persist on those markets, the regulatory authority may, as an exceptional measure, impose an obligation on vertically integrated undertakings with significant market power on those markets to place activities related to the wholesale provision of the relevant access products to an independently operating business entity, the purpose of which is to supply all access products and services to all undertakings, including to other business entities within the parent company, on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes. In defining the specific nature and extent of this obligation, the regulatory authority shall take full account of the principle of proportionality.

(2) In cases where it intends to impose an obligation pursuant to Par. 1 on an undertaking, the regulatory authority is to submit to the European Commission a proposal which includes the following content:

1. evidence justifying the conclusions of the national regulatory authority as referred to in Par. 1;
2. a reasoned assessment that there is no or little prospect of effective and sustainable competition on the relevant markets for wholesale access products within a reasonable time-frame;
3. an analysis of the expected impact on the regulatory authority, on the undertaking in question, in particular on its workforce and on the electronic communications sector as a whole, and on incentives to invest in a sector as a whole, particularly with regard to the need to ensure social and territorial cohesion, and on other stakeholders including, in particular, the expected impact on competition and any potential effects on consumers;
4. an analysis of the reasons justifying that this obligation would be the most efficient means to enforce remedies aimed at addressing the competition problems or market failures identified.

(3) Together with the proposal pursuant to Par. 2, the regulatory authority is to submit to the European Commission a draft measure which includes the following content:

1. the precise nature and level of separation, specifying in particular the legal status of the

separate business entity;

2. an identification of the assets of the separate business entity, and the products or services to be supplied by that entity;
3. the governance arrangements to ensure the independence of the staff employed by the separate business entity, and the corresponding incentive structure;
4. rules for ensuring compliance with the obligations;
5. rules for ensuring transparency of operational procedures, in particular towards other stakeholders;
6. a monitoring programme to ensure compliance, including the publication of an annual report.

(4) The decision of the European Commission shall serve as the basis for the regulatory authority's decision on the draft measure. If the European Commission approves the proposal, the regulatory authority shall subsequently perform a coordinated analysis of the relevant markets concerned pursuant to Articles 36 to 37a, in the course of which the existing regulatory obligations pursuant to Articles 38 to 42 and/or Article 47 Par. 1 are re-imposed, amended or withdrawn according to the results of the analysis.

### **Voluntary functional separation**

**Article 47b.** (1) Undertakings which have been identified as possessing significant market power on one or more relevant markets for wholesale access products are required to notify the regulatory authority in advance of any intention to transfer all of their local access network assets or a or a substantial part thereof to a separate legal entity under different ownership, or to establish a separate business entity in order to provide all customers, including their own retail business divisions, with fully equivalent access products. Undertakings shall also inform the regulatory authority in advance of any changes in such intentions as well as the final outcome of the separation process. Notifications are to be submitted in such a timely and comprehensive manner that the regulatory authority can assess the effect of the intended transaction pursuant to Par. 2.

(2) The regulatory authority shall perform a coordinated analysis of the relevant markets concerned pursuant to Articles 36 to 37a, in the course of which the existing regulatory obligations pursuant to Articles 38 to 42 and/or Article 47 Par. 1 are re-imposed, amended or withdrawn according to the results of the analysis.

### **Interconnection obligation**

**Article 48.** (1) Every operator of a public communications network shall be under the obligation to make an offer for interconnection to other operators on request. All parties involved shall strive to achieve the objective of enabling and improving communication of the users of different public communications networks.

(2) Operators may use information acquired from other operators in the process of negotiating network access solely for the purpose for which the data were supplied. The operators shall respect at all times the confidentiality of the information transmitted and shall not pass it on to any other party, in particular other departments, subsidiaries or business partners for whom such

information could provide a competitive advantage, except as otherwise provided by an agreement between operators.

(3) Reference offers pursuant to Article 38 Par. 3 shall be submitted to the regulatory authority. Agreements on network access are to be submitted to the regulatory authority at its substantiated request.

### **Scope of interconnection**

**Article 49.** (1) Interconnection shall comprise at least the following services:

1. provision of the required switching data of the respective connection or, in case of packet-oriented services, of the routing data to the interconnecting operator;
2. delivery of the connections or data packages to the user of the interconnected operator;
3. provision of the data required for interconnection payments to the interconnection operator in an appropriate manner.

(2) removed (Federal Law Gazette I No. 102/2011)

(3) If link-up via lines is required for interconnection, the installation costs as well as the current expenses of the interconnected line shall be appropriately distributed between both operators.

### **Recourse to the regulatory authority**

**Article 50.** (1) If no agreement is reached between an operator of a public communications network or service on whom specific obligations under Article 38, 41, 42 or 47 have been imposed by the regulatory authority or who is under the obligation pursuant to Article 22 Par. 3, Article 23 Par. 2, Article 48 or Article 49 Par. 3 and another operator of a public communications network or service, or an undertaking which benefits from access obligations under this Act, on the obligations existing under Article 22 Par. 3, 23 Par. 2, 38, 41, 42, 47, 47a, 48 or Article 49 Par. 3 within six weeks of receipt of the application despite negotiations, either party involved may have recourse to the regulatory authority.

(2) In justified cases the regulatory authority may institute proceedings also by virtue of office.

## **Section 6**

### **Frequencies**

#### **Frequency administration**

**Article 51.** (1) The Federal Minister of Transport, Innovation and Technology shall administer the frequency spectrum as well as the Austrian rights of use and orbital positions of satellites, observing international agreements and with attention to the high social, cultural and economic value of frequencies. He shall take appropriate measures to ensure efficient and interference-free use.

(2) removed (Federal Law Gazette I No. 102/2011)

(3) The Federal Minister of Transport, Innovation and Technology may assign to the regulatory authority, at its request or by virtue of office, parts of the frequency spectrum dedicated pursuant to Article 52 Par. 3 for licensing pursuant to Article 55, specifying in any case the intended use and the technical usage conditions.

(4) As regards frequencies which are provided for broadcasting in the frequency usage plan and the frequency allocation plan (Article 52 Par. 2 and Article 53), as defined in the Federal Constitutional Broadcasting Act [BVG-Rundfunk], the duties referred to in Par. 1 shall be performed by KommAustria (Article 1 KOG). This shall not apply to the exercise of duties according to Section 11.

### **Frequency usage plan**

**Article 52.** (1) The Federal Minister of Transport, Innovation and Technology shall draw up a frequency usage plan in which frequency ranges are allocated to specific radio services and other applications of electromagnetic waves. In preparing this plan, the Federal Minister of Transport, Innovation and Technology shall in particular account for international harmonisation, the technical development and the compatibility of frequency usage in the transmission media.

(2) The frequency usage plan shall contain the distribution of the frequency ranges to specific frequency usage as well as the definitions for such frequency usage. In particular, the maximum permissible field strengths for frequency uses may also be defined where this is necessary in order to minimise interference with other radio systems. The frequency usage plan may consist of subplans.

(3) The frequency usage plan may also provide that the number of frequencies licensed in individual frequency ranges shall be limited. In this context, the plan shall account for all current and foreseeable uses, with particular attention to frequency planning efforts taking place at the international and European levels as well as foreseeable technical developments with attention to ongoing efforts related to technology development in international organisations and the European Union, based on the duration of each frequency assignment to be expected; the plan shall also account for the need to ensure the efficient use of frequencies. The reasons for such provision shall be given and the reasoning shall be published.

(4) Should the regulatory authority determine that the requirements stipulated under Par. 3 are no longer fulfilled, the regulatory authority shall communicate this to the Federal Minister of Transport, Innovation and Technology without delay. The provision pursuant to Par. 3 is to be reviewed at reasonable intervals.

### **Frequency allocation plan**

**Article 53.** (1) The Federal Minister of Transport, Innovation and Technology may, by way of ordinance, specify detailed provisions on frequency usage and frequency licensing, in particular on the requirements to be met for licensing. In this respect, in particular, the technical

possibilities, the fundamental requirements in the public interest and efficient usage of frequencies shall be taken into account. The frequency allocation plan may consist of subplans.

(2) The definition of individual rights to use frequencies (frequency assignments) is permissible only for the following purposes:

1. to avoid harmful interference;
2. to ensure the technical quality of services;
3. to safeguard the efficient use of spectrum; or
4. to fulfil general interest objectives as defined in accordance with European Union law.

## **Frequency licensing**

**Article 54.** (1) Frequency licensing shall be carried out in compliance with the frequency usage plan and the frequency allocation plan on the basis of objective, transparent, non-discriminatory and reasonable criteria and in a technology-neutral and service-neutral manner.

(1a) As an exception to Par. 1, proportionate and non-discriminatory restrictions of technology neutrality may be introduced for the following purposes:

1. to avoid harmful interference;
2. to protect public health against electromagnetic fields;
3. to ensure the technical quality of services;
4. to ensure maximisation of radio frequency sharing;
5. to safeguard the efficient use of spectrum; or
6. to ensure fulfilment of an objective pursuant to Par. 1b.

(1b) Restrictions of service neutrality – also subject to the requirements of proportionality and non-discrimination – are permissible for the following purposes (inter alia):

1. to ensure safety of life;
2. to avoid an inefficient use of radio frequencies;
3. to promote social, regional or territorial cohesion; or
4. in the case of frequencies which are designated for broadcasting as defined in the Federal Constitutional Broadcasting Act [BVG-Rundfunk], to promote cultural and linguistic diversity and media pluralism, in particular by the provision of broadcasting and television services.

(1c) In cases where restrictions pursuant to Par. 1a and 1b are introduced, the competent authority (Par. 3) shall, at regular intervals, review the extent to which the relevant requirements for such restrictions are still fulfilled. The results of this review are to be published.

(1d) In the assessment of the protection of human life and health, the scientific state of the art, international standards as well as laws and ordinances on general protection from electromagnetic fields are to be taken into account.

(2) Frequencies shall be licensed for usage if

1. they are designated for the intended use in the frequency usage plan and cannot be used on the basis of an ordinance pursuant to Article 74 Par. 3;
2. they are available in the intended usage area;

3. compatibility with other frequency usage is provided.
4. removed (Federal Law Gazette I No. 102/2011)

(3) The responsibility for frequency licensing as well as for modification and revocation of frequency licences shall lie with:

1. KommAustria for frequencies for the provision of radio broadcasting as defined in the Federal Constitutional Broadcasting Act [BVG-Rundfunk];
2. the regulatory authority for frequencies for which provision pursuant to Article 52 Par. 3 has been made in the frequency usage plan; and
3. the telecommunications authority for all other frequencies.

(4) Approval by KommAustria shall be obtained prior to the licensing of frequencies which are provided also for broadcasting within the meaning of the Federal Constitutional Broadcasting Act [BVG-Rundfunk] in the frequency usage plan (Article 52 Par. 2) and shall not be used for the provision of broadcasting within the meaning of the Federal Constitutional Broadcasting Act [BVG-Rundfunk] as well as prior to modification of these licences. Approval by the National Telecommunications Authority shall be obtained prior to the licensing of frequencies which are not provided for broadcasting within the meaning of the Federal Constitutional Broadcasting Act [BVG-Rundfunk] in the frequency usage plan (Article 52 Par. 2) and shall be used for the provision of broadcasting within the meaning of the Federal Constitutional Broadcasting Act [BVG-Rundfunk] as well as prior to modification of these licences.

(5) KommAustria shall license the frequencies referred to in Par. 3 No. 1 within six weeks of receipt of the complete application. If KommAustria has to carry out a comparative selection procedure, this period shall be extended by eight months. KommAustria shall notify the National Telecommunications Authority of any frequency licence and operating authorisation granted as soon as possible; such notification shall contain all necessary data (in particular location, technical data, antenna diagrams etc.).

(6) The frequencies referred to in Par. 3 No. 2 shall be licensed in a procedure pursuant to Article 55.

(7) The frequency licence shall take account of the manner and extent of frequency usage, as far as this is required for efficient and interference-free usage of the frequencies and compatibility with other frequency usage.

(8) The frequency licence shall not be affected by obligations for compliance with statutory, technical or operational requirements under other statutory provisions.

(9) Licensing of frequencies for the operation of radio systems in the public interest shall be given precedence, as far as this is required for the performance of the applicant's duties.

(10) Licensing of frequencies shall be no guarantee for the quality of the radio connection.

(11) All frequencies may be licensed only for a limited period. The limitation shall be substantially and economically reasonable.

(12) removed (Federal Law Gazette I No. 102/2011)

(13) removed (Federal Law Gazette I No. 102/2011)

(14) The decision on the assignment of frequencies by the telecommunications authority pursuant to Par. 3 No. 3 shall be taken in compliance with the frequency usage plan in the course of granting the authorisation pursuant to Article 81 within six weeks of receipt of the complete application unless a frequency coordination procedure under international agreements has to be completed first.

(15) removed (Federal Law Gazette I No. 102/2011)

### **Frequency licensing by the regulatory authority**

**Article 55.** (1) The regulatory authority shall license the frequencies it has been assigned to the applicant who complies with the general requirements of Par. 2 No. 2 and guarantees the most efficient usage of the frequencies. This shall be determined by the amount of the frequency licence fee offered. The regulatory authority shall decide about applications for frequency licensing within eight months of receipt of the application or, if this will result in a shorter period for decision, within six months of publication of the tender. These limits shall not apply if a frequency coordination procedure under international agreements has to be completed first. The decision shall be published.

(2) The regulatory authority shall carry out frequency licensing in accordance with the principles of an open, fair and non-discriminatory procedure as well as in compliance with economic efficiency. It shall put out the intended licensing of frequencies to public tender if

1. a demand has been established by virtue of office or
2. an application has been received and the regulatory authority concludes that the applicant will be in the position to comply with the incidental provisions linked with the right to use the frequencies. In particular, the applicant's technical capabilities and economic circumstances, his experience in the communications sector as well as in related business segments and his expertise shall be taken into account. There must not be any reason to assume that the proposed service will not be provided, in particular as regards quality and coverage obligation.

(3) After approval of the tendering conditions by the Federal Minister of Transport, Innovation and Technology the call for tenders shall be published in the "Amtsblatt zur Wiener Zeitung". In any event, it shall contain:

1. the ranges of the frequency spectrum assigned to the regulatory authority which are designed for licensing in a joint procedure;
2. the intended purpose of and the usage conditions for the frequencies to be licensed;
3. the prerequisites for the provision of the tender documents including refund of expenses, where applicable;
4. a period of at least two months during which applications for the licensing of frequencies can be made.

(4) In any event, the tender documents shall

1. present the basic principles of the procedure for determining the highest frequency licence fee and
2. describe the requirements in terms of form and contents of the application documents so as to ensure comparability of the applications. They may also contain information on the amount of the minimum frequency licence fee to be offered. This information shall be modelled on the amount of the frequency allocation fees expected to be paid for the frequencies to be licensed. In justified cases, this minimum bid may not be based on the frequency allocation fees if this appears justified on the basis of the actual market value of the frequencies. If frequency packages are licensed, the tender documents may provide that applications for the licensing of individual of these frequency packages, for a specific number of frequency packages or combinations of frequency packages are permitted.

(5) The regulatory authority may provide in the tender documents that the undertaking to which the frequencies are licensed by the regulatory authority may be authorised in a procedure pursuant to Article 56 to transfer the rights of use for these frequencies to other undertakings as defined in Article 15 partly for the entire usage term or for a specific period.

(6) Applications may deviate from the requirements laid down in the tender documents only if, and to the extent to which, this has been declared as permitted in the documents. After expiry of the tender period it shall not be permitted to modify and withdraw applications. This shall not apply to the raising of the offered amount of the frequency licence fee if such a raise has been explicitly declared as permitted in the tender documents within the framework of the rules for determining the highest bid (Par. 9).

(7) Essential changes in the tendering conditions shall be permitted only to the extent to which statutory or internationally binding regulations for the Republic of Austria have changed.

(8) The applicants shall be parties to a joint procedure. By means of notice, the regulatory authority has to exclude applicants from the frequency licensing procedure whose applications are incomplete or unduly deviate from the tendering conditions or who do not comply with the general requirements pursuant to Par. 2.

(9) By means of a procedural order, the regulatory authority shall define appropriate rules for determining the highest bid. These rules shall be in accordance with the principles pursuant to Par. 2, first sentence, and Par. 4 No. 1 as well as take account of the intended purpose of the frequencies to be licensed (Par. 3 No. 2). The rules shall, in any case, also define the requirements for a bid to be valid and adequate guarantees for the bids. They shall stipulate that applicants who behave collusively in the determination of the highest bid may be excluded by means of a procedural order from further participating in the procedure for determining the highest bid. The rules shall be submitted to the applicants at least two weeks before the determination of the highest bid begins.

