

EU Law and Access to Court: The Experience of Austria in the Telecommunications Sector

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This article explores how Austrian administrative law rules on standing have been influenced by European Union law. Firstly, the EU law requirements concerning the right to have access to a court will be briefly explained. Secondly, the Austrian administrative procedural rules on standing will be presented. Finally, the case law of the Verwaltungsgerichtshof in the telecommunications sector will be analysed as to whether it complies with the EU law requirements.

1. JUDICIAL PROTECTION IN THE EUROPEAN UNION

1.1. NATIONAL PROCEDURAL AUTONOMY AND THE PRINCIPLES OF EQUIVALENCE AND EFFECTIVENESS

In the absence of a general European Union ((EU) or hereinafter ‘Union’) competence for the harmonization of national procedural rules,¹ it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing the actions intended to enforce the rights that individuals derive from EU law. The EU is thus based upon a decentralized system of enforcement, in which EU law is mainly applied by national authorities and adjudicated upon by national courts according to the rules of national procedural law. This is referred to as the principle of national procedural autonomy.²

However, EU law can only be effective if individuals can assert their rights before national courts. This means, first of all, that Member States are under an obligation to designate the competent court to which individuals can turn in order to protect their rights under EU law.³

Moreover, two important principles, set out by the European Court of Justice (ECJ), serve to limit the principle of national procedural autonomy.⁴

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¹ See also Treaty of Amsterdam, Declaration 43, relating to the Protocol on the application of the principles of subsidiarity and proportionality [1997], OJ C 340.

² Joined Cases 205-215/82, *Deutsche Milchkontor GmbH and others v. Federal Republic of Germany* [1983], ECR 2633; Case C-321/96, *Edilizia Industriale Siderurgica Srl (Edis) v. Ministero delle Finanze* [1998], ECR I-4951.

³ K. Lenaerts, A. Arts & I. Maselis, *Procedural Law of the European Union*, 2nd edn (London, 2006).

⁴ In general on the ECJ’s approach to domestic remedies, see R. Craufurd Smith, ‘Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection’, in *The Evolution of EU Law*, ed. P. Craig & G. de Búrca (Oxford, 1999), 287, for an attempt to explain the rationale underlying the ECJ’s case law on domestic remedies; R. Caranta,

According to the *principle of equivalence*, the procedural rules governing EU law claims may not be less favourable than those governing similar domestic actions.⁵ The national court thus must examine whether the procedural rules of a claim based on EU law and a claim based on national law are similar.⁶ Thereby, it has to consider whether the actions concerned are similar as regards their purpose, cause of action, and essential characteristics.⁷ It has to establish objectively, in the abstract, whether the rules at issue are similar, taking into account the role played by those rules in the procedure as a whole, the conduct of that procedure, and any special features of those rules.⁸

The other principle is the *principle of effectiveness*, pursuant to which national procedural rules may not render virtually impossible or excessively difficult the exercise of rights conferred by EU law.⁹ In this context, it is necessary to take into consideration the principles that lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty, and the proper conduct of the proceedings.¹⁰ Both principles are of particular importance with regard to the right to have access to courts.

1.2. NATIONAL RULES ON STANDING AND EU LAW

According to Article 6(3) of the Treaty on the European Union, the rights granted by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) constitute general principles of the Union's law. The ECHR, in turn, considers the right to have access to a court as a fundamental right.¹¹ Moreover, the Charter of Fundamental Rights of the European Union, having the same legal value as the treaties themselves,¹² guarantees in Article 47(1) everybody the right to have an effective judicial remedy.

'Judicial Protection against Member States: A New *Ius Commune* Takes Shape', *CML Rev* (1997): 703; S. Prechal, 'EC Requirements for an Effective Remedy', in *Remedies for Breach of EC Law*, ed. J. Lonbay & A. Biondi (Chichester, 1997), 3; B. Hofstötter, *Non-Compliance of National Courts – Remedies in European Community Law and Beyond* (The Hague, 2005), 9 et seq.; M. Accetto & S. Zleptnig, 'The Principle of Effectiveness: Rethinking Its Role in Community Law', *EPL* (2005): 375; A. Ward, *Judicial Review and the Rights of Private Parties in EC Law* (Oxford, 2007), 86 et seq.; J. Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems', *ELJ* (2003): 599; A. Arnulf, *The European Union and its Court of Justice* (Oxford, 2006), 267 et seq.; P. Craig, *EU Administrative Law* (Oxford, 2006), 789 et seq.

