

Guidelines for VoIP Service Providers

Austrian Regulatory Authority for Broadcasting
and Telecommunications (RTR-GmbH)
April 2005

TELEKOM AUSTRIA's POSITION

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1. INTRODUCTORY REMARKS

As stated in our position paper of August 16, 2004, it is Telekom Austria's opinion that it is not only necessary for the responsible political and regulatory decision-makers to discuss the targeted regulatory, economic and legal goals, but to legally evaluate VoIP in such a manner that the chances and risks of these services can be justified against the background of new network technologies and topologies and the technical development as a whole.

The classification of VoIP services as focused on by the RTR in the "*Guidelines*"¹ should thus be evaluated against the background of technological transformation. Focus should not only be placed on evaluating or distinguishing individual business models of VoIP. Rather the subject of "VoIP" should be analyzed in terms of the performance of the market participants with regard to information policy and the social and economic spectrum as a whole. Thus, according to Telekom Austria, in the course of this second national consultation at the latest it would have made sense to clearly stipulate the regulatory goals targeted and to classify them. Ideally, in official language, to exclude possible discrepancies in interpretation.

2. CLASSIFICATION OF VOIP BY RTR-GmbH

In the consultation document currently under review the classification of VoIP services continues to depend on the use of a gateway. From its approach, this distinction is derived from a transition to the PSTN, which is based on TDM technology, and thus cannot be portrayed as being technology-neutral. Once again, Telekom Austria would like to point out that a classification of this nature is problematic, as a legal classification of VoIP, which is only based on technological realities or differences to PSTN technology, contradicts the fundamental idea of the Guidelines on Technology Neutrality². They are not

¹ Public consultation by RTR-GmbH on the subject of "Guidelines for VoIP Service Providers" of April 25, 2005, available in German under www.rtr.at

² The authority had already explicitly recognized the basic principle of technology neutrality as a criterion of the European legal framework in July of the previous year, in the introduction to its Consultation of July 6, 2004 (VORLÄUFIGE REGULATORISCHE EINSTUFUNG VON ÖFFENTLICH ANGEBOTENEN VOICE OVER IP DIENSTEN IN ÖSTERREICH - RUNDFUNK UND TELEKOM REGULIERUNGS-GMBH JULI 2004): "In principle, in the opinion of RTR-GmbH, it can be stated that the new European legal framework for communication networks and services and the TKG 2003 which builds upon it are technology-neutral. This means that operating telephone services is not bound to a particular technology (e.g. circuit switched TDM technology in PSTN)."

appropriate for doing justice to the far-reaching changes that go hand in hand with the technological transformation process. Classification in the current form still does not provide reliable legal framework conditions, which are imperative for equal competitive chances between traditional telephone services and VoIP services.

It is Telekom Austria's view that the "Guidelines for VoIP Service Providers" presented by the RTR are an attempt to subject VoIP to the TKG regime in order to apply the current law. This is problematical due to the fact that despite its principle technology neutrality, the TKG 2003 in some sections refers to features of intrinsic PSTN technology³. In addition, there is considerable insecurity in an attempt such as this, particularly as the intrinsic features of VoIP services - at least at this point in time - cannot meet the requirements referred to in Para 3 Z 16 TKG 2003 (i.e access to emergency services). However, even a solution to this factual problem - which is the only one mentioned by the RTR - might not eliminate legal insecurity. This is due to the fact that further legal consequences of the classification undertaken in the consultation document under review were not analyzed.

The description of the current classification, which was reduced from three⁴ to two classes by the RTR⁵, is also problematical. This is due to the fact that the regulator has not communicated the economic and legal framework conditions that should be created with the publicized classification, or stated what goals should be realized. This must be criticized as from the regulatory or legal view any additional assessment and evaluation⁶ of a VoIP offer, that subsequently follows (but is currently not taken), should consequently be based on them.

Thus, the consultation falls short, as the entire market situation and regulatory goals regarding VoIP should have been discussed. The exclusive concentration on classification of services is not sufficient to provide coherent treatment of VoIP.

³ Compare i.e. Para 19, 20, 24, 94, 98, 100, 104, 105, 106, 107 TKG 2003

⁴ Compare Consultation of July 6, 2004 (VORLÄUFIGE REGULATORISCHE EINSTUFUNG VON ÖFFENTLICH ANGEBOTENEN VOICE OVER IP DIENSTEN IN ÖSTERREICH - RUNDFUNK UND TELEKOM REGULIERUNGS-GMBH JULI 2004)

⁵ Guidelines for VoIP Service Providers - Consultation Document

⁶ In the introduction to the consultation document the RTR points out: "This document only deals with classification of services and not with market definitions and analyses."

The fact that the Austrian Regulatory Authority makes no market assessment in the document under review increases corporate and legal insecurity in this connection. This must be judged critically, particularly with regard to future investments, further chances for development and the profitability of an entire branch.

3. VOIP AS A COMPETITIVE COMPONENT

It is explicitly stated in various parts of the consultation paper that the classification as PATS in no way attempts to anticipate the classification of VoIP services under a particular market or prejudice a possible decision by the Telekom Control Commission. Nevertheless, in the introduction the regulator already refers to *"providers with significant market power"* (pg. 2).

In Telekom Austria's view, this approach – which is clearly predefined, although not explained further – evaluating VoIP's competitiveness, is problematical. On page 2 of the document possible ex ante regulation is noted: *"(...) there are regulations concerning market definition and market analysis that might lead to ex-ante obligations for providers with significant market power (SMP) in one or more of the corresponding markets"*.