(10) The frequency licence may contain the following incidental provisions designed to comply in the best possible way with the objectives and provisions of this Act and the relevant regulations of the European Communities, in particular the Authorisation Directive:

1. designation of the intended purpose, the type of network and technology for which the rights of use for frequencies are granted, including, where applicable, the exclusive use of a frequency for transmission of specific content or specific audiovisual services;
2. incidental provisions required to ensure effective and efficient use of frequencies, including, where applicable, requirements relating to the range and rules relating to the time of start of operation and coverage as well as penalties in cases of non-adherence to imposed obligations;
3. technical and operational conditions necessary for the avoidance of harmful interference and special conditions for the limitation of exposure of the general public to electromagnetic fields according to the criteria set forth in Article 54 Par. 1d, where such conditions are different from those included in the general authorisation;
4. time limit;
5. conditions, if required, relating to the transfer of use of the frequencies at the initiative of the holder of these rights;
6. commitments which the undertaking obtaining the rights of use for frequencies has made in the course of a selection procedure;
7. obligations under relevant international agreements relating to the use of frequencies.

(11) At any stage of the procedure the regulatory authority may consult experts as well as advisers, the costs and additional expenses of which shall be borne by the applicant who is licensed the frequencies. If there are several applicants, the costs shall be distributed on a pro rata basis.

(12) The regulatory authority shall be entitled to cancel the call for tenders and terminate the procedure at any stage for good cause, in particular if

1. the regulatory authority finds applicants to behave collusively and an efficient, fair and non-discriminatory procedure cannot be conducted;
2. none or only one applicant complies with the requirements under Par. 2;
3. none or only one applicant who complies with the requirements under Par. 2 actually takes part in the determination of the highest bid;
4. the procedure results in the applicants requesting less frequency spectrum than the amount to be allocated. All this shall not constitute any claim to compensation; claims for government liability shall remain unaffected.

(13) The provisions of this section shall not apply to the licensing of frequencies provided in the frequency usage plan for broadcasting within the meaning of the Federal Constitutional Broadcasting Act [BVG-Rundfunk].

### **Transfer of frequencies, change in ownership structure**

**Article 56.** (1) The transfer of rights of use for frequencies granted by the regulatory authority shall require prior approval by the regulatory authority. The regulatory authority shall publish the application for, and the decision on, approval of transfer of the rights of use for frequencies. In its decision the regulatory authority shall assess on an individual basis, in particular, the technical effects of a transfer on competition. Incidental provisions may be included in the authorisation to the extent necessary to avoid adverse effects on competition. Approval shall be refused in any

case if, despite the imposition of incidental provisions, an adverse effect on competition is likely to occur because of the transfer. Last sentence removed (Federal Law Gazette I No. 102/2011).

(1a) Should a change in the type and scope of frequency usage prove necessary in the course of transferring frequency usage rights in order to prevent adverse technical effects or adverse effects on competition, then such a change must be carried out in accordance with the provisions of Article 57.

(2) Essential changes in the ownership structure of undertakings that have been granted rights of use for frequencies in a procedure pursuant to Article 55 shall require prior approval by the regulatory authority. Par. 1, third to last sentences, shall apply correspondingly.

(3) Restrictions of frequency usage resulting from broadcasting regulations shall remain unaffected by this provision.

(4) The transfer of rights to use frequencies granted by the Telecommunications Offices shall require prior notification of the Telecommunications Office. The following must be enclosed with the notification:

1. the precise designation of the official decision with which the rights to use the frequencies were assigned, with which the operating authorisation (Article 83) was issued, and with which the fees pursuant to Article 82 were prescribed;
2. the contract by which the usage rights are to be transferred;
3. information on the identity of the legal successor;
4. information on the legal successor's billing address.

**Upon receipt of the notification by the Telecommunications Office, the official decision (No. 1) shall be transferred in its entirety to the legal successor.**

### **Changes in frequency licences**

**Article 57.** (1) The competent authority may modify the type and scope of the frequency licence if

1. a considerable increase in efficiency is possible because of technological advances; or
2. it is required as a result of international circumstances, in particular further development of international telecommunications law; or
3. this is necessary for adjustment to modified frequency usage due to international circumstances; or
4. frequency usage rights which existed prior to 26 May 2011 do not meet the requirements set forth under Article 54 Par. 1a to 1b after 25 May 2016.

In carrying out such modifications the proportionality of the measure and the economic consequences for those concerned shall be taken into account. Changes must not go beyond the scope of the provisions in this section.

(2) In the procedures pursuant to Par. 1 the intended modification of the licence shall be notified to the licence holder and he shall be granted a period for comment of at least four weeks pursuant

to Article 45 Par. 3 General Administrative Procedures Act [Allgemeines Verwaltungsverfahrensgesetz, AVG].

(3) The licence holder shall carry out the ordered modifications pursuant to Par. 1 or 2 within a reasonable period at his own expense. Such an order shall not constitute any claim to compensation. Claims for government liability shall remain unaffected.

(4) At the licence holder's request, the competent authority (Article 54 Par. 3) may change the prescribed frequency usage, in particular with regard to the requirement of technology and service neutrality, where this is permissible on the basis of the designated use in the frequency usage plan. In this context, the competent authority shall in particular account for technical developments and effects on competition. Incidental provisions may be included in the authorisation to the extent necessary to avoid adverse effects on competition or on the technically efficient use of spectrum.

(5) Where the modified technical conditions of frequency usage deviate from the conditions of the call for tenders (Article 55) the Federal Minister of Transport, Innovation and Technology must be consulted.

(6) The competent telecommunications authority is to be notified of any changes in frequency usage rights introduced by the regulatory authority.

### **Frequency usage**

**Article 58.** No right of possession of specific frequencies shall accrue from the licensing of frequencies. Only the right to use specific frequencies shall be granted.

### **Frequency licence fee**

**Article 59.** (1) To ensure efficient use of the frequency spectrum, holders of a frequency licence pursuant to Article 55 shall pay a frequency licence fee in addition to the frequency usage fee.

(2) The application for licensing of a frequency pursuant to Article 55 shall state the amount of the frequency licence fee the applicant is willing to pay as a one-off for usage of the frequencies in case of licensing. The regulatory authority shall prescribe the frequency licence fee in the frequency licensing notice, whereby the applicant shall be bound, in any case, by the licence amount specified in the application.

### **Expiry of the licence**

**Article 60.** (1) A licence shall expire by

1. renunciation,
2. revocation,
3. lapse of the period for which it was granted as well as
4. death or termination of the legal personality of the licence holder but not in cases of universal succession under company law.

(2) Upon the death of the licence holder, the administrator of the deceased's estate may make use of this right until the deceased's estate is formally transferred to the legitimate heir; the administrator of the deceased's estate, however, shall notify this fact to the competent authority without delay.

(3) The licence shall be revoked if the requirements under which it had been granted have ceased to exist. The licence may be revoked if the license holder violates its obligations severely or repeatedly, or if the assigned frequency is not used as specified in the assignment within six months after the telecommunications authority's decision pursuant to Article 81, or if the use of the frequency is interrupted for more than a year after the commencement of use. Prior to the revocation, the licence holder shall be given a reasonable opportunity for comment.

(4) The licence shall be revoked if bankruptcy proceedings have been instituted against the licence holder or the bankruptcy petition has been dismissed for lack of sufficient assets likely to cover the costs of the bankruptcy proceedings; the competent authority may refrain from revocation if continuation is mainly in the creditors' interest.

(5) In the procedure under Par. 3, the regulatory authority shall apply Article 91 correspondingly. Any order under Par. 3 shall not constitute a claim to compensation. Claims for government liability shall remain unaffected.

(6) The regulatory authority shall report the expiry of the licence to the competent telecommunications authority without delay.

## **Section 7**

### **Addressing and numbering**

#### **Definitions**

**Article 61.** In this section the term "communications parameters" means any characters, letters, digits and signals in their entirety that serve directly for network control of communications connections.

#### **Purpose**

**Article 62.** The purpose of this section is to provide for the efficient structuring and administration of the communications parameters in their entirety in order to comply with the requirements of users and operators of communications networks and services in an objective, transparent and non-discriminatory way.

#### **Plan for communications parameters**

**Article 63.** (1) The regulatory authority shall issue an ordinance defining a plan for communications parameters such as emergency call numbers, including the European emergency call number 112 and harmonised numbers for harmonised services of social value, in particular a

hotline to report cases of missing children at the number 116000 as required by Decision 2007/116/EC. This ordinance must also define the requirements for the allocation of communications parameters. The plan for communications parameters may consist of subplans.

(2) This ordinance may also specify

a) standards of conduct to be observed in the usage of communications parameters and  
b) the point of time at which and the periods during which modifications of already assigned communications parameters not complying with the requirements of the plan shall take place.

(3) In preparing this plan, in particular the relevant international regulations, the development of new national and international services as well as the availability of a sufficient number of communications parameters shall be taken into account.

(4) The operators of communications networks and services shall be obliged to take part in the implementation of the plans.

### **Plan modifications**

**Article 64.** (1) The regulatory authority shall carry out modifications according to the state of the art to implement international obligations or recommendations as well as to ensure that communications parameters are available to a sufficient extent, taking into account the effects on the parties concerned, in particular the direct and indirect costs of the modifications.

(2) The parties affected by these modifications shall be obliged to carry out the measures required for implementation at their expense.

(3) The modification of the plan in part or in full, of the rules on licensing of communications parameters or the usage conditions shall not constitute any claim to compensation. Claims for government liability shall remain unaffected.

### **Competence for the licensing of communications parameters, procedures**

**Article 65.** (1) The regulatory authority shall be responsible for the efficient administration of the plan, in particular for recording the usage and for the licensing of communications parameters to users and operators of communications networks and services. They may be granted the right to administer subordinate elements autonomously.

(2) Operators of communications networks and services who have been granted the right under Par. 1 to administer subordinate elements autonomously shall be under the obligation not to discriminate against other operators of services in terms of the number sequences used to give access to their services. Furthermore, they shall be obliged to notify to the regulatory authority weekly which number sequences administered by them will be used in the future and by which operator.

(3) The regulatory authority shall license communications parameters to users and operators of communications networks and services for usage on request. The regulatory authority shall

decide on the application without undue delay, however, within three weeks of receipt of the complete application at the latest. The decision shall be published.

(4) Notices under Par. 3 may contain the following incidental provisions:

1. designation of the service for which the communications parameter may be used;
2. an appropriate time limit according to the type and significance of the licensed communications parameter;
3. incidental provisions that are required to ensure effective and efficient usage of the communications parameter, in particular the obligation to notify the actual usage;
4. obligations required for compliance with relevant international agreements on the usage of communications parameters.

(5) Rights of use shall not be freely transferable. At the licence holder's request, the right of use shall be transferred from the regulatory authority in a procedure under Par. 3 to another user or operator of a communications network or service, except for cases of number porting pursuant to Article 23. The operator of the admitting communications service shall notify these cases to the regulatory authority.

(6) The regulatory authority may modify licensed communications parameters in the public interest if this is required for good cause

1. for the security of public communications traffic,
  2. for technical or operational reasons,
  3. in the interest of the users in their entirety,
  4. for adjustment to plan modifications pursuant to Article 64,
  5. for adjustment to modified frequency usage due to international circumstances or
  6. for adjustment to market requirements,
- taking utmost account of the licence holder's economic and operational interests.

(7) In the procedure under Par. 6 the licence holder shall be notified of the intended modification of the licence and, pursuant to Article 45 Par. 3 General Administrative Procedures Act [Allgemeines Verwaltungsverfahrensgesetz, AVG], he shall be granted a period of at least four weeks for comment.

(8) The licence holder shall comply with any modification ordered under Par. 6 within a reasonable period at his expense. Such an order shall not constitute any claim to compensation. Claims for government liability shall remain unaffected.

## **Usage**

**Article 66.** (1) No right of possession of specific communications parameters shall accrue from the allocation of communications parameters. Only the right to use specific communications parameters shall be granted.

(2) Communications parameters for which no valid usage rights exist must not be used.

## **Usage fee**

**Article 67.** (1) For each communications parameter a usage fee shall be paid. The Federal Minister of Transport, Innovation and Technology shall specify the amount of the usage fee by way of ordinance, taking into account, in particular, the personnel and factual expenses associated with the achievement of the specified objectives, the economic benefit derived from the allocation and the optimum use of the communications parameters.

(2) Par. 1 shall also apply to the cases in which communications parameters are in use or in stock at the time of entry into effect of this Federal Act.

### **Expiry of the licence**

**Article 68.** (1) The licence shall expire by

1. lapse of the period for which it was granted;
2. renouncement by the licence holder;
3. revocation;
4. death or termination of the legal personality of the licence holder but not in cases of universal succession under company law.

(2) Revocation shall be pronounced by the regulatory authority if

1. one of the requirements for licensing has ceased to exist;
2. this is necessary due to international requirements;
3. the licence holder has severely or repeatedly violated a provision of this section, an ordinance issued under Article 24 or 63, or the incidental provisions to be complied with under the licence.

(3) In the procedure under Par. 2 No. 3, Article 91 shall be applied correspondingly. Revocation shall not constitute a claim to compensation.

(4) The declaration of renunciation shall be made to the regulatory authority in writing.

## **Section 8**

### **Protection of users**

#### **Rights of users and subscribers**

**Article 69.** (1) Any person shall be entitled to use public communications services including universal service under the conditions of the published general terms and conditions and tariffs.

(2) Subscribers shall have the right according to the preconditions referred to in Par. 3 to 5 to have an entry in publicly available subscriber directories, to verify the entry, correct it and have it withdrawn.

(3) A subscriber shall have the right to request from the operator of the publicly available telephone service with whom he has a contractual relationship for the use of a line to have the following data included in the operator's subscriber directory free of charge: surname, first

name(s), academic degree, address, subscriber number and, if the subscriber so requires, occupation.

(4) With the subscriber's consent additional data may be included in the subscriber directory. If this involves other persons, the inclusion of such data shall also require their consent.

(5) If a subscriber so requests, the data relating to him shall not be included in the subscriber directory at all or in part (non-listing). This shall be free of charge. If a subscriber so requests, the data relating to him shall not be included in an electronic subscriber directory which allows searching by data other than subscriber name.

(6) Operators of public communications services are to inform their subscribers of their rights pursuant to Par. 2 and 3 in an appropriate manner.

### **Provisions in force until 20th February 2012: "Default in payment**

**Article 70.** The operator of a telecommunications service may interrupt or disconnect the service in case of default in payment only after having reminded the subscriber without success, warning to interrupt or disconnect the service and granting a period of grace of at least two weeks. Interruption of access to emergency telephone numbers shall not be permitted. Disconnection or interruption of services of the universal service as defined in Article 26 Par. 2 Nos. 1 and 2 must not take place if the subscriber is in default solely with obligations under another contractual relationship of universal service or any other contractual relationship with the operator."

### **Provisions in force from 21st February 2012 onward: "Default in payment**

**Article 70.** The operator of a communications service may interrupt or disconnect the service in case of default in payment only after having reminded the subscriber without success, warning to interrupt or disconnect the service and granting a period of grace of at least two weeks. The operator may agree on a reasonable processing fee for complete disconnection of the relevant service for which payment has not been made. In cases where the operator suspends only parts of the service in question, no separate fee may be charged for suspension. Interruption of access to emergency telephone numbers shall not be permitted. Disconnection or interruption of services of the universal service as defined in Article 26 Par. 2 Nos. 1 and 2 must not take place if the subscriber is in default solely with obligations under another contractual relationship of universal service or any other contractual relationship with the operator."

### **Review of charges**

**Article 71.** (1) In cases where a subscriber doubts the correctness of the fees charged for a communications service, the operator shall, upon written request, review all factors on which the determination of this amount has been based and, as a result of this review, either confirm the correctness of the charge in writing or modify it correspondingly.

**Provisions in force from 21st February 2012 onward:** "(1a) Requests pursuant to Par. 1 may be submitted within three months."

(2) In cases where the regulatory authority is notified of an objection to the fees charged by an operator for a communications service, the payment due date of the invoiced and contested charge shall be deferred from this point in time until the dispute is settled. This notwithstanding, the operator may demand immediate payment of the amount that corresponds to the average amount of the last three billing periods.

(2a) At the subscriber's request, the operator shall refund that part of the fee which has already been paid by the subscriber and which may not be collected pursuant to Par. 2 for the duration of the dispute settlement procedure. Once the procedure has been completed, the operator shall refund any excess amounts plus legal interest from the date of collection onward.

(3) In the event that no reason for a recalculation of the contested amount is found in the operator's review procedure or the dispute settlement procedure pursuant to Article 122 Par. 1 No. 1, legal interest may be charged beginning with the payment due date stated on the bill. The limitation period pursuant to Article 1486 No. 1 General Civil Code [ABGB] shall be suspended with regard to the total amounts of the bills disputed pursuant to Par. 2 for the duration of the dispute settlement procedure pursuant to Article 122 Par. No. X.

(4) In the event that an error is identified which may have been to the detriment of the subscriber and the correct charge cannot be calculated, a lump-sum compensation amount shall be specified in the general terms and conditions (judicial decisions notwithstanding) that is based on the average use of this communications service by the subscriber if the operator can provide credible evidence of usage at least to that extent.

## **Disconnection**

**Article 72.** (1) Regardless of the institution of administrative penal proceedings, the operator of a public communications network or service may request a subscriber to remove terminal equipment interfering or not complying with the Federal Act on Radio Systems and Telecommunications Terminal Equipment, Federal Law Gazette No. 134/2001, from the network termination point without delay.

(2) This shall be without prejudice to the provisions of Article 11 Federal Act on Radio Systems and Telecommunications Terminal Equipment.