⁵ Case C-312/93, *Peterbroeck v. Belgian State* [1995], ECR I-4599, para. 12. The Court implies that it would have no problem if the procedural rules would give preferential treatment to EU law; see Case 98/86, *Criminal Proceedings v. Mathot* [1987], ECR 809, concerning requirements for packaging butter; Case C-11/92, *Gallaher* [1993], ECR I-3545 concerning minimum harmonization in the tobacco labelling; Case C-80/92, *Commission v. Belgium* [1994], ECR I-1019, concerning legislation applicable to radio-communications transmitters and receivers.

⁶ Case C-118/08, *Transportes Urbanos v. Servicios Generales*, OJ C 063, 13 Mar. 2010 P. 0004–0005 para. 35 with reference to Case C-78/98, *Preston and Others* [2000], ECR I-3201, para. 49.

⁷ Case C-78/98, *Preston and Others* [2000], ECR I-3201, para. 57.

⁸ *Ibid.*, paras 61–63.

⁹ See also for the first formulation: Case C-199/98, *San Giorgio* [1983], ECR 3595, para. 12. Later formulations also used 'practically impossible or excessively difficult'; see, e.g., recently Case C-63/08, *Virginie Ponti v. T-Comalux S.A.*, OJ C 312, 19 Dec. 2009 P. 0004–0005.

¹⁰ Case C-426/05, *Tele2 Telecommunication* [2008], ECR I-685, para. 55.

¹¹ See Art. 6 ECHR.

¹² See Art. 6(1) TEU.

By elevating the right granted in the Charter to treaty rank, the Treaty of Lisbon confirms the case law of the ECJ. Already in *Johnston*, the Court had held that the right to an effective judicial remedy reflects a general principle of law enshrined in the constitutional traditions of the Member States and *inter alia* Article 6 ECHR.¹³ This was later confirmed in a number of cases like *Heylens*,¹⁴ *Vlassopoulou*,¹⁵ *Kraus*,¹⁶ and, most recently, in *Unibet*¹⁷ and *Commission v. France*.¹⁸

More specifically with regard to the national rules on standing, the ECJ said in *Verholen* that national legislation may not undermine the right to effective judicial protection.¹⁹ Hence, although it is for national law to determine an individual's standing and legal interest in bringing proceedings, EU law requires that, whenever rights are conferred upon individuals, those individuals should have the opportunity to protect these rights before a national court. Thus, if national procedural rules on standing do not respect the principles of equivalence and/or effectiveness and the right to have an effective judicial protection, the national court has to set these rules aside.

2. JUDICIAL PROTECTION IN AUSTRIA

2.1. THE AUSTRIAN ADMINISTRATIVE COURT SYSTEM

The Austrian court system comprises only one administrative court, the *Verwaltungsgerichtshof* (VwGH). Even though there are a number of independent administrative bodies (the so-called *Unabhängige Verwaltungssenate*) that can be understood as a kind of first instance administrative judiciary in certain cases, this is not generally the case. In certain matters, the VwGH is the first court to decide. It is because of the VwGH's dominating influence in Austrian administrative law that its case law is analysed in this article.

The first stage of appeal against an administrative decision (*Bescheid*) is to the hierarchically higher authority. In case an independent administrative body is competent, this body will hear the case. Therefore, there are normally two administrative instances before an appeal before the VwGH can be lodged.²⁰

¹³ Case 222/84, *Johnston* [1986], ECR 1651, paras 18 and 19.

¹⁴ Case 222/86, *Heylens and Others* [1987], ECR 4097, para. 17.

¹⁵ Case C-340/89, *Vlassopoulou* [1991], ECR I-2357, para. 22.

¹⁶ Case C-19/92, *Kraus* [1993], ECR I-1663, para. 40.

¹⁷ Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern* [2007], ECR I-2271, para. 37.

¹⁸ Case C-389/05, *Commission v. France* [2008], ECR I-05337, para. 93.