Therefore, a steering process based on the instruments of competition law is already excluded in advance. An approach of this kind does not only contradict the special competitive situation for VoIP service providers, but also the recommendation by the Commission of February 11, 2003 on relevant product and service markets of the electronic communications sector, which stresses the primacy of general competition law. Overall, the debate should not be conducted separately from the development in Europe or from market realities – particularly due to the possibility of offering VoIP services extraterritorially. An organized and harmonized legal area that transcends national borders is thus imperative.

At this point Telekom Austria would like to expressly point out the distinctiveness of the competitive situation of VoIP services. Thus, in terms of competition the principal question of market entry barriers for new VoIP service providers can already be satisfactorily answered with reference to the numerous VoIP offers

predominating internationally and nationally and which are characterized by various forms of network access.⁷

Finally, on the level of physical network access, potential market access barriers are also being counteracted through existing access regulation in the form of unbundling of subscriber access lines (full, partial unbundling or line sharing), as well as through bit stream access, while competition prevails on the level of IP connectivity due to numerous Internet service providers.

As a result of the existing wholesale offering, discrimination-free access of other ISPs to the end-customer is assured. Last but not least, unbundling also contributes *"to establishing competition that is increasingly marked by sustainability"*, as is confirmed in the Unbundling Report by the Austrian Regulatory Authority. In the report RTR refers⁸ to a *"steep growth curve"* and emphasizes that unbundling is already used by many companies⁹. Further development – supported by the EU Commission – is in the direction of facilities-based competition. Alternative broadband technologies to fixed line broadband should be considered to an increasing extent. Therefore, regulatory necessity will also be reduced for broadband access on the wholesale level.

In conclusion, it can be said that the approach chosen by RTR-GmbH differs from the EU guidelines with regard to market recommendation and TKMVO. From the point of view of the customer, it can be noted that classification primarily concerns the provider, while it takes too little consideration of the user. It is not apparent to the customer, which service he/she is using and in which legal and regulatory environment the service is being provided.

At this point Telekom Austria underlines the fact that irrespective of categorizing or classifying VoIP services, potential chances can only be exploited when the

⁷ Such as in Austria: Inode (iTalk VoIP private), Intertel (intertel VoIP), UTA (*UTA Business Phone IP*), Comquest – or international: Skype (skype.com), Freshtel (freshtel.net), SIPphone (sipphone.com), nikotel (nikotel.de), sipgate (sipgate.de), freenet, 1&1 Internet (*einsundeins.com*), 1XNET GmbH (*1xnet.de*), Greennet (*greennet.de*), YIP (*yipgermany.com*)

Other international: International AT&T (*Vantage*), Verizon (*VoiceWing*), British Telecom (*Broadband Voice*), Vonage, Swiscom, Time Warner Cable

⁸ Unbundling. Status Report 2005

⁹ In its 10th implementation report the European Commission also points out the positive development of unbundling in Austria.

risks – for network operators as well as for consumers - are also duly recognized and resolutely met.

In any case, it must be assured that national or European providers or operators investing in infrastructure measures will not be disadvantaged. With regard to equal opportunities for national and foreign providers it should be noted that classification and above all the related consequences of classification will not be enforceable, if a gateway is not used in Austria.

If one follows the RTR's categorization, equalization of services means absolute fulfillment of the legal requirements for public telephone services, which can primarily be understood as a form of consumer protection. For Telekom Austria, however, the impression one gets from the RTR's very superficial evaluation in the consultation document is that possible legal consequences were not dealt with.¹⁰ After analysis of the document one could derive the false impression that rights based on classification (e.g. allocation of numbers) would be preceded by legal obligations (e.g. emergency calls) that also result.¹¹ This conclusion is incorrect. For this reason, primarily it should be the task of the regulator to assist in making the legal framework effective without ambiguous interpretation, or to strive to achieve improvement. Thus, for instance, a first rational step would be to make the allocation of telephone numbers depend on the fulfillment of legal obligations in advance, to avoid having to react retroactively in various tedious procedures.

4. CONCLUSIONS

As mentioned at the beginning of this position paper, in the consultation under review, the competitive goal of evaluating VoIP beyond classification was not conducted. Telekom Austria already criticized this on the occasion of the first consultation on VoIP by the RTR in 2004.

Particularly against the background of technological transformation, a sound legal and regulatory possibility must be found. It should allow the innovative power of the national telecommunications industry to be strengthened and the

¹⁰ probably also under the obvious problem areas of technology neutrality in the TKG 2003;

¹¹ e.g. by referring to a working group on emergency call problems;

interests of the population to be safeguarded through transparent information, security and the biggest possible advantages with regard to choice, price and quality. At the same time, this should not impede equal competition between traditional telephone services and VoIP services.

Overall, the financial feasibility of the public telephone network must still be guaranteed in the general interest. Operators of voice services in competition with PATS that do not fulfill services or obligations to the same extent as Telekom Austria should thus contribute.

A prerequisite for this is not only an economic climate that provides room for technological achievements that are already successfully deployed, but also one that enables research and development in the increasingly convergent information and technology sector, whose solutions satisfy the demands of quality and fault tolerance or data security.

The EU legal framework is subject to the demands of the principle of proportionality and the precedence of general competition law. These requirements should also be observed in the Internet sector.

The basic requirements for investment and planning security are fair and calculable legal framework conditions. This is not provided by the classification currently under review.