(3) removed (Federal Law Gazette I No. 102/2011)

## **Section 9**

### **Radio systems and telecommunications terminal equipment**

#### **Technical requirements**

**Article 73.** (1) In relation to their structure and functionality, radio systems and telecommunications terminal equipment shall comply with the state of the art of technology and the preconditions to be met under international regulations.

(2) The installation and operation of radio systems and telecommunications terminal equipment shall ensure the protection of life and health of people as well as interference-free operation of other radio systems and telecommunications terminal equipment. The design of radio systems and telecommunications terminal equipment shall also take into account the requirements of environmental protection, in particular with regard to professional disposal, considering economic reasonableness.

(3) By way of ordinance, the Federal Minister of Transport, Innovation and Technology may specify, in line with the state of the art, detailed provisions and technical requirements for radio systems and telecommunications terminal equipment, in particular for

1. type approval of radio systems and
2. the operation of radio systems on foreign ships, aircraft and other means of transport on Austrian territory.

### **Installation and operation of radio systems**

**Article 74.** (1) Without prejudice to the provisions of the Federal Act on Radio Systems and Telecommunications Terminal Equipment, the installation and operation of a radio system shall only be permitted

1. within the limits of technical conditions specified in an ordinance pursuant to Par. 3; or
2. after notification of the operation of a radio system based on an ordinance pursuant to Par. 3; or
3. under an authorisation to be issued pursuant to Article 81 with the simultaneous assignment of frequencies by the telecommunications authority (Article 54 Par. 14) or KommAustria (Article 54 Par. 3 No. 1);
4. under an authorisation to be issued pursuant to Article 81 after the assignment of frequencies by the regulatory authority pursuant to Article 55.

(2) The authorisation to install and operate an electrical facility which, pursuant to Article 3 No. 6, last sentence, is considered a radio system shall be granted exclusively to government authorities entrusted with duties related to public security, defence, government security or criminal justice.

(3) In cases not covered by Article 53 Par. 2, the Federal Minister of Transport, Innovation and Technology shall issue an ordinance defining the technical conditions and rules of conduct for the operation of radio systems. In issuing this ordinance, the Federal Minister of Transport, Innovation and Technology shall account for international standards and for the need to ensure the orderly and interference-free operation of telecommunications systems. Where necessary for the purpose of monitoring the interference-free operation of radio systems, this ordinance may also stipulate that certain radio applications are subject to notification requirements pursuant to Article 80a.

### **Import, sale and possession of radio systems**

**Article 75.** (1) In principle, the import, sale and possession of radio systems shall not require an authorisation.

(2) The Federal Minister of Transport, Innovation and Technology may, by way of ordinance, declare the import, sale and possession of radio transmission systems to be subject to an authorisation. In this respect, it shall be considered if the use of the radio system may increasingly endanger public security or, otherwise, may be in conflict with the exercise of official duties.

3) The authorisation under Par. 2 shall be granted if the Federal Act on Radio Systems and Telecommunications Terminal Equipment, Federal Law Gazette I No. 134/2001, does not apply to the radio system and there is reason to assume that the technical requirements pursuant to Article 73 are complied with, in particular if no interference with other radio systems is to be expected and there is no other reason for refusal pursuant to Article 83, or if the radio system serves for museum or demonstrative purposes.

### **Type approval of radio systems**

**Article 76.** (1) The Office for Radio Systems and Telecommunications Terminal Equipment shall establish on request if a radio system complies with the technical requirements pursuant to Article 73 (type approval). Type approval shall be granted if the radio system complies with the technical requirements. The request shall not be permitted if the radio system concerned is subject to the Federal Act on Radio Systems and Telecommunications Terminal Equipment [Bundesgesetz über Funkanlagen und Telekommunikationseinrichtungen] or the Ordinance on Ship Equipment [Schiffsausrüstungsverordnung], Federal Law Gazette II No. 139/1999.

(2) An authorisation shall not be required if, according to the internationally binding regulations for the Republic of Austria on the basis of a conformity assessment procedure described therein or according to the Austrian regulations on a producer's declaration of conformity,

1. approval by a foreign body subject to international recognition (certificate of conformity) or
  2. a producer's declaration of conformity has been obtained and the equipment is duly marked.
- Such equipment shall be considered as authorised under Par. 1.

(3) By way of ordinance, the Federal Minister of Transport, Innovation and Technology, taking into consideration the binding international regulations, shall issue detailed provisions on conformity assessment procedures subject to international recognition (certification, prototype test and the like), national producer's declaration of conformity, marking of the equipment, product controls and monitoring duties.

### **Marking**

**Article 77.** (1) Notwithstanding the regulations of the Federal Act on Radio Systems and Telecommunications Terminal Equipment [Bundesgesetz über Funkanlagen und Telekommunikationseinrichtungen], Federal Law Gazette I No. 134/2001, the required marking of radio systems may be attached only by the person authorised to do so. The markings may be attached only to devices complying with the approved type. The markings shall be considered as public deeds.

(2) By way of ordinance, the Federal Minister of Transport, Innovation and Technology shall specify the appearance of these markings.

(3) If radio systems are marked pursuant to an ordinance issued under Par. 2 and the requirements pursuant to Par. 1 do not exist, the Office for Radio Systems and Telecommunications Terminal Equipment shall apply Article 14 of the Federal Act on Radio Systems and Telecommunications Terminal Equipment [Bundesgesetz über Funkanlagen und Telekommunikationseinrichtungen] correspondingly. This shall also apply if radio systems or telecommunications terminal equipment bear markings which may be confused with the markings prescribed in the ordinance.

## **Usage**

**Article 78.** (1) Radio systems and telecommunications terminal equipment must not be abused. The following shall be considered as abuse:

1. any communication that threatens law and order or morality or violates the laws;
2. any severe harassment or intimidation of other users;
3. any violation of the duty to observe secrecy existing under this Act and the international agreements and
4. any communication that does not correspond to the authorised purpose of a radio system.

(2) Owners of radio systems and telecommunications terminal equipment shall take appropriate measures to rule out abuse to the extent to which they can be reasonably expected to do so as well as considering the fundamental right to data protection as defined in the Data Protection Act [Datenschutzgesetz, DSG] 2000, Federal Law Gazette I No. 165/1999. Service providers who only provide access to communications services shall not be considered owners.

(3) Radio systems may be operated only for the authorised purpose as well as at the locations specified in the authorisation; mobile systems may be operated only in the usage area indicated in the authorisation.

(4) Radio transmission systems may be only operated using the frequencies and call signs assigned by means of the authorisation.

(5) Radio systems and telecommunications terminal equipment which have neither been authorised under the Telecommunications Act nor comply with the provisions of the Federal Act on Radio Systems and Telecommunications Terminal Equipment must not be connected to, nor operated in connection with, a public communications network.

## **Section 10**

### **Procedures, fees**

#### **Procedures for approval and type approval**

**Article 79.** (1) Only the producer or his agent may file an application for type approval of a radio system. An applicant domiciled outside the European Economic Area may file the application only through a person who has his principal residence in the European Economic Area.

(2) Applications under Par. 1 shall be filed in writing. An application for type approval shall be permitted only if the radio system bears a type label with the producer's or his agent's name and the device designation (type designation) he has chosen.

(3) Applications pursuant to Par. 1 shall be accompanied by an expert opinion of a recognised national or accredited foreign test authority in proof of compliance with the technical requirements pursuant to Article 73. If foreign approval has already been granted, only a supplementary expert opinion in proof of the technical requirements not covered by this approval shall be submitted. Moreover, the Office for Radio Systems and Telecommunications Terminal Equipment may request that additional documents, such as descriptions and wiring schemes, and a prototype be submitted at the applicant's expense if this is required for the decision on the application.

(4) A radio system shall belong to the approved type if it is constructed according to the descriptions and wiring schemes submitted for the test and if its designation on the type label corresponds to the designation of the tested type.

(5) Article 81 Par. 6 and 7 shall apply also to approvals and type approvals.

### **Revocation of approval or type approval**

**Article 80.** The approval shall be revoked if the requirements pursuant to Article 77 Par. 1 do not exist.

### **Notification procedure**

**Article 80a.** The commencement of operation of a radio system pursuant to an ordinance issued under Article 74 Par. 3 is to be notified to the telecommunications authority in writing. This notification must include the information stipulated under Article 81 Par. 1 Nos. 1 to 3.

### **Authorisation procedure**

**Article 81.** (1) Applications pursuant to Article 74 Par. 1 Nos. 3 and 4 are to be submitted in writing. The application shall contain the following information in any case:

1. applicant's name and address;
2. information about the intended use of the radio system;
3. information about the functionality of the radio system;
4. any official decisions issued by the regulatory authority pursuant to Article 55.

At the authority's request, the application shall be accompanied by documentation verifying the technical characteristics of the radio system as well as the declaration of conformity for the equipment used.

(2) The Telecommunications Office responsible for the geographical area in which the radio system will be operated shall decide on applications under Par. 1. KommAustria shall decide on applications under Par. 1 relating to radio transmission systems designed for broadcasting within the meaning of the Federal Constitutional Broadcasting Act [BVG-Rundfunk]. The authority shall take a decision within six weeks of receipt of the complete application unless a frequency coordination procedure under international agreements has to be completed first. If the authority has to carry out a comparative selection procedure, this period shall be extended by eight months.

(3) In cases where a radio system is to be installed or operated in the area of local competence of two or more Telecommunications Offices, or where frequencies assigned by the regulatory authority under Article 55 will be used, the Telecommunications Office in the area of local competence where the applicant has his principal residence shall have competence. Where the applicant does not have such a principal residence, the Telecommunications Office responsible for the geographical area in which the radio system will first be put into operation shall be responsible.

(4) In cases where frequencies were not assigned by the regulatory authority, the authority competent under Article 54 Par. 3 shall decide on the assignment on the basis of the criteria stipulated in Article 54.

(5) Notices pursuant to Article 83 shall be granted for a period not exceeding ten years.

(6) Notices pursuant to Article 75, Article 76 and Article 83 may contain incidental provisions. In cases pursuant to Article 55, additional obligations may be imposed as necessary in order to ensure the interference-free operation of other radio systems in the specific deployment of a radio system, in particular when a coordination procedure with domestic or foreign radio systems is required. In other cases, obligations may be imposed by means of conditions and requirements which should be observed to protect the life or health of humans in accordance with the criteria under Article 54 Par. 1d, to prevent damage to property, to comply with international agreements, to ensure interference-free operation of other telecommunications systems or for other technical or operational reasons, depending on the circumstances of the case.

(7) In cases pursuant to Article 56 Par. 4, the telecommunications authority is to issue an official decision on the transfer of the official decision at the legal successor's request.

## **Fees**

**Article 82.** (1) Fees shall be paid for notifications pursuant to Article 80a and for authorisations and approvals granted under this Federal Act.

(1a) The obligation to pay fees shall arise at the point in time when the authorisation is granted with legal effect or when the official act is carried out. In the case of notifications pursuant to Article 80a, this obligation shall arise upon receipt of the notification by the authority.

(2) The fees to be collected pursuant to Par. 1 shall serve for compensation of the expenditure for the administration of the frequencies, for planning, coordination and updates of frequency usage as well as for the required measurements, tests and compatibility examinations to ensure efficient and interference-free frequency usage. Fees may be provided for in the following forms:

1. one-off fees for notifications pursuant to Article 80a;
2. one-off fees for the assignment of frequency usage rights;
3. periodic fees for the use of frequencies;
4. one-off fees for other administrative activities according to the provisions of this Act.

The allocation fee shall not be due in cases where a frequency licence fee is paid. For the services of authorities and organisations entrusted with rescue duties or with the responsibility for maintaining public peace, order, safety and security, no fees shall be charged for the authorisation to install and operate a radio system for the sole purpose of fulfilling those duties or responsibilities.

(3) The fees pursuant to Par. 2 are to be defined in an ordinance by the Federal Minister of Transport, Innovation and Technology in agreement with the Federal Minister of Finance. In this respect, the personnel and factual expenses associated with the achievement of the specified objectives and the optimum usage of the frequency resources shall be taken into account. It shall be also considered whether frequencies shall be used commercially.

(4) If a person has evaded fees through an unlawful act, the Telecommunications Offices, regardless of the penalty imposed for the unlawful act, shall require the party at fault to pay the evaded fee within the period of limitation according to the rates in force at the time the unlawful act has been established.

(5) Fees in arrears may be collected by means of statements of arrears.

(6) The ordinance pursuant to Par. 3 for frequencies designated for broadcasting within the meaning of the Federal Constitutional Broadcasting Act [BVG-Rundfunk], except for those not to be used for broadcasting within the meaning of the Federal Constitutional Broadcasting Act [BVG-Rundfunk], is to be issued by KommAustria. In these cases KommAustria shall also carry out the procedure pursuant to Par. 4.

### **Granting of authorisations**

**Article 83.** The authorisation for the installation and operation of a radio system shall be granted unless

1. removed (Federal Law Gazette I No. 102/2011)
2. the requested frequencies are not available in the intended usage area or cannot be licensed due to previously existing uses of the frequency spectrum;
3. removed (Federal Law Gazette I No. 102/2011)
4. at least six months have passed since revocation pursuant to Article 85 Par. 3;
5. operation may jeopardise public security;
6. operation may hinder the performance of official duties.
7. removed (Federal Law Gazette I No. 102/2011)

## **Subsequent modifications of the authorisation**

**Article 84.** (1) As far as provisions of the authorisation are concerned,

1. any change of location;
2. any usage outside the usage area indicated in the authorisation in the case of mobile systems; as well as
3. any technical change of the system shall require prior approval by the competent Telecommunications Office.

(2) The authority may modify granted authorisations in the public interest if this is required for good cause

1. to ensure the security of public telecommunications traffic;
2. for technical or operational reasons;
3. for changes in frequency licences pursuant to Article 57;
4. for adjustment to modified frequency usage due to international circumstances. In this respect, utmost account shall be taken of the authorisation holder's economic and operational interests.

(3) The authorisation holder shall comply with any modification ordered under Par. 2 within a reasonable period at his expense. Such an order shall not constitute any claim to compensation. Claims for government liability shall remain unaffected.

(4) If a user's increased communications have such a strong impact on the utilisation of the licensed frequencies that other users of the same frequency cannot use it as intended, the authority may license another frequency to the party whose radio operation has caused the limitation unless corrective action of a different kind is possible. The same shall apply if the intended frequency range of other users is restricted in connection with applications for expansion of existing radio networks.

(5) The duties pursuant to Par. 1 and 2 relating to authorisations in the field of broadcasting within the meaning of the Federal Constitutional Broadcasting Act [BVG-Rundfunk] shall be performed by KommAustria.

## **Expiry of the authorisation**

**Article 85.** (1) The authorisation shall expire by

1. lapse of the period for which it was granted;
2. renouncement by the authorisation holder;
3. revocation;
4. expiry of the frequency assignment pursuant to Article 60.

(2) removed (Federal Law Gazette I No. 102/2011)

(3) Revocation shall be declared by the authority granting the authorisation if

1. removed (Federal Law Gazette I No. 102/2011)
2. this is required to ensure interference-free operation of a public communications network;
3. the authorisation holder has severely or repeatedly violated the provisions of this Act or the

obligations or conditions to be complied with under the authorisation;  
4. the requirements for granting the authorisation are no longer fulfilled;  
5. the systems are not operated (or not operated according to the intended purpose authorised); or  
6. the systems are not operated with the authorised technical characteristics and the authorisation holder has not carried out the modifications despite being requested; or  
7. the authorisation holder fails to pay the fees prescribed under Article 82 despite two reminders.

(4) removed (Federal Law Gazette I No. 102/2011)

(5) Revocation shall not constitute any claim to compensation.

(6) Revocation and renunciation shall not be tied to a time limit. The declaration of renunciation shall be submitted in writing to the authority that granted the authorisation.

(7) removed (Federal Law Gazette I No. 102/2011)

(8) removed (Federal Law Gazette I No. 102/2011)

(9) removed (Federal Law Gazette I No. 102/2011)

## **Prohibition**

**Article 85a.** The operation of a radio system may be prohibited by the telecommunications authority if

1. the notification required in the ordinance pursuant to Article 74 Par. 3 is not submitted; or
2. the conditions and rules of conduct for radio systems as prescribed in the ordinance pursuant to Article 74 Par. 3 are not observed; or
3. the fees prescribed pursuant to Article 82 for notifications are not paid despite two reminders; or
4. a radio system is operated without an authorisation required pursuant to Article 81.

## **Section 11**

### **Rights of supervision**

#### **Scope**

**Article 86.** (1) Communications services shall be subject to supervision by the regulatory authority which may use the agents of the telecommunications authorities for this purpose.

(2) The agents of the Telecommunications Offices and the Office for Radio Systems and Telecommunications Terminal Equipment shall assist the regulatory authority on request within the scope of its range of functions, in particular in telecommunications matters.

(3) Telecommunications systems and their operation shall be subject to the supervision of the telecommunications authorities. Within the meaning of this section, telecommunications systems shall be all systems and devices for handling communications, such as, in particular, communications networks, cable broadcasting networks, radio systems and telecommunications terminal equipment.