¹⁹ Joined Cases C-87/90 to C-89/90, *Verholen and Others* [1991], ECR I-3757, para. 24. This was later confirmed in Case C-13/01, *Safalero Srl v. Prefetto di Genova* [2003], ECR I-8679, and Case C-174/02, *Streekgewest Westelijk Noord-Brabant* [2005], ECR I-85.

²⁰ There is an ongoing discussion on the introduction of a general administrative first instance system in order to ease the workload of the VwGH. See M. Thaler, 'Vom Wesen und Wert der Verwaltungsverfahrensgesetze', ZÖR 64 (2009): 433–459. In 2007, an expert group suggested the introduction of such a system. See Proposal of a Committee of State and Administrative Reform Experts in the Austrian Federal Chancellery (*Entwurf der Expertengruppe Staats- und Verwaltungsreform im Bundeskanzleramt vom 23. Juli 2007*); 94/ME XXIII. GP. Available in German under <www.parlament.gv.at/PG/DE/XXIII/ME/ME_00094/pmh.shtml> (website of the Austrian Parliament, last visited 11 Apr. 2010). The administrative courts of first instance would operate at the level of the Austrian states (*Länder*) and the

2.2. AUSTRIAN ADMINISTRATIVE PROCEDURAL LAW

As regards Austrian administrative procedural law, it is noteworthy that there is no single and uniform procedural law. The *Allgemeines Verwaltungsverfahrensgesetz* (AVG),²¹ however, plays a dominant role. It has to be applied by most administrative bodies, including the *Verwaltungsbehörden*, the *Unabhängige Verwaltungssenate*, and the VwGH.²² For all practical purposes, the focus of this article will lie on the AVG.

Standing requirements are regulated in section 8 AVG. This paragraph reads:

Persons who avail themselves of an activity of the authority or to whom the activity of the authority relates shall be interested parties and, in so far as they are interested by virtue of a legal entitlement or a legal interest, they shall be parties to the proceedings.²³

(Personen, die eine Tätigkeit der Behörde in Anspruch nehmen oder auf die sich die Tätigkeit der Behörde bezieht, sind Beteiligte und, insoweit sie an der VwGH vermöge eines Rechtsanspruches oder eines rechtlichen Interesses beteiligt sind, Parteien.)

Since the AVG distinguishes between interested parties and parties to the proceedings and grants the latter much more procedural rights,²⁴ the crucial question is whether a party can assert a legal entitlement or a legal interest. Decisive for being granted standing is whether the decision of an administrative body directly affects the legal position of a person.²⁵ In order to find out whether a party should have standing, the interpreting court first has to look at the specific administrative rules that governed the decision-making proceedings.²⁶ The problem that might arise here is that not every legal provision explicitly defines who should have standing. Secondly, should explicit provisions indeed be missing, the court has to draw a conclusion by way of interpretation of the specific provisions. It has to take into account the object and purpose of the respective law.²⁷ In the end, the decisive point is whether the interest of an individual person should be regarded as worthy of protection.

The VwGH has developed a rule for those cases. The rule says that, *in dubio*, the interest of individual persons should lead to *ius standi* whenever this interest is fundamentally involved in the decision-making procedure of an administrative authority and that

VwGH, on the federal level. So far the suggestions had not been realized. It is also worth mentioning that, since July 2008, a separate administrative court for asylum matters is in operation. It has exclusive competence in asylum matters; an appeal to the VwGH is not possible.

²¹ BGBl. 1991/51, as amended by BGBl. I 2004/10.

²² See section II of the Introductory Act to the Administrative Procedure Acts 2008 (*Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 2008*), BGBl. I 2008/87. Notable exceptions are tax law matters, which are governed by the Federal Tax Act [(*Bundesabgabenordnung*) BGBl. 1961/194, as amended by BGBl. I 2008/5] and the procedural rules governing civil service [Civil Service Law (*Beamtendienstrechtsgesetz*), BGBl. 1979/133].

²³ Translation from the judgment in Case C-426/05, *Tele2 Telecommunication GmbH v. Telekom-Control-Kommission* [2008], ECR I-685, para. 9.

²⁴ See s. 43(3) AVG.

²⁵ R. Thienel & E. Schulev-Steindl, *Verwaltungsverfahrenrecht*, 5th edn (Verlag Österreich, 2009), 92.

