THE FINAL ACT IN THE DEREGULATION OF THE AUSTRIAN POSTAL MARKET: THE POSTAL MARKET ACT (POSTMARKTGESETZ-PMG)¹

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Abstract: On 1 January 2011, the PMG entered into force. It implements the EC/EU Postal Directive and finally eliminates the protected market for letters of the former incumbent “Österreichische Post Aktiengesellschaft” (Post AG). This is the last step in the full liberalization of the postal service sector in Austria.³ The following article presents the new Act with a focus on the universal service and the closure of post offices by the Post AG.

Keywords: postal market, liberalization, Austria, European Union, postal directive, implementation

On 1 January 2011, the PMG entered into force. It implements the EC/EU Postal Directive and finally eliminates the protected market for letters of the former incumbent “Österreichische Post Aktiengesellschaft” (Post AG). This is the last step in the full liberalization of the postal service sector in Austria.³ The following article presents the new Act with a focus on the universal service and the closure of post offices by the Post AG.

1. Introduction

The roots of the former long-standing monopoly position in the postal sector date back to the 16th century⁴. It has even long been assumed that the postal ser-

1 Bundesgesetz über die Regulierung des Postmarktes (Postmarktgesetz-PMG Federal Law Gazette I 2009/123).

2 Universität Graz, Austria.

3 ErläutRV 319 BlgNR XXIV. GP 3.

4 Adamovich, Grundriss des österreichischen Staatsrechts² (1932) 514. By the so-called “Postregal”, postal services were reserved for the emperor or the state.

vice sector is a natural monopoly.⁵ Austrian legislation has therefore upheld this specific market situation by the Postal Act of 1837⁶ and the Postal Act of 1957⁷ until the end of the 20th century.⁸ The monopoly in the postal sector was recently given to the Post AG. Given that 52.85 per cent of the Post AG's shares are held by the ÖIAG, a corporation exclusively owned by the Republic of Austria, the Post AG can be considered a public-sector corporation.⁹

A paradigm shift was eventually brought about on a European level. Since the Green Paper on the development of the single market for postal services (COM/91/476)¹⁰, the complete opening of the postal market in its Member States has been a major goal of the EU Commission. The ECJ, in contrast, considered restrictions on competition in accordance with Art 86 (2) EEC Treaty (now Art 106 (2) TFEU) as necessary "to ensure the performance of the particular tasks assigned to the undertakings possessed of the exclusive rights".¹¹

The legal basis for the liberalization of the postal market was thus the three Postal Directives.¹² The Directive 97/67/EC¹³ ("1st Postal Directive") provides the overall framework for a moderate, step-by-step liberalization which guarantees universal postal service.¹⁴ For a transitional period, it has hence preserved exclusive rights for the universal service provider. The Directive 2002/39/EC¹⁵ ("2nd Postal Directive") restricted these rights, but still allowed Member States to reserve a certain part of the postal market for the universal service provider (Art 7 Directive 97/67/EC as amended by Directive 2002/39/EC).¹⁶ The Directive 2008/6/EC¹⁷ ("3rd Postal Directive") obliged Member States to accomplish

5 A natural monopoly occurs when it is more efficient for production to be concentrated in a single firm (*Ogus*, Regulation: Legal form and economic theory (2004) 30).

6 PGS 240/1837.

7 Federal Law Gazette 1957/58.

8 Even the Constitutional Court (VfSlg 11.494/1987) considered the monopoly as constitutional.

9 *Feiel*, Zur Neuordnung des österreichischen Postrechts, ZÖR 2011, 417 (424).

10 *Stratil*, Postmarktgesetz (2010) 159 ff provides a compilation of the numerous EU documents concerning the postal service sector.

11 ECJ, case C-320/91, *Corbeau*, report 1993 I-2533, 2568 margin no 14; criticized by *Géradin/Humpe*, The Liberalization of Postal Services in the European Union: An Analysis of Directive 97/67, in *Géradin* (ed.), The Liberalization of Postal Services in the European Union (2002) 91 (97).

12 *Feiel*, ZÖR 2011, 419.

13 Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ 1998 L 15, 14.

14 The following two Directives in this area are both amendments to Directive 97/67/EC.

15 Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, OJ 2002 L 176, 21.

16 *Holoubek/Damjanovic*, Postrecht, in *Holoubek/Potacs* (eds.), Handbuch des öffentlichen Wirtschaftsrechts I² (2007) 1287 (1292).

17 Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008

the complete opening of the postal market by 31 December 2010.¹⁸ Given the substantial changes introduced by the “3rd Postal Directive”, a reform of the current Postgesetz (PostG) was not found appropriate.¹⁹ It was therefore replaced by a new law: the Postal Market Act (Postmarktgesetz-PMG).

2. The content of the Postal Market Act

The Postal Market Act is divided into seven sections: (1) General provisions, (2) The universal service, (3) The duties of the universal service provider, (4) Other postal service providers, (5) Public Authorities, supervision procedures, (6) Penal provisions, (7) Transitional and final provisions.

