

Recent developments in Information Technology and Telecommunications Law in Austria

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Subjects related to IT and Telecommunications have within the past three years gained importance in the legal practice in Austria. With many issues still being unsolved and subject to ongoing consolidation, the telecom sector remains a major playground for the legal services industry.

The further convergence goes ahead, the more difficult it becomes to separate the subjects Information Technology, internet and Telecommunications from each other. To give but a brief insight into current developments in Austria, we therefore “cherry-picked” some of the major events which occurred in these fields during the last months.

IT-Law

1. General

Formerly, IT-Law was seen as a specialised legal field for software-issues and intellectual property disputes. Today, IT-Law has found its entry into most areas of law, from data protection to tax law, from administration law to criminal law, leaving its footprints throughout the legal landscape.

Until now, many questions arising from technical applications have remained unresolved:

- How will international tax and duties regulation deal with global e-commerce;
- Where does VAT accrue,
- How will intellectual property be protected in future,
- How will administrative authorities cope with IT-based communication with citizens,
- How to deal with cyber crime?

IT-related topics partly are infiltrating existing regulation and partly create demand for new legal concepts.

Legislators and legal consultants around the world have to cope with technical applications which do not necessarily fit into our existing legal structures.

One of the very first steps to provide for a stable legal framework for new IT developments has been the creation of a secure commercial environment in the internet; issues currently under discussion are, amongst others, e-signatures, domain name disputes and questions of liability for hyperlinks.

2. Electronic signatures

The Austrian legislator has undertaken major efforts to create the basic environment for e-commerce solutions and to comply with existing and upcoming EU-legislation by enacting the Austrian Federal Electronic Signature Act (Signature Act, or SigG) which entered into force on 1 January 2000. Telekom-Control Commission, the regulatory authority for the Austrian telecommunications market, is responsible for supervisory activities under this new law.

The Signature Act aims at converting the obligations set forth in the EU-Signature Directive into national law. The Signature Act follows a neutral approach to technology, demanding high security standards from providers of qualified certificates. Generally, the provision of signature services is supervised by the Telekom Control Commission. The Act introduced various security requirements

for different kinds of electronic signatures, with the “secure” electronic signature being the most advanced in terms of security. “Secure” electronic signatures may only be issued by licensed certificate providers, which may be held liable for the correctness of the issued certificate.

Responding to new technical requirements, the Signature Act established a new type of expression of will which is considered legally binding when provided with a secure signature. An electronic signature is considered secure under the following conditions:

- if it is allocated solely to the signatory,
- if it identifies the signatory,
- if its creation is exclusively controlled by the signatory,
- if any later change of the transferred data is identifiable and
- if it is backed by a qualified certificate.

Qualified certificates may only be issued by approved certification institutions that must comply with certain standards when issuing certificates (i.e., they must check the signatory’s identity before issuing a certificate for a secure signature).

Such secure electronic signatures fulfill the legal requirement of a signature and documents, thus signed meet the requirements of a document in one’s own handwriting according to sec 886 Austrian Civil Code (ABGB) and are deemed to provide evidence before civil courts.

Internet topics

1. Domain names - landmark decision on domain name disputes

On 17 August 2000, the Austrian Supreme Court issued a landmark decision in a domain name dispute:

Since 1998, the publisher of the business magazine "Gewinn" had held the rights of the domain "gewinn.co.at" and of the trademark "Gewinn". "Gewinn" intended to register the domain name "gewinn.at" to promote the magazine via the internet. However, "gewinn.at" was already registered for another company offering prize competitions. The publisher therefore sued for forbearance and transfer of the domain "gewinn.at" to his company. The Supreme Court had to deal with two issues involved in the case. The main issue was to decide whether the internet user could potentially confuse "gewinn.at" and "gewinn.co.at" as well as the sign "Gewinn". The Court replied to this question in the negative for two reasons.

The Court referred to the nature of the domain name system, the possibility of registering a domain name only once and the awareness of internet users that each letter of a domain name is significant to reach a specific web site. Taking into account this specificity and the fact that the business areas of the companies involved were different, the Court concluded that internet users could not potentially mistake the – albeit identical – domain names "gewinn.co.at" and "gewinn.at".

The second issue involved potential domain grabbing by the appellant. Since the First Instance Court had not decided whether the appellant had registered "gewinn.at" merely for the purpose of impeding the magazine publisher from the registration of this domain name, the Supreme Court referred the case back to the first instance for re-evaluation.

2. Liability for hyperlinks

In a controversial decision of 19 December 2000 (4 Ob 225/00 t), the Austrian Supreme Court held that the operator of a web site providing links to web sites of other operators is to be held responsible as joint offender for violations of law on the web site the link is leading to.

The case concerned a law suit by an Austrian newspaper against a recruitment company which operated a web site with a link to another web site operated by an undertaking active in the advertising business. This undertaking copied contents of the plaintiff newspaper on its

web site, thereby violating the Austrian Unfair Competition Act.