²⁶ VwGH 27 Apr. 1992, Zl. 91/19/0059.

²⁷ VwGH 18 Apr. 1994, Zl. 92/03/0259.

decision has a direct effect on the legal position of the person.²⁸ This principle is referred to as the *Schutznormtheorie*.²⁹

It is worth mentioning that not every activity of an administrative body automatically triggers *ius standi*. Provisions that only serve to protect the general public – thus, *not* an individual – do not trigger the right to have standing.

Crucially, the right to have access to an administrative court may not only result from Austrian law alone, but also from EU law. In such situations, Individuals need to obtain effective judicial protection for the rights conferred upon them by EU law.³⁰ National procedural rules, however, may restrict access to courts, for example, by applying narrower criteria, like the *Schutznorm*, which requires that the legal rule on which the applicant relies serves to protect his/her individual interest. In a situation where national procedural rules conflict with the requirement of effective judicial protection and/or the principles of effectiveness and equivalence, the national judge is called upon to disapply the national rule.

Theoretically, three constellations are possible. First, should EU law be broader than the *Schutznorm*, the national administrative court must, in application of the principle of effectiveness, hear the case and thereby disapply the relevant national provision.³¹ Second, if the scope of both provisions is essentially the same, there is no problem at all.³² Finally, if the national provision is broader than the one resulting from EU law, the principle of equivalence would demand the application of the national provision. The next section will analyse the VwGH's case law, which arose with regard to the first and second category of cases. It is not possible to refer to cases where the national provision is broader than EU law because, in those cases, the issue is generally not contentious.

3. THE CASE LAW OF THE VERWALTUNGSGERICHTSHOF WITH REGARD TO ACCESS TO COURT IN THE TELECOMMUNICATIONS SECTOR

Until 1 May 2010, the VwGH has passed some thirty-eight judgments in cases that dealt with standing requirements in an EU law context.³³ Most of the cases deal with

²⁸ See VWSlg 9151 A/176 and recently VwGH 25 Feb. 2004, Zl. 2002/03/0186: '*Nach der Rechtsprechung des Verwaltungsgerichtshofes, streitet – wenn eine Person ein Interesse an der Erfüllung einer Pflicht hat, das für die gesetzliche Festlegung der verpflichtenden Norm maßgebend war – im demokratischen Rechtsstaat eine Vermutung für ihre Befugnis zur Rechtsverfolgung*', para. 2.3. See also VwGH 25 Feb. 2004, 2002/03/0186.

²⁹ See W. Wessely, *Eckpunkte der Parteistellung* (Springer, 2008), 147; M. Pöschl et al., *Gleichheit vor dem Gesetz* (Springer, 2008), 808 et seq. For a detailed analysis of subjective public rights (*subjective-öffentliche Rechte*) in Austria, see E. Schulev-Steindl, *Subjektive Rechte: Eine rechtstheoretische und dogmatische Analyse am Beispiel des Verwaltungsrechts* (Springer, 2008). Compare also the identical German concept of the *Schutznormtheorie*: an individual may only assert the impairment of his/her individual rights by the state if the legal rule on which he/she relies serves to protect his/her individual interest. See J.H. Jans et al., *Europeanisation of Public Law* (Europa Law Publishing, 2007), 289 et seq. and F. Schoch, E. Schmidt-Abmann & R. Pietzner, *Verwaltungsgerichtsordnung*, 18th edn (C.H. Beck, 2009), Rn 94–97.

³⁰ E. Schulev-Steindl, 'Parteistellung im Verwaltungsverfahren, im Lichte des Gemeinschaftsrechts', in *Abgabenverfahrensrecht und Gemeinschaftsrecht*, ed. M. Holoubek (Linde, 2006), 89–114.

³¹ Case C-462/99, *Connect Austria Gesellschaft für Telekommunikation GmbH v. Telekom-Control-Kommission, and Mobilkom Austria AG* [2003], ECR I-5197, para. 41.

³² See VwGH 28 Feb. 2006, 2005/03/0232.