2.1. General provisions

In accordance with § 1 PMG, the purpose of the Postal Market Act is to ensure high quality postal services encompassing at least a minimum range of services of specified quality at affordable prices for the benefit of all users. These objectives should be achieved without preventing competition.²⁰

The PMG is applicable only for postal services operating on a commercial basis (§ 2 (1) PMG). In accordance with the Postal Directive²¹, § 3 No. 1 PMG²² defines “postal services” as services involving the clearance, sorting, transport and delivery of postal items. “Postal items” do not mean only letters, but also include books, catalogs, newspapers or periodicals (§ 3 No. 10 PMG). The PMG also applies to cross-border mail (§ 2 (2) PMG). An exception is made if the transport and the delivery of newspapers or periodicals are effected by publishers themselves or by an undertaking of their exclusive property.²³

§ 4 PMG obliges the Austrian Federal Minister of Transport, Innovation and Technology (*Bundesminister für Verkehr, Innovation und Technologie*) to periodically check the quality of the universal postal service. The Minister’s report has to be transmitted to the National Assembly (*Nationalrat*) to allow the parliament to modify the legal framework if needed.²⁴

amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, OJ 2008 L 52, 3.

18 *Schneider*, Das neue Postmarktgesetz, ÖZW 2010, 2 (3). Some Member States (not Austria!) are authorized to postpone the implementation of this Directive until 31 December 2012 (Art 2, 3 Directive 97/67/EC as amended by Directive 2008/6/EC).

19 ErläutRV 319 BlgNR XXIV. GP 1.

20 These provisions are programmatic and should facilitate the interpretation of the PMG (ErläutRV 319 BlgNR XXIV. GP 4).

21 Art 2 No. 1 Directive 97/67/EC, OJ 1998 L 15, 18.

22 § 3 PMG contains 16 definitions of terms used in the following provisions.

23 The undertaking’s sole object has to be the transport and delivery of newspapers or periodicals to users. That should prevent corporations from bypassing the PMG by selling a small amount of its shares to a publisher (ErläutRV 319 BlgNR XXIV. GP 4).

24 ErläutRV 319 BlgNR XXIV. GP 5.

§ 5 PMG concerning postal secrecy is a complementary provision to the constitutional right of privacy of correspondence (Art 10 Staatsgrundgesetz 1867²⁵).²⁶ Employees of a postal service provider are not allowed to give any information about postal items to others than the sender or the addressee of the item. Thereby included are not only the employees of the Post AG, but also the employees of their partner companies.²⁷ Given that most of these employees cannot be considered officials within the meaning of § 74 (4) Austrian Criminal Code²⁸ any more, § 57 PMG ensures postal secrecy by punishing every infringement of § 5 PMG.²⁹

2.2. The universal service

The key subject matter of the PMG is to guarantee a universal postal service in a liberalized Austrian postal market.³⁰ According to the Constitutional Court (*Verfassungsgerichtshof* – VfGH), the Austrian legislator has thereby fulfilled its responsibility to guarantee a basic infrastructure³¹ and met the requirements of the Postal Directive.³²

2.2.1. Definition

In accordance with § 6 (1) PMG, a universal service involves the permanent provision of a postal service of specified quality at all points in Austria at affordable prices for all users. That contains the clearance, sorting, transport and distribution of postal items up to two kilograms, of postal packages up to 10 kilograms, and services for registered items and insured items (§ 6 (2) PMG). § 6 (4) PMG explicitly excludes from the universal service all parcels that can be returned by the addressee to the sender at their expense (“Retourpaket”). No longer part of the universal service are also bulk mail items which are directly delivered at the distribution centers of the universal service provider (§ 6 (3) PMG).³³

25 Staatsgrundgesetz vom 21. December 1867, über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder RGBl 1867/142.

26 *Wiederin* in *Korinek/Holoubek* (eds.), Österreichisches Bundesverfassungsrecht (1999), Art 10 StGG Rz 40.

27 ErläutRV 319 BlgNR XXIV. GP 5.

28 Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch – StGB) Federal Law Gazette 1974/60.

29 *Stratil*, Postmarktgesetz 10.

30 *Schneider*, ÖZW 2010, 4.

31 VfSlg 18.909/2009: „Infrastrukturverantwortung“.

32 Art 3 No. 1 Directive 97/67/EC, OJ 1998 L 15, 19.

33 ErläutRV 319 BlgNR XXIV. GP 5. *Stratil*, Postmarktgesetz 14, considers this limitation in accordance with the Postal Directive given that the universal service is primarily dedicated to individuals. For *Schneider*, ÖZW 2010, 4, that is more than uncertain given that the CoJ, joined cases C-287/06 to C-292/06, *Deutsche Post AG/Germany*, report 2008, I-1243, qualifies these items as subject to the universal service.