(4) The telecommunications authorities shall be entitled to test telecommunications systems, in particular radio systems and telecommunications terminal equipment or parts thereof, for compliance with the provisions of this Act and the ordinances and notices issued under this Act. For this purpose, the agents of the telecommunications authorities, who duly identify themselves, shall be granted access to the premises or rooms where such systems are, or presumed to be, located. They shall be given all required information about the systems and their operation. Authorisation deeds as well as the certificates issued pursuant to Article 15 shall be presented on request.

(5) If required for testing, the authorisation holder shall make the radio systems available for testing at his expense, at the request of the Telecommunications Office, at a specified location and the specified time. Radio systems may be also tested on-site at the authorisation holder's expense if this is practicable because of the size or technical design of the system or the financial expenses involved.

## **Searches**

**Article 87.** (1) Upon the strong suspicion that a radio transmission system installed or operated without authorisation may endanger persons or damage property or if it is required to enforce obligations under international agreements, the telecommunications authorities may order searches of property, houses, persons and cars and in case of imminent danger their agents may conduct searches also on their own authority.

(2) Searches shall be carried out with the utmost respect for the persons present and the utmost care of property. Particular attention shall be paid to the fact that interference with the legal sphere of the person concerned shall be proportional as defined in Article 29 of the Security Police Act [Sicherheitspolizeigesetz, SPG; Federal Law Gazette No. 566/1991]. The provisions of Article 121 Par. 2 and 3 as well as Article 122 Par. 3 of the Code of Criminal Procedure [Strafprozessordnung, StPO; Federal Law Gazette No. 631] shall apply correspondingly unless the purpose of the measure would be thwarted.

(3) The agent shall draw up short minutes on the spot about the sequence of events and the results of the search. One copy shall be handed over to the person searched or left at the site of the search.

## **Supervision measures**

**Article 88.** (1) In the event of interference of a telecommunications system with another telecommunications system the Telecommunications Offices may order and execute such measures as are necessary to protect the affected system and most appropriate for the systems in

question, under the given circumstances and avoiding excessive costs. In cases where a telecommunications system is disrupted by an electrical system or by electrical equipment which is not subject to supervision by the Telecommunications Offices, the Telecommunications Office shall report this to the authority responsible for supervision of the system causing the disruption.

(2) Telecommunications systems installed and operated without authorisation may be shut down without prior warning. This shall apply to telecommunications systems otherwise installed or operated violates the provisions of this Act only if it is required to preserve or restore interference-free communications traffic.

### **Shutdown of operation**

**Article 89.** (1) To maintain public law and order the Federal Minister of Transport, Innovation and Technology may shut down the operation of telecommunications systems in part or in full or for specific types of systems for a limited or unlimited period of time and impose temporary restrictions on the use of specific systems.

(2) An order pursuant to Par. 1 shall take utmost account of the operator's economic and operational interests; it shall not constitute any claim to compensation.

### **Duties to provide information**

**Article 90.** (1) Operators of communications networks or services as well as holders of rights of use for frequencies or communications parameters shall be obliged to provide, upon written request, to the Federal Minister of Transport, Innovation and Technology and the regulatory authority the information that is required for the execution of this Act and the relevant international regulations, in particular

1. information required for systematic or individual review of the obligations arising from this Federal Act or an ordinance or official decision issued under this Federal Act,
2. information required for individual review of the obligations if a complaint has been addressed to the regulatory authority or if it assumes a violation of duties for other reasons or conducts investigations on its own behalf,
3. information in procedures for the licensing of frequencies or communications parameters;
4. information required for a procedure pursuant to Articles 36 to 37a;
5. information required for the publication of quality and price comparisons for services to the benefit of consumers; and
6. information on future network or service developments which may affect the relevant services existing at the wholesale level.

This information shall be presented within the period specified and according to the time schedule and shall give the requested details. Undertakings may request information pursuant to No. 3 also prior to the commencement of their activities. The requested information shall be in reasonable proportion to the execution of the tasks. The request shall be substantiated and the party concerned shall be notified of the specific purpose for which the information provided is to be used. Refusal to provide information with reference to contractually agreed company and trade secrets shall not be permissible. This provision is without prejudice to Article 125.

(2) To observe and monitor the development of the market and of competition pursuant to Article 34 the Federal Minister of Transport, Innovation and Technology shall be authorised to order the preparation of statistics for the field of communications. The statistics shall be prepared by the regulatory authority.

(3) In addition to the statistical surveys, the order pursuant to Par. 2 shall comprise in particular:

1. the survey population;
2. statistical units;
3. the type of statistical survey;
4. survey characteristics;
5. the frequency and intervals of data survey;
6. the definition of the population obliged to give information;
7. whether and to what extent the results of the statistical surveys shall be published, observing the provisions of Article 19 Par. 2 Federal Statistics Act 2000 [Bundesstatistikgesetz], Federal Law Gazette I No. 163/1999.

(4) Individual data may be passed on to the “Bundesanstalt Statistik Österreich“ for purposes of federal statistics.

(5) The preparation of statistics shall take place, correspondingly applying the provisions of the Federal Statistics Act 2000 [Bundesstatistikgesetz], Federal Law Gazette I No. 163/1999.

(6) Operators of communications services shall be obliged to provide information to administrative authorities, at their written and substantiated request, on master data, as defined in Article 92 Par. 3 No. 3 lit. a to e, of subscribers who are suspected of having committed an administrative offence by an act using a public telecommunications network, to the extent that such provision is possible without processing traffic data.

(7) At the written request of the competent courts, public prosecutor’s offices or the police responsible for criminal investigations (Article 76a Par. 1 StPO), providers of communications services are obliged to provide those authorities with information on master data (Article 92 Par. 3 No. 3) on subscribers for the investigation and prosecution of actual suspicions of a criminal offence. This shall apply accordingly to requests from law enforcement authorities in accordance with Article 53 Par. 3a No. 1 Security Police Act [Sicherheitspolizeigesetz, SPG]. In urgent cases, such requests may be conveyed orally on a preliminary basis.

(8) Providers of mobile communications networks shall maintain records of the geographical location of the radio cells used to operate their services in order to ensure that a cell ID can be accurately matched to its actual geographical location with an indication of geo-coordinates for any point in time within the last six months.

### **Supervision measures of the regulatory authority**

**Article 91.** (1) If the regulatory authority in relation to its duties has any reason to assume that an undertaking violates the provisions of this Federal Act, the provisions of an ordinance issued under this Federal Act or a notice issued under this Federal Act, it shall notify the undertaking

thereof while granting at the same time the opportunity to comment on the allegations or remedy any shortcomings within a reasonable period following receipt of the notification. Last sentence removed (Federal Law Gazette I No. 102/2011).

(2) If the regulatory authority establishes that the shortcomings due to which the supervision procedure had been started have not been remedied after expiry of the period, it shall, by way of notice, order reasonable measures called for to ensure compliance with the violated provisions and set a reasonable period during which the measure shall be complied with.

(3) If the measures ordered pursuant to Par. 2 are unsuccessful, the regulatory authority may suspend the right of an undertaking, which has severely or repeatedly violated its duties, to provide communications networks or communications services until the shortcomings have been remedied or may forbid this undertaking to continue to provide communications networks or communications services. For the same reasons, the regulatory authority may revoke the licences for frequencies and communications parameters.

(4) If a violation of the provisions of this Federal Act, the provisions of an ordinance issued under this Federal Act or a notice issued under this Federal Act constitutes a direct and serious threat to public order, security and health or if it results in serious economic or operational problems of other providers or users of communications networks or services, the regulatory authority may order measures pursuant to Par. 2 also in a procedure pursuant to Article 57 General Administrative Procedures Act [Allgemeines Verwaltungsverfahrensgesetz, AVG]. These measures are to be subject to a time limit of no more than three months and may be extended by an additional three months in especially severe circumstances.

(5) Should the regulatory authority establish that the deficiencies due to which the supervisory procedure was initiated do not actually exist or were remedied within the period specified by law, the authority shall issue an official decision stating that the deficiencies do not (or no longer) exist.

(6) The undertaking in which the regulatory authority has reason to assume violations pursuant to Par. 1 shall be a party to the supervisory procedure in any case.

(7) In supervisory procedures pursuant to Article 40 KOG, undertakings which are able to provide credible evidence that they are affected by the procedure in accordance with Article 40 Par. 2 KOG shall also be parties to the procedure. Last sentence removed (Federal Law Gazette I No. 102/2011).

(8) Article 40 Par. 3 No. 1 KOG applies subject to the provision that the decree must contain a description of the reasons for suspicion which prompted the authority to initiate a supervisory procedure.

### **Blocking of value-added service numbers**

**Article 91a.** (1) Where the regulatory authority has reason to believe that the regulations contained in the ordinance pursuant to Article 24 Par. 1 and 2 or Article 63 Par. 2 lit. a with

regard to

1. fee information immediately prior to the use of services;
2. fee information during the use of services; or
3. the use of a telephone number in accordance with its designated purpose

are violated in such a way that may lead to significant economic disadvantages for users, the regulatory authority shall order the relevant communications service operator, the relevant assignment holder or the operators in whose networks the telephone number is routed to introduce an immediate block in accordance with Article 57 General Administrative Procedures Act [Allgemeines Verwaltungsverfahrensgesetz, AVG]. The block ordered by the regulatory authority shall not justify any claims to compensation from the party obliged to impose the block.

(2) Official decisions pursuant to Par. 1 are to be published on the regulatory authority's web site. The regulatory authority is to maintain a list of blocked telephone numbers.

## **Section 12**

### **Confidentiality of the communications, data protection**

#### **General**

**Article 92.** (1) The provisions of this section apply to the processing and transmission of personal data in connection with the provision of public communications services in public communications networks, including those public communications networks which support data collection and identification equipment. Unless otherwise provided by this Federal Act, the provisions of the Data Protection Act 2000 [Datenschutzgesetz], Federal Law Gazette I No. 165/1999, shall apply to the facts regulated in this Federal Act.

(2) The provisions stipulated in this section are without prejudice to the Code of Criminal Procedure [Strafprozessordnung, StPO].

(3) Irrespective of Article 3, in this section the term

1. "provider" means an operator of public communications services;
2. "user" means any natural person using a publicly available communications service, for private or business purposes, without necessarily having subscribed to this service;
- 2a. "subscriber identifier" means an identifier which enables communication to be attributed unambiguously to a specific subscriber;
- 2b. "e-mail address" means the unique identifier assigned to an electronic mailbox by an Internet e-mail provider;
3. "master data" means all personal data required for the establishment, processing, modification or termination of the legal relations between the user and the provider or for the production and publication of subscriber directories, including
  - a) name (surname and first name in the case of natural persons, name or designation in the case of legal entities);
  - b) academic degree in the case of natural persons;

c) address (address of residence in the case of natural persons, place of establishment or billing address in the case of legal entities);

4. "traffic data" means any data processed for the purpose of the conveyance of a communication on a communications network or for the billing thereof;

4a. "access data" means the traffic data created at the operator during access by a subscriber to a public communications network and required for assignment to the subscriber of the network addresses used for a communication at a specific point of time;

5. "content data" means the contents of conveyed communications (No. 7);

6. "location data" means any data processed in a communications network or by a communications service, indicating the geographic position of the telecommunications terminal equipment of a user of a publicly available communications service; in the case of fixed-link telecommunications terminal equipment, location data refer to the address of the equipment;

6a. "cell ID" means the identity of the cell through which a mobile telephony call is established;

6b. "retained data" means data which are stored solely in order to fulfil an obligation to retain data pursuant to Article 102a;

7. "communication" means any information exchanged or conveyed between a finite number of parties by means of a public communications service. This does not include any information conveyed as part of a broadcasting service to the public over a communications network except to the extent that the information can be related to the identifiable subscriber or user receiving the information;

8. "call" means a connection established by means of a public telephone service allowing two-way or multi-way communication in real time;

8a. "unsuccessful call attempt" means a communication where a telephone call has been successfully connected but not answered or there has been a network management intervention;

9. "value added service" means any service which requires the processing of traffic data or location data other than traffic data beyond what is necessary for the transmission of a communication or the billing thereof;

10. "electronic mail" means any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient;

11. "electronic mailbox" means an electronic storage system assigned to a subscriber to an e-mail service;

12. "e-mail" means electronic mail sent via the Internet using the Simple Mail Transfer Protocol (SMTP);

13. "Internet telephone service" means a public telephone service as defined under Article 3 No. 16 which is based on packet-switched communications using the Internet Protocol;

14. "Internet access service" means a communications service as defined in Article 3 No. 9 which consists providing facilities or services for the provision of access to the Internet;

15. "e-mail service" means a communications service as defined in Article 3 No. 9 which includes the dispatch and delivery of e-mail messages on the basis of the Simple Mail Transfer Protocol (SMTP);

16. "public IP address" means a unique numerical address from an address block assigned by the Internet Assigned Numbers Authority (IANA) or a regional Internet registry to an Internet access service provider for the purpose of assigning addresses to its customers; a public IP address identifies a computer uniquely on the Internet and can be routed on the Internet. Public IP

addresses constitute access data as defined under Article 92 Par. 3 No. 4a. When a specific IP address is assigned to a subscriber for exclusive use for the duration of a contract, the IP address simultaneously constitutes master data as defined under Article 92 Par. 3 No. 3;

17. "personal data breach" means any breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed in connection with the provision of a publicly available communications service in the Community.

### **Confidentiality of the communications**

**Article 93.** (1) The content data, traffic data and location data shall be subject to confidentiality of the communications. Confidentiality of the communications shall also refer to the data of unsuccessful connection attempts.

(2) Every operator of a public communications network or service and all persons who are involved in the operator's activities shall observe confidentiality of the communications. The obligation to maintain confidentiality shall continue to exist also after termination of the activities under which it was established.

(3) Persons other than a user shall not be permitted to listen, tap, record, intercept or otherwise monitor communications and the related traffic and location data as well as pass on related information without the consent of all users concerned. This shall not apply to the recording and tracing of telephone calls when answering emergency calls and to cases of malicious call tracing as well as to technical storage which is necessary for the conveyance of a communication.

(4) If communications are received unintentionally by means of a radio system, a telecommunications terminal equipment or any other technical equipment which are not intended for this radio system, this telecommunications terminal equipment or the user of the other equipment, the contents of the communications as well as the fact that they have been received must neither be recorded nor communicated to unauthorised persons nor used for any purposes. Recorded communications shall be erased or otherwise destroyed.

### **Technical facilities**

**Article 94.** (1) In accordance with the ordinances issued under Par. 3 and 4, the provider shall be obliged to make available all facilities necessary for monitoring communications and for providing information on data in communications, including information on retained data in accordance with the provisions of the Code of Criminal Procedure [Strafprozessordnung, StPO]. For the provision of information, the provider is to be reimbursed 80% of the costs (personnel and material costs) incurred in order to establish the functions necessary pursuant to the ordinances issued under Par. 3 and 4 in the provider's systems. In agreement with the Federal Minister of the Interior, the Federal Minister of Justice and the Federal Minister of Finance, the Federal Minister of Transport, Innovation and Technology shall issue an ordinance defining the assessment base for this percentage and the procedures for asserting such claims to reimbursement. This ordinance shall account, in particular, the economic reasonableness of the effort, any possible interest of the undertaking concerned in the services to be provided and any

possible danger caused by the technical facilities provided which is to be averted by the participation requested, as well as the simplicity and economy of the procedure.

(2) The provider shall be obliged to cooperate to the required extent in the monitoring of communications and in the provision of information on communications data, including information on retained data, in accordance with the provisions of the Code of Criminal Procedure [Strafprozessordnung, StPO]. In agreement with the Federal Minister of Transport, Innovation and Technology and the Federal Minister of Finance, the Federal Minister of Justice shall issue an ordinance providing for adequate compensation of costs, taking into account, in particular, the economic reasonableness of the effort, any possible interest of the undertaking concerned in the services to be provided and any possible danger caused by the technical facilities provided which is to be averted by the participation requested, as well as the public duty of the administration of justice.

(3) By way of ordinance, the Federal Minister of Transport, Innovation and Technology, in agreement with the Federal Ministers of the Interior and Justice, may specify, in line with the state of the art, detailed provisions for the design of the technical facilities to guarantee interception of communications according to the provisions of the Code of Criminal Procedure and for the protection of the data to be transmitted from unauthorised notice or use by third parties. A report shall be submitted to the executive committee of the National Council [Nationalrat] directly after the ordinance has been issued.

(4) The transmission of traffic data, location data and master data which require the processing of traffic data, including the transmission of retained data, under the provisions of the Code of Criminal Procedure [Strafprozessordnung, StPO] as well as the Security Police Act [Sicherheitspolizeigesetz, SPG], must be carried out using a transmission technology which allows the identification of the sender and recipient as well as ensuring data integrity. The data are to be transmitted in comma-separated value (CSV) file format using an advanced encryption technology. This does not apply to the transmission of data in cases pursuant to Article 98, of data in cases pursuant to Article 99 Par. 5 Nos. 3 and 4 in cases of imminent danger, of location data in cases requiring determination of current whereabouts pursuant to Articles 134 et seq. Code of Criminal Procedure, or the transmission of accompanying call data in the course of communications monitoring. In agreement with the Federal Minister of the Interior and the Federal Minister of Justice, the Federal Minister of Transport, Innovation and Technology may issue an ordinance stipulating a standardised definition of the syntax, data fields and encryption for the storage and transmission of the data as well as further specifications regarding storage of the logs prepared pursuant to Article 102c. A report shall be submitted to the executive committee of the National Council [Nationalrat] directly after the ordinance has been issued.