³³ This number results from a scan of the Austrian database for law (*Rechtsinformationssystem* at <www.ris.bka.gv.at>) in the subcategory of VwGH judgments. The database provides access to all judgments handed down by the Court from 1980 onwards. Therefore, all possible connections to EU law with regard to standing

environmental (eighteen cases) and telecommunications law (nine cases). Other issues involved *inter alia* IP law, transport, and electricity or immigration law. For the sake of consistency and comparability of results, this article will focus on telecommunications law only.

Essentially, there are two strings of case law. Crucially, both of them rely on preliminary references to the ECJ. The first concerns Directive 2002/21/EC (five cases),³⁴ and the second, Directive 97/13/EC (three cases),³⁵ which is no longer in force but lucidly illustrates the VwGH's approach. Finally, a single case concerns Directive 97/33/EC.³⁶

First, the question will be addressed as to how the VwGH rules upon cases where EU law grants broader access to courts than national law. Secondly, the consequences of equivalent provisions on EU and national level with regard to standing will be explored.

3.1. EU LAW GRANTS BROADER ACCESS TO COURTS THAN NATIONAL LAW

The leading case with regard to Directive 2002/21/EC (Framework Directive) is *Tele2*.³⁷ The Framework Directive states, in Article 4, that Member States shall ensure that there is an effective mechanism that grants any user or undertaking providing electronic communication networks and/or services that is *affected (betroffen)* by a decision of a national regulatory authority the right of appeal against the decision to an independent appellate body. Austria implemented the Framework Directive in the 2003 Law on Telecommunications (*Telekommunikationsgesetz (TKG)*).³⁸ The TKG provided, in section 37, that only undertakings in respect of which specific obligations are imposed, amended, and withdrawn by the regulatory authority in a market analysis procedure may have the status of parties to the proceedings. This right includes access to files. The TKG gave interested parties the right to comment on implementing measures and rights of end users.

The dispute concerned the Austrian regulatory authority – *Telekom-Control-Kommission (TCK)* – and *Tele2*, an Austrian undertaking providing electronic communications networks and services. *Tele2* requested the TCK to grant it party status and access to files pursuant to section 37 TKG. The TCK turned down this request because *Tele2* was not an undertaking in respect of which specific obligations were imposed, amended, or withdrawn. *Tele2* appealed because it was of the opinion that the TCK's decision in market analysis proceedings concerning a competitor of *Tele2* constituted a decision for the

requirements in administrative proceedings should be covered since Austria's accession to the Union in 1995. The search terms were '*parteistellung eu*', '*parteistellung europa*', '*schutznorm eu*', and '*schutznorm gemeinschaftsrecht*'.

³⁴ Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24 Apr. 2002, 33–50.

³⁵ Directive 97/13/EC of the European Parliament and of the Council of 10 Apr. 1997 on a common framework for general authorizations and individual licenses in the field of telecommunications services, OJ L 117, 7 May 1997, 15–27.

³⁶ Directive 97/33/EC of the European Parliament and of the Council of 30 Jun. 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), OJ L 199, 26 Jul. 1997, 32–52.

³⁷ VwGH 26 Mar. 2008, 2008 Mar. 0020.

³⁸ BGBl. I No. 70/2003.

purposes of Article 4 of the Framework Directive, which would mean that Tele2 should be given the right of party in the proceedings because it was an ‘affected party’. The VwGH decided to refer the matter to the ECJ for a preliminary ruling. It wanted to know whether the term ‘affected’ in the Framework Directive would cover a range of subject broader than the national implementing measure.

The ECJ held that Article 4 of the Framework Directive must be interpreted in the light of the principle of effective judicial protection.³⁹ Consequently, not only undertakings that are subject to a decision of a regulatory authority taken in the context of a market analysis procedure should be granted standing, but also those undertakings that are not themselves addressees of the decision, but whose rights are adversely affected. This could be a competitor like Tele2.⁴⁰