The court held that a person establishing a link on a web site is responsible for the content on this web site if users regard such link as extension

This 2001 update gives a brief insight into recent developments in Austrian IT and Telecom regulations and jurisdiction. The authors are cited by Euromoney's Expertguides as telecommunication law experts in Austria and have been monitoring the liberalisation process from the very beginning.

of its own service portfolio.

The decision was criticised since it is allegedly based on a fundamental misunderstanding of the functioning of the World Wide Web. Against the court's opinion, it is questionable whether the average user of the internet identifies a link found on a specific web site as an integral part of the services offered on such site.

Applying this ruling, every web site operator providing links to other sites would in fact have to examine whether such sites violate Austrian competition law in order to exclude the risk to be successfully sued by a third person.

Telecommunications law

Since the full liberalisation as of 1 January 1998, the Austrian telecommunications landscape has undergone substantial changes. Upcoming challenges are the global consolidation process in telecoms, the future of 3G Systems and further steps towards convergence.

The deregulation of telecom markets is an issue that will continue to occupy all of Europe in the years to come. Regulatory

authorities have been established throughout the European Union, not only because of the general European legal environment and the requirements and other activities of the EU. Their purpose is also to ensure free and fair competition in the national telecommunication markets.

1. New structure for the Austrian Regulatory Authority

For this reason, Telekom-Control GmbH, a non profit organisation, and the Telekom-Control Commission, an independent authority with regulatory powers, were established at the end of 1997.

Telekom-Control GmbH was established under the Austrian Telecommunications Act (TKG) of November 1997 as the regulator for the Austrian telecommunications market; Telekom-Control Commission was established as an independent panel authority for deciding inter alia, on issues with a civil rights component Telekom-Control GmbH. Since 1 January 2000, Telekom Control GmbH has also been the supervisory authority for electronic signatures under the Electronic Signatures Act.

After three and a half years of regulating the Austrian telecommunications sector, Telekom-Control GmbH formally ceased to exist on 31 March 2001 in accordance with sec 5 para 2 of the KommAustria Act (KOG) and was incorporated in the Austrian Regulatory Authority for Telecommunications and Broadcasting (RTR GmbH), established under sec 1 of the same Act.

As of 1 April 2001, RTR assumed previous responsibilities of Telekom-Control GmbH in the telecommunications sector, including Telekom-Control's function as administrative body to Telekom-Control Commission. In addition, RTR will also serve as the operating arm of the new regulatory authority for broadcasting, also known as the Austrian Communications Authority ("KommAustria").

Activities of Telekom-Control GmbH include the supervision of the Austrian telecommunications market, the Administration of numbering plans, decisions in cases of arbitration, only to name a few.

The regulatory duties set forth in the Telecommunications Act of 1997 are

carried out by the Telekom-Control Commission and RTR-GmbH. In this context, these authorities are subject to Austria's General Administrative Procedures Act, thus decisions are made by official decree. By law, decisions of fundamental importance have to be published.

2. Recent and current developments

a) Unbundled access to the local loop

On 12 March 2001, the Austrian regulator Telecom-Control Commission issued a series of orders (decisions Z 12/00, Z 14/00 and Z 15/00) regarding access of alternative network operators and service providers to the unbundled local loop of the incumbent Telekom Austria AG.

Already with decisions of 7 February 2000, 9 May 2000 and 14 July 2000, the regulator had established the framework for access to the local loop. The term of these decisions expired on 30 September 2000.

In the recent decisions, the regulator addressed the following main issues:

- The regulator obliged Telekom Austria to grant alternative operators access not

only to the entire, but also to parts of unbundled subscriber lines ("sub-loop unbundling"). It is thus now possible for the alternative operator to access the subscriber line not only at the Main Distribution Frame, but also, for instance, at the in-house distribution point.

- The new decisions further provide for space limits in the assignment of collocation room from Telekom Austria to alternative provider in order to ensure efficient use of the available room capacity.
- Finally, monthly charges for access to the local loop or the sub-loop were reduced from ATS 170 (EUR 12,35) to ATS 160 (EUR 11,63) until 31 December 2001 and ATS 150 (EUR 10,90) from 1 January 2002.

The term of the decisions is indefinite, provisions on charges are, however, limited until 30 September 2002.

b) Interconnection fees

On 22 June 2001, new interconnection tariffs (which must be cost-orientated)

were fixed by the regulator. In accordance with the general line of its previous rulings, the Telekom Control Commission reduced interconnection fees for fixed-line traffic by an average 10 per cent, retroactively as per 30 April 2001, which are valid until 30 June 2002.

3. Outlook

After three and a half years of supporting and enabling competition, the regulator's task is expected to undergo certain changes. Not only the creation of competition will be on its agenda, but also maintain the delicate balance between existing players in a consolidating market. The so-called new economy must face the challenges of a real economy. Significant investments into infrastructure will have to show their potential to reach break-even numbers in future. Thus, the regulator's role is to handle this process, not only with regard to creation of competition, but also with the aim of maintaining it. ■

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