### **Data security measures**

**Article 95.** (1) The obligation to issue data security measures as defined in Article 14 of the Data Protection Act 2000 [Datenschutzgesetz] related to the provision of a public communications service shall be imposed upon every operator of a public communications service for each service provided by that operator.

(2) Notwithstanding Par. 1, in case of a particular risk of a violation of confidentiality, the operator of a public communications service must inform the subscribers concerning such risk and, where the risk lies outside the scope of the measures to be taken by the operator, of any possible remedies including their costs.

(3) Notwithstanding the provisions of the Data Protection Act [Datenschutzgesetz, DSG] 2000, operators of public communications services must take data security measures for the following purposes in any case:

1. to ensure that personal data can be accessed only by authorised personnel for legally authorised purposes;
2. to protect personal data stored or transmitted against accidental or unlawful destruction, accidental loss or alteration, and unauthorised or unlawful storage, processing, access or disclosure.

**Provisions in force from 21st February 2012 onward:** "3. to ensure the implementation of a security policy with respect to the processing of personal data."

The regulatory authority may review the measures taken by the operators of public communications services and issue recommendations with regard to the security level to be reached.

### **Breaches of security**

**Article 95a.** (1) Notwithstanding the provisions of Article 16a and the provisions of the Data Protection Act 2000 [Datenschutzgesetz], in the case of a personal data breach the provider of public communications services shall, without delay, notify the personal data breach to the Austrian Data Protection Commission. In cases where such a breach is likely to adversely affect the privacy or personal data of individuals, the operator shall also notify the individuals affected by the breach without delay.

(2) An operator of public communications services may omit notification of the persons affected in cases where the operator demonstrates to the satisfaction of the Data Protection Commission that it has implemented appropriate technological protection measures, and that those measures were applied to the data concerned by the security breach. In all cases, these technological protection measures must ensure that the data are not accessible to unauthorised persons.

(3) Without prejudice to the operator's obligation pursuant to Par. 1 (second sentence), the Austrian Data Protection Commission may, having considered the likely adverse effects of the breach, also require the operator of public communications services to notify the persons affected.

(4) The notification to the persons affected shall in any case describe the nature of the personal data breach and the contact points where more information can be obtained, and shall recommend measures to mitigate the possible adverse effects of the personal data breach. The notification to the Austrian Data Protection Commission shall, in addition, describe the consequences of, and the measures proposed or taken by the provider to address, the personal data breach.

(5) The Federal Chancellor may issue an ordinance requiring additional detailed information, in particular the form, procedure and requirements for notifications in the case of security breaches. In individual cases, the Austrian Data Protection Commission may also issue instructions in order to ensure that notification of the persons affected is appropriate to the effects of the security breach. The Data Protection Commission may also issue guidelines in connection with security breaches.

(6) Operators of public communications services are to maintain an inventory of personal data breaches. This inventory must comprise the facts surrounding the breaches, their effects and the remedial action taken and must be sufficient to enable the Data Protection Commission to verify compliance with the provisions of Par. 1 to 4.

(7) The Austrian Data Protection Commission shall inform the regulatory authority of security breaches as necessary for the regulatory authority's fulfilment of its duties under Article 16a."

### **Data protection – General**

**Article 96.** (1) Master data, traffic data, location data and content data may be collected and processed only for the purposes of providing a communications service.

(2) The transmission of data referred to in Par. 1 may take place only to the extent necessary for the provision, by the operator of a public communications service, of the communications services for which these data have been collected and processed. The data may be used for the purpose of marketing of communications services or the provision of value added services as well as for other transmissions only with the consent of the data subjects that may be withdrawn at any time. Such use shall be restricted to the necessary extent and the period necessary for marketing. Operators of public communications services must not make the provision of their services dependent on such consent.

(3) Operators of public communications services and providers of information society services as defined in Article 3 No. 1 E-Commerce Act [E-Commerce-Gesetz], Federal Law Gazette I No. 152/2001, are obliged to inform subscribers or users about the personal data which the operator or provider will collect, process and transmit, about the legal basis for those activities, about the purposes for which these activities will be carried out, and about the period of time for which these data will be stored. Collecting these data shall only be permissible given the consent of the subscriber or user. This shall not prevent any technical storage or access for the sole purpose of carrying out the transmission of a communication over a communications network, or as strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service. The subscriber shall also be informed of the usage possibilities based on search functions embedded in electronic versions of the directories. This information shall be given in an appropriate form, in particular within the framework of general terms and conditions and, at the latest, upon commencement of the legal relations. The right to information pursuant to the Data Protection Act shall remain unaffected.

### **Master data**

**Article 97.** (1) Irrespective of Article 90 Par. 6 and 7 as well as Article 96 Par. 1 and 2, providers may collect and use master data only for the following purposes:

1. conclusion, execution, modification or termination of the contract with the subscriber;
2. subscriber billing;
3. preparation of subscriber directories, also pursuant to Article 18; and
4. provision of information to emergency services.

(2) The operator shall erase the master data at the latest upon termination of the contractual relations with the subscriber. Exceptions shall be permitted only to the extent to which these data are still required to settle or collect charges, handle complaints or comply with other legal obligations.

### **Information to operators of emergency services**

**Article 98.** Operators of communications networks or services shall provide information to operators of emergency services, at their request, on master data as defined in Article 92 Par. 3 No. 3 lit. a to d as well as on location data as defined in Article 92 Par. 3 No. 6. Both cases shall require an emergency to permit the transmission, which can be only averted by providing this information. The need for transmission of the information shall be documented by the emergency service operator and shall be presented to the operator of the communications network or service without delay, however, at the latest within 24 hours. The operator of the communications network or service must not make the transmission dependent on previous presentation of the need. The emergency service operator shall be responsible for the legal permissibility of the request for information.

(2) In cases where it is not possible to determine a current location, the cell ID of the last communication registered for the communication equipment belonging to the endangered person may be processed, even in cases where access to data retained in accordance with Article 102a Par. 3 No. 6 lit. d is necessary for this purpose. The provider shall inform the subscriber concerned about the provision of location data pursuant to this item at the earliest 48 hours and at the latest 30 days after such provision; in general, this information is to be provided by sending a short message (SMS) or in writing where it is not possible to send a short message. The information sent to the subscriber shall include the following:

- a) the legal basis for the provision of information;
- b) the data in question;
- c) the date and time of the query;
- d) an indication of the body which requested the location data as well as the contact information for that body.

(3) Immediately after the receipt of an emergency call, operators pursuant to Article 20 are to provide operators of emergency services with location data pursuant to Article 92 Par. 3 No. 6 for the telecommunications terminal device from which an emergency number is called and to provide information on master data pursuant to Article 92 Par. 3 No. 3 lit. a to d upon request.

(4) Operators of communications networks shall cooperate in determining the location of telecommunications terminal device free of charge to the extent that international standards exist in this regard.

(5) The Federal Minister of Transport, Innovation and Technology may issue an ordinance specifying the details of these procedures, in particular the precision and reliability of location data and the transmission of the location of the telecommunications terminal device. In issuing this ordinance, the Minister shall in particular account for international standards, fundamental requirements in the public interest, the technical possibilities and the investments necessary for this purpose, any previously existing contractual agreements between providers of communications networks or services and operators of emergency services, as well as the appropriateness of the required economic expense.

### **Traffic data**

**Article 99.** (1) Except in the cases regulated by this Act, traffic data must not be stored or transmitted and shall be erased or made anonymous after termination of the connection. The permissibility of further use of traffic data transmitted in accordance with Par. 5 shall be based on the provisions of the Code of Criminal Procedure [Strafprozessordnung, StPO] as well as the Security Police Act [Sicherheitspolizeigesetz, SPG].

(2) The operator of a public communications network or service shall store traffic data to the extent required for the purposes of retail or wholesale billing. The traffic data are to be deleted or made anonymous as soon as the payment process has been completed and the charges have not been contested in writing within a period of three months. However, the data are not to be deleted

1. until the end of the period during which a bill may be legally contested in cases where a timely objection is raised;
2. until the end of the period in which payment can be pursued in cases where the bill is not settled; or
3. until a final decision is issued in cases where a procedure is initiated regarding the amount of the charges.

These data shall be made available in full to the decision-taking body as well as to the arbitration authority (Article 122). The amount of stored traffic data must be restricted to what is absolutely necessary.

(3) Processing of traffic data must be restricted to persons who handle billing or traffic management, fault recovery, customer enquiries, fraud detection or marketing communications services or provide value added services, or have been commissioned by these persons, and must be restricted to what is absolutely necessary.

(4) Except for cases specially regulated by this Act, the provider shall not process a subscriber line according to subscriber numbers called from that line beyond the purposes of billing. With the subscriber's consent the provider may use the data for the purpose of marketing his own telecommunications services or for the provision of value added services.

- (5) Traffic data may be processed for information purposes with regard to the following:
1. data on communications pursuant to Article 134 No. 2 Code of Criminal Procedure [Strafprozessordnung, StPO];
  2. access data, even those stored as retained data pursuant to Article 102a Par. 2 No. 1, Par. 3 No. 6 lit. a and b or Article 102a Par. 4 Nos. 1, 2, 3 and 5 for a maximum of six months prior to the query, to courts and public prosecutor's offices in accordance with Article 76a Par. 2 StPO;
  3. traffic data and master data in cases where it is necessary to process traffic data for this purpose and for the provision of information on location data to competent law enforcement agencies pursuant to the Security Police Act [Sicherheitspolizeigesetz, SPG] in accordance with Article 53 Par. 3a and 3b SPG. In cases where it is not possible to determine a current location, the cell ID of the last communication registered for the communication equipment may be processed, even in cases where access to data retained in accordance with Article 102a Par. 3 No. 6 lit. d is necessary for this purpose;
  4. access data, even in cases where these data were retained in accordance with Article 102a Par. 2 No. 1 or Article 102a Par. 4 Nos. 1, 2,3 and 5 no more than three months prior to the query, to competent law enforcement agencies pursuant to the Security Police Act [Sicherheitspolizeigesetz, SPG] in accordance with Article 53 Par. 3a No. 3 SPG.

## **Bills**

**Article 100. Provisions in force until 20 February 2012:** "(1) The subscriber fees shall be presented in the form of an itemised bill unless the subscriber objects. On request, the subscriber shall have the option of receiving the itemised bill on paper free of charge. The bill shall make reference to the possibility of reviewing the charges as well as how to contact the operator sending the bill."

**Provisions in force from 21 February 2012 onward:** "(1) Subscriber charges are to be presented in the form of an itemised bill. Subscribers shall also have the right to receive non-itemised bills. Upon concluding the contract, the subscriber must have the option of receiving invoices in electronic or printed form. The subscriber's option to receive a printed invoice free of charge must not be precluded by the contract. In cases where the bill is made available in electronic form, the subscriber must be able to receive a printed itemised bill free of charge at the subscriber's specific request. The bill shall make reference to the possibility of reviewing the charges as well as how to contact the operator sending the bill."

(2) The regulatory authority may issue an ordinance specifying the degree of detail and the form in which the itemised bill is to be provided. In issuing this ordinance, the regulatory authority shall consider the type of subscriber relationship and the type of service, the technical options and the protection of personal data, and shall take account of the fact that subscribers must be able to control their expenditure and that providers of value-added services have been identified.

(3) In preparing the bill no data other than absolutely necessary may be processed. Called subscriber numbers or other information identifying the recipient of a communication may be shown in an itemised bill only in shortened form unless the tariff applied to a connection can be derived only from the non-shortened subscriber number or the subscriber has declared in writing that he has informed, and will inform, all other existing or future co-users of the line thereof.

Any possible further restrictions under labour law shall remain unaffected. Calls or other connections not subject to billing as well as calls to or connections with emergency services must not be shown in the bill.

(4) The erasure of the data of a bill and the erasure of traffic data shall be subject to the same time limits.

### **Content data**

**Article 101.** (1) In principle, content data must not be stored unless storing constitutes an essential component of the communications service. If short-term storage is required for technical reasons, the provider shall immediately erase the stored data when the reasons cease to exist.

(2) The provider shall make technical and organisational arrangements to ensure that content data are not stored or only to the minimum extent required for technical reasons. If storage of the contents is a facility, the data shall be erased directly after provision of the service.

### **Location data other than traffic data**

**Article 102.** (1) Irrespective of Article 98, location data other than traffic data may be processed only if they are

1. made anonymous or
2. the users or subscribers have given their consent, which may be withdrawn at any time.

(2) Even in cases where consent of the users or subscribers has been obtained for the processing of data pursuant to Par. 1, the user or subscriber must have the possibility, using a simple means and free of charge, of temporarily refusing the processing of such data for each transmission.

(3) Processing of location data other than traffic data in accordance with Par. 1 and 2 must be restricted to what is necessary for the purposes of providing the value added service as well as to persons acting under the authority of the provider or of the third party providing the value added service. Without prejudice to Article 93 Par. 3, the collection and use of location data not connected to a communication is not permissible for information purposes.

### **Data retention**

**Article 102a.** (1) Beyond the authorisation to store or process data pursuant to Articles 96, 97, 99, 101 and 102, providers of public communications services shall store data in accordance with Par. 2 to 4 from the time of generation or processing until six months after the communication is terminated. The data shall be stored solely for the purpose of investigating, identifying and prosecuting criminal acts whose severity justifies an order pursuant to Article 135 Par. 2a Code of Criminal Procedure [Strafprozessordnung, StPO].

(2) Providers of Internet access services are obliged to store the following data:

1. the name, address and identifier of the subscriber to whom a public IP address was assigned at

- a given point in time, including an indication of the underlying time zone;
2. the date and time of the assignment and revocation of a public IP address for an Internet access service, including an indication of the underlying time zone;
  3. the calling telephone number for dial-up access;
  4. the unique identifier of the line over which Internet access was established.

(3) Providers of public telephone services, including Internet telephone services, are required to store the following data:

1. the subscriber number or other identifier for the calling line and the line called;
2. for additional services such as call forwarding or call diverting, the subscriber number to which the call is forwarded/diverted;
3. the name and address of the calling subscriber and of the called subscriber;
4. the start date and time as well as the duration of communication, with an indication of the underlying time zone;
5. the type of service used (calls, additional services, messaging and multimedia services).
6. in the case of mobile networks, the following additional data is to be stored:
  - a) the international mobile subscriber identity (IMSI) of the calling line and the line called;
  - b) the international mobile equipment identity (IMEI) of the calling line and the line called;
  - c) in the case of anonymous prepaid services, the date and time of the initial activation of the service and the  
cell ID at which the service was activated;
  - d) the location label (cell ID) at the start of the communication;

(4) Providers of e-mail services are obliged to store the following data:

1. the identifier assigned to a subscriber;
2. the name and address of the subscriber to whom an e-mail address was assigned at a given point in time;
3. when an e-mail is sent, the e-mail address and the public IP address of the sender as well as the e-mail address of each recipient of the e-mail;
4. when an e-mail is received and delivered to an electronic mailbox, the e-mail address of the message sender and recipient as well as the public IP address of the last communications network facility involved in the transmission;
5. when a user logs in and out of an e-mail service, the date, time, identifier and public IP address of the subscriber, including an indication of the underlying time zone.

(5) The storage obligation pursuant to Par. 1 applies only to those data pursuant to Par. 2 to 4 which are generated or processed in the course of providing the relevant communications services. In connection with unsuccessful call attempts, the storage obligation pursuant to Par. 1 only applies to the extent that these data are generated or processed and stored or logged in the course of providing the relevant communications service.

(6) The storage obligation pursuant to Par. 1 does not apply to those providers whose undertakings are exempt from the financing contribution requirement pursuant to Article 34 KommAustria Act [KommAustria-Gesetz].

(7) The content of communications and in particular data on addresses retrieved on the Internet are not to be stored on the basis of this provision.

(8) Without prejudice to Article 99 Par. 2, once the retention period has ended, the data to be stored pursuant to Par. 1 are to be deleted without delay, at the latest within one month after the end of the retention period. The provision of information after the end of the retention period shall not be permissible.

(9) With regard to retained data transmitted in accordance with Article 102b, the claims to information on this use of data shall be based solely on the provisions of the Code of Criminal Procedure [Strafprozessordnung, StPO].

### **Provision of information on retained data**

**Article 102b.** (1) Information on retained data may be provided solely on the basis of a court-approved order from the public prosecutor's office for the investigation and prosecution of criminal acts whose severity justifies an order pursuant to Article 135 Par. 2a Code of Criminal Procedure [Strafprozessordnung, StPO].