When resuming the proceedings, the VwGH held that the effectiveness of judicial protection would be seriously hampered if an affected party were not granted *ius standi*, especially because parties to the proceedings are granted a wide range of rights by the AVG, like the right to access files⁴¹ and the right to a hearing.⁴² Consequently, if a party is adversely affected according to Article 4 of the Framework Directive, it should also be given the right to be a party to the proceedings.⁴³ The administrative body must check on a case-by-case basis whether the party requesting standing is indeed affected.⁴⁴ However, as the VwGH in a later case recalled, the ECJ did not provide clear criteria for national authorities and courts to decide when a person is affected.⁴⁵ The Court of Justice rather referred to the opinion of AG Poirares Maduro, who said that the concept of the term of ‘affected undertaking’ must be based on an examination of the purposes and objectives of Article 4, viewed in the context of the Framework Directive and the purpose of the rule at issue.⁴⁶ The ECJ thus, rather vaguely, concluded that, in the context of the Directive, *affected* means a person whose rights are adversely affected (*deren Rechte beeinträchtigt sind*) by a decision in market analysis proceedings.⁴⁷

So, in the end, the Austrian administrative authorities have to check whether a party is *affected* by checking *whether his or her rights are adversely affected*. If the national administrative body finds that this is the case, it has to grant the party the status of ‘party to the proceedings’. This was confirmed in the later *Hutchinson* cases (*Hutchinson I-III*).⁴⁸ In *Hutchinson I* and *II*, the judges annulled the decision of an administrative body because it had failed to check whether the claimant could have been affected by the contested

³⁹ Case C-426/05, *Tele2 Telecommunication GmbH v. Telekom-Control-Kommission* [2008], ECR I-685, para. 30.

⁴⁰ *Ibid.*, para. 48.

⁴¹ Section 17 AVG.

⁴² Sections 37, 43(3) and (4), 45(3), and 65 AVG.

⁴³ Explicitly in VwGH 22 Feb. 2010, 2008/03/0128 (*Hutchinson III*), para. 3: ‘*Ist jemand betroffen, muss ihm ein Rechtsmittel zustehen*’.

⁴⁴ See *supra* n. 31, para. 7.

⁴⁵ VwGH 22 Feb. 2010, 2009/03138, para. 4.2.

⁴⁶ Case C-426/05, *Tele2 Telecommunication* [2008], ECR I-685, Opinion of AG Poirares Maduro, para. 20.

⁴⁷ Case C-426/05, *Tele2 Telecommunication* [2008], ECR I-685, para. 43.

⁴⁸ VwGH 3 Sep. 2008, 2008/03/0088 (*Hutchinson I*); VwGH 17 Apr. 2009, 2008/03/0146 (*Hutchinson II*); VwGH 22 Feb. 2010, 2008/03/0128 (*Hutchinson III*).

measure. According to the judges, this was essential, because if the administrative body had done so, it might have decided the subject matter of the case differently. In *Hutchinson III*, the VwGH confirmed the rulings of the preceding cases. Also in this case, the administrative body had not checked whether Hutchinson was affected. However, the VwGH distinguished the case from the others by applying the test the ECJ had adopted under reference to the opinion of AG Poiares Maduro. The VwGH examined the purpose and the objective of Article 4 of the Directive and found that it concerned market analysis proceedings, more precisely an examination of whether one or more competitors have a dominant position on the market. *Hutchinson III* was regarded as different because, according to the judges, it concerned market surveillance operations whose purpose was to ensure compliance with the applicable telecommunication laws. Consequently, the decision of the administrative authority was upheld.

This case law thus seems to suggest that the literal meaning of the *Schutznorm* has been expanded to include 'affected'. However, it has not been made clear yet if a test that seeks to establish whether a party's rights were adversely affected is *substantially* broader, narrower, or essentially the same as the *Schutznorm*.⁴⁹

In a case concerning Directive 97/33/EC, the text of the EU law instrument was much clearer.⁵⁰ T GmbH was a competitor of T AG, which had a dominant position on the Austrian market. T GmbH had been denied access to T AG's network. Article 34 of the 1997 Law on Telecommunications (*Telekommunikationsgesetz (TKG) 1997*)⁵¹ provided that when a telecommunications provider has a dominant position on the market, it has to grant competitors access to its network on the same conditions as it does on the market. If such a provider fails to do so and abuses its dominant position, the national administrative authority may impose a sanction by its own motion. This provision implemented Article 9 of Directive 97/33/EC, which provides that national regulatory authorities may intervene on their own initiative at any time and shall also do so if requested by a party. Thus, the European provision granted parties the right to request intervention, whereas the national provision did not.

T GmbH was denied the status of party to the proceedings by the TCK, which relied on national law. On appeal, the VwGH held that the fact that T GmbH had been denied access to the competitor's network meant that T GmbH's subjective rights were affected. Thus, it had the right to be a party to the proceedings. As such it had also the right, on basis of the Directive, to request the TCK to take action. The TCK would have been under an obligation to set national law aside and apply EU law. Clearly, the VwGH saw the *Schutznorm* requirements fulfilled, which is why standing was granted according to the wider EU provision.

The Court's rulings allow the conclusion that, whenever a party can show that its rights are adversely affected, it will generally be granted standing by the national authorities

⁴⁹ Thienel & Schulev-Steindl, *supra* n. 25, 93.

⁵⁰ VwGH 25 Feb. 2004, 2002/03/0186.

⁵¹ BGBl. I Nr. 100/1997.

and the VwGH, if the *Schutznorm* requirements are fulfilled. It remains to be seen whether this is also the case where the *Schutznorm* requirements are not met.

3.2. EU LAW AND NATIONAL LAW ARE EQUIVALENT WITH REGARD TO THE RIGHT TO HAVE ACCESS TO COURTS

The VwGH was also faced with situations different than those discussed before, namely situations in which the relevant EU and national provisions have an equivalent scope with regard to the rules on standing. The cases under examination concern section 125(3) TKG, which allowed, under certain conditions, the allocation of additional frequencies from the frequency band to existing license holders of DCS-1800 (a GSM frequency) licenses. DCS-1800 license holders were automatically granted the status of party to the proceedings, since they have an individual interest on basis of the provision in the TKG. The question was whether the holder of a DCS-900 license should be granted the status of party to the proceedings in the allocation decisions taken on basis of Directive 97/13/EC, which prohibits discrimination in the licensing sector.⁵² The VwGH referred the question to the ECJ for a preliminary ruling.⁵³ The ECJ held that the national rules were in accordance with the Directive. Consequently, the VwGH ruled, in *S GmbH*, that only those who already hold a DCS-1800 license could be granted the status of party to the proceedings in an allocation decision that concerns DCS-1800 licenses.⁵⁴ The VwGH confirmed this ruling in *T GmbH*, where it held that a party that does not belong to the group targeted by the relevant legislation cannot derive the right to be a party to the proceedings on the basis of that legislation.⁵⁵ The later ruling in *TriCoTel* underpinned this line of case law.⁵⁶

To conclude, a party cannot rely on EU law in order to have standing where the national legislation on standing is in conformity with the European requirements. Such had also been the ruling in *ONE*, where the VwGH had held that, where an obligation to check whether a party is affected cannot be deduced from an EU law instrument, national procedural rules remain applicable.⁵⁷

4. CONCLUSION

The analysis carried out above allows the conclusion that VwGH exhibits a strong tendency to rule in conformity with EU law. The VwGH heavily relies on the answers to preliminary references it submitted to the ECJ. This reliance explains why the VwGH has shown itself to be willing to set conflicting national administrative procedural rules aside

⁵² See Art. 9(2) and Art. 11(2) Directive 97/13/EC.

⁵³ Case C-462/99, *Connect Austria Gesellschaft für Telekommunikation GmbH v. Telekom-Control-Kommission, and Mobilkom Austria AG* [2003], ECR I-5197.

⁵⁴ VwGH 31 Jan. 2005, 2003/03/0105.

⁵⁵ VwGH 20 Jul. 2004, 2003/03/0104.

⁵⁶ VwGH 31 Jan. 2005, 2003/03/0105.

⁵⁷ VwGH 28 Feb. 2006, 2002/03/0186.

where the principles of effectiveness and effective judicial protection demand it. With regard to both analysed situations, the overall assessment of the VwGH's case law, therefore, must be that it fully complies with EU law requirements concerning access to courts, as far as telecommunications law is concerned.

All in all, albeit with the limitation of the restricted scope of the investigation carried out above, one may conclude that the Austrian highest administrative court has properly behaved as a 'European' court in referring, when in doubt, preliminary questions to the ECJ as to the compatibility of their national procedural rules with the EU requirements; in setting these procedural rules aside when they were regarded as incompatible with European law; and, in general, in granting access to court when individuals wished to enforce the rights they derive from EU law.