(2) The data to be stored pursuant to Article 102a are to be stored in such a way that they can be transmitted without delay to the competent authorities pursuant to the provisions of the Code of Criminal Procedure [Strafprozessordnung, StPO] and in accordance with the procedures set forth in the Code of Criminal Procedure for the provision of information on communications data.

(3) The data is to be provided in an appropriately protected form in accordance with Article 94 Par. 4.

### **Data security, logging and statistics**

**Article 102c.** (1) Retained data is to be stored in such a way that it is possible to differentiate the data stored in accordance with Articles 96, 97, 99, 101 and 102. The data is to be protected by appropriate technical and organisational measures against unlawful destruction, accidental loss or unlawful storage, processing, access and disclosure. Likewise, appropriate technical and organisational measures shall be taken to ensure that retained data can be accessed only by authorised persons with due adherence to the principle of dual control. Log data are to be stored for a period of three years after the end of the data storage period for each retention date. The Austrian Data Protection Commission, which is responsible for data protection supervision under Article 30 Data Protection Act [Datenschutzgesetz, DSG] 2000, shall be responsible for monitoring compliance with these provisions. The Federal Minister of Transport, Innovation and Technology may issue an ordinance detailing the standards of due care to be observed in order to ensure data security.

(2) Providers obliged to store data pursuant to Article 102a shall ensure that any access to retained data as well as any queries and information provided on retained data pursuant to Article 102b are logged in a non-alterable form. These logs shall include the following:

1. the reference to the public prosecutor's order or court order pursuant to the provisions of the

Code of Criminal Procedure [Strafprozessordnung, StPO] which was conveyed to the provider along with the request for information and which formed the basis for the provision of data;

2. in cases pursuant to Article 99 Par. 5 Nos. 3 and 4, the law enforcement agency's reference number conveyed to the provider along with the request for information;
3. the date of the request as well as the date and exact time at which the information was provided;
4. the number of data records provided, broken down by date and category pursuant to Article 102a Par. 2 to 4;
5. the storage duration of the conveyed data at the time when provision was ordered;
6. the name and address of the subscriber concerned in the information on retained data, to the extent that the provider is able to provide such data; and
7. a unique identifier which makes it possible to identify the persons who accessed the retained data within the provider's undertaking.

(3) Log data is to be stored in such a way that it is possible to differentiate them from retained data and from data stored in accordance with Articles 96, 97, 99, 101 and 102.

(4) The providers obliged to store data pursuant to Article 102a shall

1. convey the log data pursuant to Par. 2 to the Austrian Data Protection Commission and the Data Protection Council for the purpose of supervising data protection and ensuring data security; and
2. convey the log data pursuant to Par. 2 Nos. 2 to 4 to the Federal Minister of Justice for the purpose of reporting to the European Commission and the Austrian National Council.

(5) Log data are to be conveyed at the written request of the Austrian Data Protection Commission or the Federal Minister of Justice; in addition, by 31 January each year, log data from the previous calendar year must be conveyed to the Federal Minister of Justice.

(6) Beyond the logging obligations pursuant to Par. 2, storage of the data records conveyed shall not be permitted.

### **Subscriber directory**

**Article 103.** (1) The operator may use and evaluate the data included in the subscriber directory pursuant to Article 69 Par. 3 and 4 only for the purposes of using the publicly available telephone service. Any other usage shall not be permitted. In particular, data must not be used to create electronic profiles of subscribers or to categorise these subscribers, except for the preparation and publication of subscriber directories. The operator shall make it more difficult to copy electronic subscriber directories, according to the state of the art and economic reasonableness.

(2) Transmission of data contained in a subscriber directory to the persons specified in Article 18 Par. 1 No. 4 shall be permitted taking into account Article 69 Par. 5.

(3) The restriction of use under Par. 1 shall apply to data transmitted under Par. 2.

(4) removed (Federal Law Gazette I No. 27/2011)

## **Presentation of calling line identification**

**Article 104.** (1) In the public communications network the calling user shall be offered the possibility, on his own initiative and free of charge, of preventing the presentation of the calling line identification on a per-call basis, except for emergency calls. The subscriber shall have this possibility on a per-line basis.

(2) In the public communications network the called subscriber shall be offered the possibility, on his own initiative and free of charge, of preventing the presentation of the calling line identification of incoming calls. Where the calling line identification is presented prior to the call being established, the called subscriber shall be offered the possibility, on his own initiative and free of charge, of rejecting incoming calls where the presentation of the calling line identification has been prevented.

(3) In the public communications network the called subscriber shall be given the possibility of preventing, on his own initiative and free of charge, the presentation of his number to the calling user.

(4) removed (Federal Law Gazette I No. 102/2011)

(5) The provisions of Par. 1 to 3 shall also apply to calls to countries not members of the European Union as well as to calls originating in such countries.

## **Automatic call forwarding**

**Article 105.** In the provision of services which allow call forwarding, operators of communications networks and services shall, at the subscriber's request and free of charge, deactivate automatic call forwarding set up by other subscribers. Where multiple operators are involved in forwarding calls, the operators shall cooperate in this regard.

## **Call tracing, malicious calls**

**Article 106.** (1) Call tracing is the process of establishing the identity of a calling line, irrespective of the calling user's will.

(2) If a subscriber so requests for the tracing of malicious calls, the communications service operator shall set up a trace for future calls or have such a trace set up by the communications network operator. The trace may also consist in overriding the elimination of calling line presentation and storage of incoming numbers by the operator. The operator or provider may collect an appropriate charge for this service.

(3) The result of the call trace or of overriding the elimination of calling line presentation shall be stored by the communications service operator and revealed to the subscriber for those calls regarding which the subscriber provides credible evidence that malicious calls were made during the trace.

## **Unsolicited communications**

**Article 107.** (1) Calls, including facsimile transmissions, for marketing purposes shall not be permitted without the prior consent of the subscriber. The consent of the subscriber shall be equivalent to the consent of a person authorised by the subscriber to use his line. The consent given may be withdrawn at any time; withdrawal of the consent shall not have an impact on any contractual relationship with the addressee of the consent.

(1a) In the case of telephone calls for marketing purposes, the caller may not eliminate or falsify calling line identification, nor may the service operator be instructed to eliminate or falsify calling line presentation.

(2) The sending of electronic mail – including SMS messages – without the recipient's prior consent shall not be permitted if

1. the message is sent for purposes of direct marketing; or
2. the message is addressed to more than 50 recipients.

(3) Prior consent to electronic mail pursuant to Par. 2 shall not be required if

1. the sender has received the contact details for the communication in the context of a sale or a service to his customers; and
2. the communication is transmitted for the purpose of direct marketing of his own similar products or services; and
3. the customer has been given a clear and explicit opportunity to refuse such uses of electronic contact information from the outset upon its collection and upon each transmission free of charge and without problems; and
4. the recipient has not already refused such communication, in particular by registering on the list mentioned in Article 7 Par. 2 of the E-Commerce Act.

(4) removed (Federal Law Gazette I No. 133/2005)

(5) The sending of electronic mail for purposes of direct marketing shall be prohibited in any case if

1. the identity of the sender on whose behalf the communication is transmitted is disguised or concealed; or
2. the provisions of Article 6 Par. 1 E-Commerce Act are violated; or
3. the recipient is asked to visit web sites which violate that provision; or
4. there is no valid address to which the recipient may send a request that such communications cease.

(6) If administrative offences pursuant to Par. 1, 2 or 5 have not been committed in Austria, they shall be considered as having been committed in the place where the call reaches the subscriber's line.

## **Section 13**

### **Penal provisions**

## **Violation of the rights of users**

**Article 108.** (1) Any person as defined in Article 93 Par. 2 who

1. without authorisation discloses the fact or the contents of the telecommunications traffic of specific persons to an unauthorised person or gives such a person the opportunity to perceive facts himself that are subject to the obligation to maintain secrecy,
2. falsifies, incorrectly relates, modifies, suppresses or incorrectly conveys a communication or withholds it from the intended recipient without authorisation shall be punished by the court with a prison sentence of up to three months or a fine of up to 180 times the daily rate unless the offence carries a more severe penalty under another provision.

(2) The offender shall be prosecuted only at the request of the aggrieved party.

## **Administrative penal regulations**

**Article 109.** (1) Any person who

1. violates Article 57 Par. 3 by failing to comply with a modification that has been ordered;
2. violates Article 65 Par. 8 by failing to comply with a modification that has been ordered;
3. violates Article 74 Par. 1 in installing or operating a radio system;
4. violates an ordinance issued under Article 75 Par. 2 by importing, selling or possessing a radio system without authorisation;
5. violates Article 78 Par. 1 by abusing a radio system or telecommunications terminal equipment;
6. violates Article 78 Par. 2 by failing to take the appropriate measures to rule out abuse of radio systems or telecommunications terminal equipment;
7. violates Article 78 Par. 3 by operating a radio system for purposes other than intended at an unauthorised location or in an unauthorised usage area;
8. violates Article 78 Par. 4 by operating radio transmission systems using unassigned frequencies or call signs;
9. violates Article 78 Par. 5 by connecting telecommunications terminal equipment which is not approved or does not comply with the Federal Act on Radio Systems and Telecommunications Terminal Equipment to, or operating it in connection with, a public communications network;
10. violates Article 84 Par. 1 by failing to notify modifications or to comply with modifications ordered pursuant to Article 84 Par. 2;
11. violates Article 84 Par. 4 by failing to comply with a modification that has been ordered;
- 11a. violates a prohibition pursuant to Article 85a in operating a radio system;
12. violates Article 86 Par. 4 by failing to provide the required information or to submit the requested documents or certificates;
13. violates Article 86 Par. 5 by failing to provide radio systems for testing at the specified location or the specified time;.
14. violates Article 122 Par. 1 by failing to cooperate in a dispute settlement procedure shall be guilty of an administrative offence and shall be punished by a fine of up to EUR 4,000.00.

(2) Any person who

1. violates Article 55 Par. 10 by failing to comply with incidental provisions;

2. violates Article 56 Par. 1 by failing to comply with incidental provisions;
  3. violates Article 65 Par. 4 by failing to comply with incidental provisions;
  - 3a. violates Article 65 Par. 5 in transferring communications parameters to other users;
  4. violates Article 77 Par. 1 by marking radio systems without being authorised;
  5. violates Article 77 Par. 1 by marking radio systems not complying with the approved type;
  6. violates Article 81 (6) by failing to comply with incidental provisions;
  7. violates Article 86 Par. 4 by failing to grant the agents of the Telecommunications Offices access to property or premises;
  8. violates Article 87 Par. 1 by preventing a search;
  9. violates an ordinance or a notice issued under this Federal Act;
  10. violates the Roaming Regulation
- shall be guilty of an administrative offence and shall be punished by a fine of up to EUR 8,000.00.

(3) Any person who

1. violates Article 16a Par. 1 or 2 by failing to take measures to ensure network integrity and network security;
  - 1a. violates Article 16a Par. 4 by failing to submit to a security audit or failing to provide information for the assessment of the security or integrity of services and networks, including documented security policies or results of the security audit;
  - 1b. violates Article 16a Par. 5 by failing to communicate security breaches or failing to inform the public at the regulatory authority's request, failing to publish information on service quality or failing to provide the regulatory authority with this information;
  - 1c. violates Article 17 Par. 1 by failing to publish information on the service quality or to notify this information to the regulatory authority;
2. violates Article 18 by failing to comply with the duties of an operator of a publicly available telephone service;
3. violates Article 19 by failing to provide additional facilities;
4. violates Article 20 Par. 1 by failing to ensure connection to all emergency telephone numbers;
5. violates Article 20 Par. 2 by failing to ensure connection to emergency telephone numbers free of charge;
6. violates Article 20 Par. 3 by failing to ensure that the presentation of calling line identification is available at the emergency service;
7. violates Article 21 Par. 1 by failing to comply with separate accounting;
8. violates Article 23 Par. 1 and 4 by failing to ensure number portability;
- 8a. violates Article 23 Par. 5 by performing a prohibited number porting procedure;
9. violates Article 27 Par. 3 by failing to publish or notify performance benchmarks;
10. violates Article 33 by failing to notify his turnover;
11. violates Article 48 Par. 3 by failing to submit reference interconnection offers or interconnection agreements;
  - 11a. violates Article 66 Par. 2 by using communications parameters without the right to use such parameters;
12. violates Article 65 Par. 2 by behaving in a discriminatory way or failing to perform the weekly notification;
13. violates Article 90 by failing to provide the necessary information or information on master data;

14. violates Article 94 Par. 2 by failing to cooperate in the monitoring of communications or to provide information on communications data to the required extent;
15. violates Article 95 Par. 2 by failing to inform subscribers;
- 15a. violates Article 95a Par. 1 or 3 by failing to provide notification;
- 15b. violates Article 95a Par. 6 by failing to maintain an inventory;
16. violates Article 96 Par. 3 by failing to inform subscribers;
17. violates Article 98 by failing to provide information on master data or location data, or by failing to inform subscribers;
18. violates Article 103 Par. 1 by failing to make it more difficult to copy electronic subscriber directories;
19. removed (Federal Law Gazette I No. 23/2011)
- 19a. violates Article 107 Par. 1a by suppressing or falsifying calling line identification, or by arranging to do so;
20. violates Article 107 Par. 2 or Par. 5 in sending electronic mail;
21. violates Article 99 Par. 5 by providing information on traffic data or processing traffic data for information purposes;
22. violates Article 102a by failing to store data; this offence shall not be punishable in cases where the investment costs required for this purpose have not yet been reimbursed on the basis of an ordinance issued pursuant to Article 94 Par. 1;
23. violates Article 102a Par. 8 by failing to delete data;
24. violates Article 102b by providing information on data in the absence of a court authorisation;
25. violates Article 102b by transmitting data via a communications network in unencrypted form;
26. violates Article 102c by failing to log data or to provide the necessary information shall be guilty of an administrative offence and shall be punished by a fine of up to EUR 37,000.00.

(4) Any person who

1. violates Article 15 Par. 1 by failing to notify the provision of a communications network or service;
2. violates Article 22 by failing to establish interoperability;
3. violates Article 25 Par. 1 or 2 by failing to notify or publish general terms and conditions or tariff conditions or changes thereof to the regulatory authority in due time before the service is started or the change takes effect;
4. violates Article 90 Par. 1 No. 4 by failing to take part in a procedure pursuant to Articles 36 to 37a to the extent defined in Article 90;
5. violates Article 45 by failing to make an application relating to tariffs that may be subject to approval;
6. violates an ordinance issued by RTR or KommAustria on the basis of this Federal Act or an official decision issued by RTR, the Telekom-Control-Kommission or KommAustria on the basis of this Federal Act;
7. fails to provide technical facilities in accordance with Article 94 Par. 1. this act shall not be punishable in cases where the investment costs required for this purpose have not yet been reimbursed on the basis of an ordinance issued pursuant to Article 94 Par. 1;
8. violates Article 107 Par. 1 in making calls for marketing purposes

shall be guilty of an administrative offence and shall be punished by a fine of up to EUR 58,000.00.

(5) In assessing the fines pursuant to Par. 1 to 4 it shall be also considered if the offence has been committed for professional purposes or repeatedly. If the offence has been committed for professional purposes, the unlawful benefit achieved according to the result of the preliminary investigation shall be taken into account in the assessment.

(6) An administrative offence pursuant to Par. 1 to 4 shall not exist if the punishable act is a criminal offence that falls within the jurisdiction of the courts or shall be subject to a more severe penalty according to other administrative penal provisions.

(7) In the penal order the objects used for committing the offence may be declared as forfeited for the benefit of the state.

(8) The fines imposed by the Telecommunications Offices under this Federal Act shall go to the state.

(9) If an accused person in proceedings pursuant to Par. 1 to 4 is an operator of public communications services or networks, the administrative offence prosecution authority shall notify the regulatory authority of the completion of the proceedings.

### **Publication of the penal order**

**Article 110.** The penal order issued for a punishable act pursuant to Article 109 Par. 4 may rule that the penal order be published within a specific period in one or more periodicals at the expense of the convicted person if the offender had already been punished twice for offences that are based on the same detrimental inclination as the offence for which he has been convicted now and, given the nature of the offence, it is to be expected that, otherwise, the offender will continue to commit offences punishable under this Federal Act. The publication shall relate to the judgement of the penal order. If special circumstances so require, also publication of the grounds of the penal order may be ordered.

### **Skimming off of gains**

**Article 111.** (1) If the regulatory authority establishes that an undertaking has gained economic advantage due to an unlawful act in violation of this Federal Act or the provisions of an ordinance or a notice issued under this Federal Act, the regulatory authority may file apply to the Cartel Court to fix an amount and skim it off. The amount to be skimmed off shall depend on the extent of the economic advantage and may be set by the Cartel Court to be up to 10% of the undertaking's turnover of the preceding year. The regulatory authority shall be a party to these proceedings.

(1a) In cases where evidence of the amount of the benefit obtained unlawfully cannot be provided or can only be provided with unreasonable difficulty, the Cartel Court may, at its own discretion, set a reasonable amount in response to a request or by virtue of office.

(2) The amount skimmed off shall be used for the financing of Rundfunk und Telekom Regulierungs-GmbH.

## **Section 14**

### **Authorities**

#### **Telecommunications authorities**

**Article 112.** Telecommunications authorities shall be the Federal Minister of Transport, Innovation and Technology as the National Telecommunications Authority as well as the Telecommunications Offices subordinate to the National Telecommunications Authority and the Office for Radio Systems and Telecommunications Terminal Equipment.

### **Competences**

**Article 113.** (1) The area of local competence of the National Telecommunications Authority and the Office for Radio Systems and Telecommunications Terminal Equipment shall extend to the whole federal territory.

(2) The Telecommunications Offices are located:

1. in Graz for the provinces of Styria and Carinthia,
2. in Innsbruck for the provinces of Tyrol and Vorarlberg,
3. in Linz for the provinces of Upper Austria and Salzburg as well as
4. in Vienna for the provinces of Vienna, Lower Austria and Burgenland.

(3) The Telecommunications Office with local competence shall be responsible for the official acts under this Federal Act unless otherwise provided. Without prejudice to Article 81 Par. 3, if a measure affects the area of competence of two or more Telecommunications Offices, concerted action shall be taken.

(4) Unless otherwise provided, the Office for Radio Systems and Telecommunications Terminal Equipment shall be responsible for

1. decisions on applications for type approval of radio systems,
2. revocation of approvals and type approvals granted.

(5) The Federal Minister of Transport, Innovation and Technology (National Telecommunications Authority) shall be responsible for

1. fundamental requirements for the activities of the regulatory authority pursuant to Article 18 Par. 3 and 4 KommAustria Act [KommAustria-Gesetz],
2. issuing and administration of the regulations required for the execution of the international agreements, in particular on the use of the frequency spectrum,
3. decisions on appeals to notices by the Telecommunications Offices and the Office for Radio Systems and Telecommunications Terminal Equipment unless an independent administrative senate has jurisdiction.

(6) The regulatory authority shall periodically carry out an evaluation of legal provisions and, after consultation with the Federal Minister of Transport, Innovation and Technology, enclose the results of the evaluation with the Communications Report (Article 19 KOG) every two years.

### **Participation by officers of the law enforcement agencies, enforcement**

**Article 114.** (1) The officers of the law enforcement agencies shall assist the Telecommunications Offices and their agents, at their request, to ensure the exercise of the interception powers within the scope of their lawful sphere of activity.

(2) The notices issued by the telecommunications authorities shall be enforced by the Telecommunications Offices themselves, applying the regulations of the Administrative Enforcement Act [Verwaltungsvollstreckungsgesetz], except where payment is involved.

### **Duties of Rundfunk und Telekom Regulierungs-GmbH**

**Article 115.** (1) Rundfunk und Telekom Regulierungs-GmbH [RTR-GmbH] shall perform all duties conferred to the regulatory authority by this Federal Act and the ordinances issued under this Federal Act unless the Telekom-Control-Kommission (Article 117) or KommAustria have competence.

(1a) RTR-GmbH shall be the regulatory authority pursuant to the BEREC Ordinance (Article 3 No. 8a). In matters for which KommAustria is responsible, agreement shall be reached with that authority.

(2) In case of disputes that fall within the competences of the regulatory authorities of two or more Member States the request may be directed to the regulatory authorities concerned which shall coordinate their course of action.

(3) RTR-GmbH may be asked to take part in discussions about disagreements resulting from this Federal Act according to the criteria to be published by RTR-GmbH. A corresponding request shall be addressed in writing to RTR-GmbH by all parties involved. The consultation of RTR-GmbH shall not preclude the institution of administrative proceedings under the provisions of this Act. Agreements pursuant to this paragraph which are reached with RTR-GmbH participating shall be legally effective only between the parties involved. Enforcement shall be possible only by means of civil law proceedings.

### **Regulatory approach**

**Article 115a.** (1) The Telekom-Control-Kommission shall prepare a document outlining its regulatory approach for electronic telecommunications with regard to the authority's legally assigned duties. With due attention to the purpose and objectives stipulated under Article 1 Par. 1 to 3 and in line with the relevant political declarations and approaches of the European Union, the Austrian Federal Government and the Austrian Federal Provinces, the regulatory approach shall include regulatory considerations on foreseeable developments in the field of electronic communications in order to enhance the predictability of regulation.

(2) The regulatory approach shall cover a reasonable planning period which, however, shall not be longer than one market analysis cycle. Where necessary, the approach may also be modified before the end of this period with due indication of the reasons for such modifications. The approach is to be published on the regulatory authority's web site. Before the approach is published, interested persons shall be given the opportunity to submit comments and opinions within a reasonable period of time.

## **Telekom-Control-Kommission**

**Article 116.** (1) The Telekom-Control-Kommission shall be established to perform the functions specified in Article 117.

(2) The Telekom-Control-Kommission shall be based with Rundfunk und Telekom Regulierungs-GmbH. The Telekom-Control-Kommission shall be managed by Rundfunk und Telekom Regulierungs-GmbH. Within the framework of their activities on behalf of the Telekom-Control-Kommission the staff of Rundfunk und Telekom Regulierungs-GmbH shall be bound by the instructions of the chairperson or the member designated in the rules of procedure.

(3) Pursuant to Article 20 Par. 2 of the Federal Constitutional Act [B-VG], the members of the Telekom-Control-Kommission shall not be bound by instructions in the performance of their duties.

## **Duties**

**Article 117.** The Telekom-Control-Kommission shall have the following duties:

1. to decide in procedures pursuant to Articles 6, 7, 9, 11, 12a and 13;
  - 1a. to decide on security audits pursuant to Article 16a Par. 4;
2. to decide in procedures pursuant to Article 18 Par. 3;
  - 2a. to decide in procedures pursuant to Article 22;
  - 2b. to decide in procedures pursuant to Article 24a;
3. to exercise the right to object pursuant to Article 25;
4. to determine the financial compensation to be paid from the Universal Service Fund pursuant to Article 31;
5. to determine the contribution to be paid into the Universal Service Fund pursuant to Article 32;
6. to identify the relevant markets subject to sector-specific regulation and to determine whether one or more undertakings have significant market power or effective competition prevails on those markets, and whether specific obligations are to be withdrawn, maintained, amended or imposed pursuant to Article 36 to 37a;
7. to decide in procedures pursuant to Articles 23 Par. 2, 38, 41, 42, 47, 47a, 47b Par. 2, 48 and 49 Par. 3;
  - 7a. to decide in procedures pursuant to Article 50;
8. to approve general terms and conditions as well as tariffs and to execute the right to object pursuant to Article 26 and Article 45;
9. to license frequencies pursuant to Article 54 Par. 3 No. 2 for which provision is made in the frequency usage plan pursuant to Article 52 Par. 3;

10. to decide on the transfer of frequencies pursuant to Article 56;
11. to change and revoke the licensed frequencies pursuant to Article 57 and Article 60, respectively;
12. to decide on the right to provide communications networks or services pursuant to Article 91 Par. 3;
13. to decide about temporary orders pursuant to Article 91 Par. 4;
- 13a. to decide in procedures pursuant to Article 91a;
14. to establish violations and request the skimming off of gains pursuant to Article 111;
15. to make a request to the Cartel Court pursuant to Article 127;
16. to issue decisions pursuant to Article 130 Par. 1.

### **Structure of the Telekom-Control-Kommission**

**Article 118.** (1) The Telekom-Control-Kommission shall consist of three members who are appointed by the federal government. One member shall belong to the judiciary. In appointing this member, the federal government shall consider three candidates suggested by the president of the Supreme Court. The other two members shall be appointed at the suggestion of the Federal Minister of Transport, Innovation and Technology. In this respect, it shall be considered that one member shall have relevant technical and the other shall have legal and economic expertise. The term of office of the Telekom-Control-Kommission shall be five years. Reappointment shall be permitted.

(2) The Federal Minister of Transport, Innovation and Technology shall appoint a substitute member for each member. The substitute member shall take the place of a member if the member is prevented from fulfilling his duties.

(3) The following must not be members of the Telekom-Control-Kommission:

1. members of the federal government or a provincial government as well as state secretaries;
2. persons who are in a close legal or de facto relationship with those who make use of a function of the Telekom-Control-Kommission;
3. persons not eligible to the National Council [Nationalrat].

(4) If a member of the Telekom-Control-Kommission fails to take part in three consecutive meetings without adequate excuse or if a ground for exclusion pursuant to Par. 3 occurs subsequently, the Telekom-Control-Kommission shall establish such fact after hearing the member, which shall result in the loss of membership.

(5) Par. 1, 3 and 4 shall apply correspondingly to the substitute members.

(6) If a member dies or retires prematurely on a voluntary basis or pursuant to Par. 4, the respective substitute member shall become a member of the Telekom-Control-Kommission and, applying Par. 1 and 2, a new substitute member shall be appointed to serve until the end of the term of office.

(6a) The departure of a member pursuant to Par. 6 is to be published by the Federal Minister of Transport, Innovation and Technology in the “Amtsblatt zur Wiener Zeitung”. The departing member may request that the reason for departure be mentioned in the publication.

(7) The members of the Telekom-Control-Kommission shall be entitled to receive compensation of reasonable travel expenses and out-of-pocket expenses as well as an attendance fee which shall be fixed by the Federal Minister of Transport, Innovation and Technology in agreement with the Federal Minister of Finance, by way of ordinance, taking into account the significance and the scope of the duties to be performed by the Telekom-Control-Kommission.

### **Chairperson and rules of procedure**

**Article 119.** (1) The judicial member shall be chairperson of the Telekom-Control-Kommission.

(2) The Telekom-Control-Kommission shall define its rules of procedure under which one of its members shall be put in charge of handling day-to-day business matters.

(3) Decisions by the Telekom-Control-Kommission shall require a unanimous vote in order to be valid. Abstention shall not be permitted.

### **Competences of KommAustria**

**Article 120.** (1) In derogation of the division of competences set out in Articles 115 and 117,

a) if an application instituting proceedings refers to the use of a communications network, an associated facility or the use of a communications service for the distribution of broadcasting within the meaning of the Federal Constitutional Broadcasting Act [BVG-Rundfunk], or supplementary broadcasting services as defined in the Audiovisual Media Services Act [Audivisuelle Mediendienste-Gesetz], Federal Law Gazette I No. 84/2001; or

b) if a regulatory measure refers to a market for the distribution of broadcasting within the meaning of the Federal Constitutional Broadcasting Act [BVG-Rundfunk] or of supplementary broadcasting services;

KommAustria shall perform the following duties of the regulatory authority within the meaning of this Federal Act:

1. defining the reference rates pursuant to Article 7;
2. ordering joint use pursuant to Articles 8 and 9;
3. duties pursuant to Articles 15, 16a, 17, 21 and 25;
4. duties concerning the regulation of competition according to Section 5 of this Federal Act;
5. approval of the transfer of frequencies pursuant to Article 56;
6. approval of modifications pursuant to Article 57 and revocation pursuant to Article 60;
7. duties pursuant to Article 90;
8. supervision measures pursuant to Article 91;
9. skimming off of gains pursuant to Article 111;
10. dispute settlement pursuant to Article 122;
11. duties pursuant to Articles 124 to 130.

(2) The Telekom-Control-Kommission and KommAustria shall exchange information regularly on the subject matters and the parties of newly pending proceedings.

(3) KommAustria shall act as a party in proceedings before the Telekom-Control-Kommission on request if the proceedings refer to the use of a communications network, an associated facility or the use of a communications service also for the distribution of broadcasting within the meaning of the Federal Constitutional Broadcasting Act [BVG-Rundfunk] as well as of supplementary broadcasting services.

(4) The Telekom-Control-Kommission shall act as a party in proceedings before KommAustria on request if the proceedings refer to the use of a communications network, an associated facility or the use of a communications service also for telecommunications services.

(5) If KommAustria acts as a party pursuant to Par. 3, it may file a complaint to the Administrative Court [Verwaltungsgerichtshof] against decisions of the Telekom-Control-Kommission on grounds of unlawfulness.

### **Procedural rules, stages of appeal**

**Article 121.** (1) Unless otherwise provided by this Federal Act, the Telekom-Control-Kommission shall apply the General Administrative Procedures Act 1991 [Allgemeines Verwaltungsverfahrensgesetz].

(2) Applications referring to Article 117 Nos. 2 and 7 shall be passed on to Rundfunk und Telekom Regulierungs-GmbH to carry out conciliation proceedings.

(3) If an application under Par. 2 is passed on to Rundfunk und Telekom Regulierungs-GmbH, conciliation proceedings shall be carried out. If an agreement is reached within six weeks, the proceedings before the Telekom-Control-Kommission shall be discontinued; otherwise, the proceedings shall be continued. The Telekom-Control-Kommission shall decide within four months of receipt of the application. This decision shall replace an agreement to be reached. The parties to the conciliation proceedings shall be obliged to take part in the proceedings and answer all inquiries necessary to assess the situation as well as provide the necessary documents.

(4) Article 39 Par. 3 General Administrative Procedures Act [Allgemeines Verwaltungsverfahrensgesetz, AVG] shall apply subject to the provision that upon completion of the preliminary investigation new matters cannot be raised.

(5) The Telekom-Control-Kommission shall take decisions at the highest instance. Its decisions shall not be subject to quashing or modification by administrative action. A decision by the Telekom-Control-Kommission may be appealed by filing a complaint to the Administrative Court [Verwaltungsgerichtshof].

### **Dispute settlement**

**Article 122.** (1) Irrespective of the jurisdiction of the courts of law, users, operators of communications networks or services and interest groups may submit cases of dispute or complaint to the regulatory authority, in particular

1. in relation to the quality of the service and payment disputes which have not been settled satisfactorily between a customer and an operator, in particular with the operator of universal service, or

2. about an alleged violation of this Act.

The operators shall be obliged to take part in such proceedings and answer all inquiries necessary to assess the situation as well as provide the necessary documents. The regulatory authority shall negotiate an amicable solution or communicate its opinion on the case in question to the parties.

(2) The regulatory authority shall define guidelines for carrying out the proceedings provided in Par. 1, where, in particular, time limits shall be laid down for termination of the proceedings, as may be required in the respective situation. The guidelines shall be published in an appropriate form.

### **Transparency**

**Article 123.** (1) Decisions of fundamental significance taken by Rundfunk und Telekom Regulierungs-GmbH and the Telekom-Control-Kommission shall be published in an appropriate manner with due regard to data protection.

(2) Considering Article 125, the regulatory authority shall publish information which contributes to an open, competition-oriented market.

### **Information by the regulatory authority**

**Article 124.** The regulatory authority shall transmit to the European Commission, at its substantiated written request, the information needed for the performance of its duties. This shall also include information on the general content, number and duration of appeal procedures. If the information to be transmitted to the European Commission refers to data provided by operators of communications services or networks, the regulatory authority shall inform these operators of the transmission of the information.

### **Business and company secrets**

**Article 125.** (1) The regulatory authority shall keep confidential business and company secrets that have been disclosed to it, in particular in compliance with the Data Protection Act [Datenschutzgesetz].

(2) It shall be the duty of the regulatory authority to qualify a fact as a company or business secret and, in the process, it shall also weigh the interests of the person entitled to secrecy against the interests of third parties in its disclosure.

(3) If the regulatory authority has reasonable doubt about a fact warranting its secrecy, it shall inform the person entitled to secrecy of this fact and ask him to prove his economic interest in the secret.

### **Cooperation with other authorities**

**Article 126.** (1) To the extent necessary for the performance of the duties assigned to the regulatory authority, the regulatory authority shall be entitled to bring to the notice of the Cartel Court [Kartellgericht], the Higher Cartel Court [Kartellobergericht], the Public Attorney for Cartel Matters [Bundeskartellanwalt], the Federal Competition Authority [Bundeswettbewerbsbehörde], the European Commission and the regulatory authorities of other Member States the information, and to submit the documents, they require to carry out their functions in matters of joint interest.

(2) If the regulatory authority receives information from the European Commission or other regulatory authorities that is marked confidential, it shall ensure that it is treated confidentially.

(3) After consultation with the Austrian Data Protection Commission, the regulatory authority may issue measures for the purpose of ensuring effective transnational coordination of the enforcement of the provisions stipulated in Section 12 of this Federal Act and for the purpose of creating harmonised conditions for the provision of services with which cross-border data flows are associated and which fall within the scope of application of this Federal Act. Prior to issuing such measures, the regulatory authority shall submit to the European Commission a summary of the reasons for its intervention, the measures planned and the proposed course of action. In adopting such measures, the regulatory authority shall take utmost consideration of the European Commission's recommendations.

### **Right to make requests to the Cartel Court**

**Article 127.** (1) If the regulatory authority has reason to assume in the course of its activities that a fact is subject to cartel law, it shall review this fact and, where appropriate, shall file a request to the Cartel Court [Kartellgericht] pursuant to Article 28 Par. 1 and 2 Cartel Act [Kartellgesetz, KartG] 2005, Federal Law Gazette No. 61/2005.

(2) In the case of violations of the prohibitions stipulated in the first chapter of the Cartel Act 2005 [Kartellgesetz, KartG], and in the case of non-adherence to the commitments declared binding under Article 27 Cartel Act 2005, the regulatory authority shall be obliged to file a request if the provisions on the purpose and objectives pursuant to Article 1 of this Federal Act are concerned.

1. removed (Federal Law Gazette I No. 102/2011)

2. removed (Federal Law Gazette I No. 102/2011)

3. removed (Federal Law Gazette I No. 102/2011)

4. removed (Federal Law Gazette I No. 102/2011)

5. removed (Federal Law Gazette I No. 102/2011)

6. removed (Federal Law Gazette I No. 102/2011)

## **Consultation procedure**

**Article 128.** (1) The Federal Minister of Transport, Innovation and Technology as well as the regulatory authority shall give interested persons the opportunity to comment, within a reasonable period, on draft measures pursuant to this Federal Act that are likely to have a significant impact on the relevant market, except for measures pursuant to Article 91 Par. 4, Article 122 and Article 130. The consultation procedures as well as their results shall be made publicly available by the respective authority unless otherwise provided in Article 125.

(2) Any procedural time limits shall be suspended during the period granted for comment.

(3) If the draft refers to an individual measure that is being considered at the request of a party, only withdrawal of the request shall be permitted during the period granted for comment. In such case the proceedings shall be discontinued and the relevant decision shall be published.

(4) The Federal Minister of Transport, Innovation and Technology as well as the regulatory authority shall give interested persons the opportunity to comment, within a reasonable period, on questions relating to end-user or consumer rights in connection with public communications services. They shall take account of these comments, as appropriate, in particular if they are expected to have a significant impact on the market.

## **Coordination procedure**

**Article 129.** (1) If the draft measure pursuant to Article 128, which is expected to have an effect on trade between Member States, refers to

1. market definition or market analysis (Articles 36 and 37); or
2. removed (Federal Law Gazette I No. 102/2011)
3. removed (Federal Law Gazette I No. 102/2011)
4. obligations imposed pursuant to Article 38 to Article 43

the draft, together with a statement of the reasons, shall be made available to the European Commission, BEREC and the national regulatory authorities of the Member States of the European Union.

(2) In cases where the European Commission, BEREC or the national regulatory authorities of the Member States submit comments or opinions on the draft in question within one month, utmost consideration shall be taken of these comments and opinions. With the exception of the cases referred to in Par. 3, the resulting measure may be put into effect. It shall be communicated to the European Commission and BEREC.

(3) The measure shall be deferred for two additional months if

1. the European Commission has communicated in its comments pursuant to Par. 2 that it considers the measure an obstacle to the Single Market or that there is serious doubt about compatibility with European Union law, in particular with the objectives set out in Article 1; and
2. the measure relates to market definition or market analysis pursuant to Article 36 and 37.
3. removed (Federal Law Gazette I No. 102/2011)

(3a) In cases where the European Commission issues an instruction to withdraw the measure with due indication of objective and detailed reasons within the period stipulated in Par. 3, the measure is to be amended or withdrawn within six months. Amended draft measures shall be subjected to the procedures stipulated under Articles 128 Par. 1 and 129 Par. 1.

(3) However, the measure shall be deferred for three additional months if

1. the European Commission has communicated in its comments pursuant to Par. 2 that it considers the measure an obstacle to the Single Market or that there is serious doubt about compatibility with European Union law, in particular with the objectives set out in Article 1; and
2. the measure relates to the imposition of specific obligations pursuant to Articles 38 to 43.

(3c) Within the period stipulated under Par. 3b, the regulatory authority shall cooperate closely with the European Commission and BEREC in order to determine the most suitable and most effective measure with regard to the objectives stipulated under Article 1.

(3d) In cases where BEREC submits comments in which it shares the doubts expressed by the European Commission under Par. 3b No. 1 within the first six weeks of the period stipulated under Par. 3b, the regulatory authority may retain the draft measure, or amend or withdraw the measure in consideration of the comments of the European Commission and BEREC.

(3e) In cases where the European Commission issues a recommendation for the regulatory authority under the conditions of Article 7a (5) (a) of the Framework Directive, and where the regulatory authority has not yet withdrawn the draft measure pursuant to Article 129 Par. 6, the regulatory authority shall adopt the planned measure within one month, at the latest, however, after completing a procedure pursuant to Article 128. The regulatory authority shall provide reasons in cases where it does not amend or withdraw the measure in accordance with the recommendation.

(3f) Draft measures pursuant to Par. 1 may be withdrawn by the regulatory authority at any stage in the procedure.

(3g) Procedural time limits shall remain suspended while the procedure under Par. 1 is being followed.

(4) Measures under Par. 1 may be issued for a maximum period of three months without requiring the procedures under Par. 1 and 3 if the measure needs to be taken instantly, with exceptional circumstances prevailing, to ensure competition and to protect the interests of the users. The European Commission, BEREC and the national regulatory authorities of the Member States of the European Union shall be informed without delay, with a full statement of the reasons enclosed. The procedure pursuant to Par. 1 is to be carried out before the validity period of the measure is extended.

(5) For practical reasons, an agent responsible for creating standards may instruct the regulatory authority to publish the draft as well as the incoming comments.

(6) The regulatory authority shall maintain and publish a list of pending procedures under Par. 1.

## **Resolution of cross-border disputes**

**Article 130.** (1) In the event of cross-border disputes between parties in different Member States, where the dispute lies within the competence of authorities from at least two Member States, any party may call upon the competent authorities. The authorities shall coordinate their efforts in order to bring about a resolution of the dispute. The competence of the courts of law shall remain unaffected.

(2) The regulatory authority may request comments from BEREC on the measures to be taken in accordance with the Framework Directive or the Specific Directives for the settlement of the dispute. In cases where comments are requested from BEREC, the regulatory authority which has competence in the dispute shall wait until BEREC has submitted its comments before taking measures to settle the dispute. Procedural time limits shall remain suspended until such comments have been submitted. This provision is without prejudice to the regulatory authority's option of taking immediate measures if necessary.

## **Telecommunications Advisory Board**

**Article 131.** (1) To advise the Federal Minister of Transport, Innovation and Technology and the regulatory authority, in particular in respect of fundamental telecommunications issues and their effects on the development of competition, on Austria as an economic location and on the needs of the consumers as well as further development of universal service a Telecommunications Advisory Board shall be established at the Federal Minister of Transport, Innovation and Technology.

(2) The Telecommunications Advisory Board shall comprise a maximum of ten members who are appointed by the Federal Minister of Transport, Innovation and Technology for six years. Only persons who have adequate experience in economics, business administration, social politics, technology and law as well as in the field of consumer protection may be appointed as members. Each discipline referred to shall be covered by at least one member.

(3) Members of the Telecommunications Advisory Board shall qualify for compensation of travel expenses.

(4) The Telecommunications Advisory Board shall elect a chairperson and a deputy from among its members to serve for a period of two years. Re-election shall be permitted.

(5) The Telecommunications Advisory Board shall define its rules of procedure. The regulatory authority shall be in charge of the management. The meetings shall be closed to the public.

(6) The Telecommunications Advisory Board may commission studies for scientific presentation of the subjects to be covered.

(7) The Telecommunications Advisory Board shall be financed by the regulatory authority.

## **Section 15**

## **Transitional and final provisions**

### **Expiry of legal provisions**

**Article 132.** (1) With the entry into force of this Federal Act, the Telecommunications Act [Telekommunikationsgesetz], Federal Law Gazette I No. 100/1997 (TKG), as last amended by the Federal Act Federal Law Gazette I No. 134/2002, as well as the Act on Telecommunications Routes [Telekommunikationswegegesetz], Federal Law Gazette No. 435/1929, as last amended by the Federal Act Federal Law Gazette I No. 100/1997, shall become ineffective.

(2) With the entry into force of Federal Law Gazette I No. 102/2011, the following legal provisions shall become ineffective:

1. Ordinance of the Federal Chancellor on Announcements of Rundfunk und Telekom Regulierungs-GmbH in Federal Law Gazette II, Federal Law Gazette II No. 38/2005;
2. Ordinance of the Austrian Federal Minister of Science, Transport and Arts defining a pricing system for specific telecommunications services [Telekom-Tarifgestaltungsverordnung], Federal Law Gazette No. 650/1996;
3. Ordinance of the Austrian Federal Minister of Public Economy and Transport defining framework guidelines for the issuance of general terms and conditions for the sharing of infrastructure and for the provision of reserved telecommunications services [Rahmenrichtlinienverordnung], Federal Law Gazette No. 756/1994;
4. Ordinance of the Austrian Federal Minister of Science and Transport specifying requirements with regard to interconnection [Zusammenschaltungsverordnung], Federal Law Gazette II No. 14/1998;
5. Ordinance of the Austrian Federal Minister of Science, Transport and Arts allocating frequencies and frequency bands for harmonised European radio systems [Frequenzwidmungsverordnung], Federal Law Gazette No. 313/1996;
6. Ordinance of the Austrian Federal Minister of Public Economy and Transport on the Enforcement of the Telecommunications Act 1993 with regard to the Telecommunications Authorities in the Field of Broadcasting [1. Durchführungsverordnung zum Fernmeldegesetz 1993, 1. DVO-FG], Federal Law Gazette No. 230/1994;
7. Ordinance of the Federal Minister of Science and Transport on the Declaration of Conformity with Technical Standards by the Manufacturers of Terminal Equipment [Endgeräte-Herstellererklärungsverordnung], Federal Law Gazette II No. 122/1997;
8. Ordinance of the Federal Minister of Public Economy and Transport on Conformity Assessment Procedures in the Approval of Terminal Equipment [Konformitätsbewertungsverordnung], Federal Law Gazette No. 791/1994.

### **Transitional provisions**

**Article 133.** (1) Administrative procedures under Section 2 pending at the time when Federal Law Gazette I No. 102/2011 enters into force are to be completed in accordance with the material and procedural laws (including competences) which were applicable prior to the entry into force of Federal Law Gazette Federal Law Gazette I No. 102/2011.

(2) Procedures under Section 2 for which a final official decision was issued and overturned by a ruling of the Austrian Constitutional or Administrative Court on the basis of the laws applicable prior to the entry into force of Federal Law Gazette I No. 102/2011 are to be completed in accordance with the material law and procedures which were applicable at the time when the final official decision was issued.

(2a) Article 71 Par. 3, last sentence, shall not be applied to procedures pursuant to Article 71 Par. 3 pending at the time when Federal Law Gazette I No. 102/2011 goes into force.

(3) Authorisations and approvals existing at the time of entry into force of this Federal Act shall remain valid. Last sentence removed (Federal Law Gazette I No. 102/2011).

(4) Notifications pursuant to Article 13 TKG and licences pursuant to Article 14 TKG existing at the time of entry into force of this Federal Act shall expire upon the entry into force of this Federal Act unless otherwise provided in Par. 6. The confirmation of the notification submitted and the licence document pursuant to the TKG shall be considered as certificates within the meaning of Article 15 Par. 3.

(5) If at the time of entry into force of this Federal Act communications services are provided which so far have not been subject to notification but shall be notified under this Federal Act in the future, notification pursuant to Article 15 Par. 1 shall be made without delay.

(6) Rights and obligations established in the course of a selection procedure based on competition or comparison shall remain unaffected; this shall apply, in particular, to the obligation of “national roaming“ on the occasion of the award procedure relating to UMTS/IMT-2000. The rights and obligations shall be considered as incidental provisions within the meaning of Article 55 Par. 10. Rights and obligations resulting from the licensing of frequencies to licence holders shall also remain unaffected.

(7) removed (Federal Law Gazette I No. 102/2011)

(8) removed (Federal Law Gazette I No. 102/2011)

(9) Within a maximum of one year after entry into force, the Federal Minister of Transport, Innovation and Technology shall review whether universal services are provided under competitive conditions on the market; in all cases, this review is to be carried out every five years.

(10) The Numbering Ordinance [Nummerierungsverordnung], Federal Law Gazette II No. 416/1997, the Ordinance on the Definition of Access Numbers for Emergency Services [Verordnung über die Festlegung von Zugangskennzahlen für Notrufdienste], Federal Law Gazette II No. 278/1999, and the Fees Ordinance [Entgeltverordnung], Federal Law Gazette II No. 158/1999, shall remain in force until the corresponding ordinances are issued on the basis of this Federal Act.

(11) The Telecommunications Markets Ordinance 2008 (TKMV 2008), Federal Law Gazette II No. 505/2008 as last amended by Federal Law Gazette II No. 468/2009, shall remain in force until the first procedures pursuant to Articles 36 and 37 as amended by Federal Law Gazette I No. 102/2011 have been completed with regard to the markets to be reviewed under those provisions.

(12) With the exception of coordination procedures pursuant to Article 129, procedures pursuant to Section 5 pending before KommAustria at the time when Federal Law Gazette I No. 102/2011 enters into force are to be completed by KommAustria by applying the procedural and material provisions of this Federal Act as amended by Federal Law Gazette I No. 50/2010 as well as the Broadcasting Markets Definition Ordinance 2009 (RFMVO 2009) published in the “Amtsblatt zur Wiener Zeitung” on 30 April 2009. The same shall apply to the Federal Communications Senate [Bundeskommunikationssenat] in cases where an appeal has been submitted against an official KommAustria decision in accordance with the previous sentence, or where the Austrian Constitutional Court or Administrative Court overturns an official decision issued by the Federal Communications Senate in such a procedure and the procedure is re-initiated before the Federal Communications Senate.

(13) The Number Portability Ordinance [Nummernübertragungsverordnung, NÜV], Federal Law Gazette II No. 513/2003, shall become ineffective on 1 March 2012.

(14) Article 54 Par. 1a to 1d shall apply only to usage rights granted after 25 May 2011.

## **References**

**Article 134.** References in this Federal Act to other federal laws or ordinances shall be considered as references to the respective law or ordinance as amended.

## **Publications**

**Article 135.** (1) Ordinances and promulgations by the Federal Minister of Transport, Innovation and Technology may contain references to documents with technical subject matters, in particular measurement and test methods, plans and graphs, which are of interest only to a limited number of persons and shall be promulgated by making them available for inspection during office hours.

(2) Ordinances of the regulatory authority are to be published in Federal Law Gazette II.

(3) Information to be published by the regulatory authority according to the provisions of this Federal Act shall be included, in any case, in the regulatory authority’s web site.

## **Enforcement**

**Article 136.** (1) The Federal Minister of Transport, Innovation and Technology shall be in charge of enforcing this Federal Act unless otherwise provided in Par. 2 to 8.

(2) The Federal Chancellor in agreement with the Federal Minister of Transport, Innovation and Technology shall be in charge of enforcing Article 16 Par. 4.

(3) The Federal Chancellor shall be in charge of enforcing Articles 16a Par. 10, 82 Par. 6 and 95a.

(4) The Federal Minister of Transport, Innovation and Technology in agreement with the Federal Minister of Finance shall be in charge of enforcing Article 82 Par. 3 and Article 118 Par. 7.

(5) The Federal Minister of Transport, Innovation and Technology in agreement with the Federal Minister of the Interior, the Federal Minister of Justice and the Federal Minister of Finance shall be in charge of enforcing Article 94 Par. 1.

(6) The Federal Minister of Justice in agreement with the Federal Minister of Transport, Innovation and Technology and the Federal Minister of Finance shall be in charge of enforcing Article 94 (2).

(7) The Federal Minister of Transport, Innovation and Technology in agreement with the Federal Minister of the Interior and the Federal Minister of Justice shall be in charge of enforcing Article 94 Par. 3.

(8) The Federal Minister of Transport, Innovation and Technology in agreement with the Federal Minister of the Interior and the Federal Minister of Justice shall be in charge of enforcing Article 94 Par. 4.

(9) The Federal Minister of Justice shall be in charge of enforcing Article 108.

(10) The Federal Minister of the Interior shall be in charge of enforcing Article 114 Par. 1.

### **Gender equality in language**

**Article 136a.** All designations of positions as well as expressions relating to persons used in this Federal Act are to be understood as gender-neutral.

### **Entry into effect**

**Article 137.** Articles 1, 37, 107 and 109 as amended by Federal Law Gazette I No. 133/2005 shall enter into force as of 1 March 2006.

(2) Articles 34, 37 and 91 as amended by Federal Law Gazette I No. 50/2010 shall enter into force as of 1 October 2010.

(3) Article 107 Par. 1a as well as Article 109 Par. 3 and Par. 4 as amended by Federal Law Gazette I No. 23/2011 shall enter into effect as of TT Mmmmm YYYY.

(4) Articles 94 Par. 1 and 102a Par. 1 as amended by Federal Law Gazette I No. 27/2011 shall enter into force as of 1 April 2012.

(5) Articles 25, 25b, 25d, 70, 71 Par. 1a, 95 Par. 3 No. 3 and 100 as amended by Federal Law Gazette I No. 102/2011 shall enter into force three months after the announcement of Federal Law Gazette I No. 102/2011.

(6) Article 29 Par. 2 as amended by Federal Law Gazette I No. 102/2011 shall enter into effect six months after the announcement of Federal Law Gazette I No. 102/2011.

## **Title II**

### **Amendment to the KommAustria Act**

[not included in this document; see the KommAustria Act (KOG) available on this web site]

## **Title III**

### **Amendment to the Cooperation of Consumer Protection Authorities Act**

[not included in this document]

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