2.2.2. Post offices

The required number of post offices has been a very controversial topic over the last years in Austria. After the privatization of the postal service, which had previously been provided by the state, in 1996³⁴, the Post AG has systematically closed down many post offices (particularly in rural areas).³⁵ Given the numerous employees with a permanent employment status working at these post offices, their closure has been very problematical.³⁶

§ 7 (1) PMG now states that a permanent provision of a postal service in Austria requires at least 1650 post offices. In larger municipalities and towns, a post office has to be reached by 90 per cent of the inhabitants within 2 kilometers, in other regions within 10 kilometers.³⁷ 10 per cent of these 1650 post offices can be post offices that do not include universal service and standard opening hours (§ 7 (2) PMG).³⁸ Universal service is also ensured by the conditions for the closure of post offices operated by the Post AG. Such post offices can only be closed down in cases where it is not possible to cover the costs of running the post office in the long term and where the provision of universal service is ensured by another post office (§ 7 (3) PMG).

According to § 7 (5), (6) PMG, the complexity of the closure procedure also protects the post offices. The Post AG has to indicate every intended closure of one of its post offices to the municipality³⁹ and provide them with the documents proving that the conditions of § 7 (3) PMG are met. Within the next three months, they both have to look for an alternative to guarantee the current quality of postal service in this area.⁴⁰ The Post AG also has to inform the regulatory authority. It has to submit documents proving that it is not possible to cover the costs of running the post office in the long term and that the municipality's authorities have been invited for further discussions.

34 § 1 Bundesgesetz über die Einrichtung und Aufgaben der Post und Telekom Austria Aktiengesellschaft (Poststrukturgesetz – PTSG) Federal Law Gazette 1996/201.

35 *Pöcherstorfer*, Die flächendeckende Versorgung mit Postdienstleistungen, in *Post-Geschäftsstellenbeirat* (ed.), Von der Postliberalisierung zur Post-Geschäftsstelle, RFG Schriftenreihe 3/2010, 5 (17 f); <http://oesv1.orf.at/stories/346098> (3.8.2012).

36 The dealing with these employees by the Post AG has been harshly criticized: <http://www.karriereentwicklungszentrum.at> (3.8.2012).

37 According to ErläutRV 319 BlgNR XXIV. GP 6, these distances correspond to 10 minutes from a household to the next post office.

38 See 2.2.3.

39 However, municipalities are not being granted the status of party in the closing procedure (*Feiel*, ZÖR 2011, 435 following VfSlg 18.909/2009).

40 *Haubenberger*, Behörden und Verfahren in Post- und Universaldienstangelegenheiten, in *Post-Geschäftsstellenbeirat* (ed.), Von der Postliberalisierung zur Post-Geschäftsstelle, RFG Schriftenreihe 3/2010, 19 (23).

The regulatory authority then indicates the intended closure to the Post Office Advisory Board (“Post-Geschäftsstellen-Beirat”).⁴¹ Nevertheless, the regulatory authority is entirely responsible for reviewing whether the prerequisites for the closure of the post office are fulfilled. It can forbid the closure within three months. Otherwise, the Post AG is finally allowed to close down the post office (§ 7 (6) PMG).⁴²

These provisions have a strong effect on the Post AG’s economic management and could be unconstitutional regarding Art 6 StGG (“Erwerbsfreiheit”: freedom to carry on a business). Given the role of postal services in a highly developed country, the Post AG as universal service provider (§ 12 (1) PMG) hence has to tolerate stronger restrictions than companies normally do under the stipulations of Art 6 StGG.⁴³

2.2.3. Opening hours, letter boxes, distribution

Post offices generally have to provide a full universal service within the meaning of § 6 (2) PMG on five working days per week (at least 20 hours per week). Exceptions are made for post offices operated by the municipalities.⁴⁴

§ 9 PMG obliges the universal service provider to guarantee full geographical coverage via letter boxes. These letter boxes can be stationed on public property and have to be emptied at least once a day during the week.⁴⁵

The universal service provider must distribute postal items on five working days per week at the addressee’s address (§ 10 (1) PMG). § 10 (2) PMG however permits rural post box clusters in sparsely populated areas. § 11 PMG contains detailed rules regarding the timing from the clearance of mail to the distribution of postal items.

2.2.4. Organization and financing of the universal service

§ 12 PMG pronounces the Post AG the universal service provider. In 2016, the regulatory authority will have to review if there are other postal service providers that could provide universal service. In that case, a public tender procedure will have to be effected. In order to lower costs for universal service, two

41 Compare 2.5.1.2.

42 *Haubenberger* in Post-Geschäftsstellenbeirat 24 f.

43 VfSlg 18.909/2009 following *Raschauer*, *Österreichisches Wirtschaftsrecht*² (2003) 185. That judgment, however, was given according to the circumstances of the old PostG, which had constituted a reserved market for the Post AG. After the fall of the last monopoly, the argumentation still seems valid as long as the Post AG gets financial support for providing universal service.

44 § 8 (1), (2) PMG; *Schneider*, *ÖZW* 2010, 5.

45 *Feiel*, *ZÖR* 2011, 435.

or more companies other than the Post AG may be pronounced the universal service provider.⁴⁶

Given the full liberalization of the postal market, the universal service that is often inefficient in rural areas can no longer be financed by the profits made on the reserved market.⁴⁷ § 13 PMG therefore stipulates the financial compensation for the costs of the universal service that cannot be covered by the universal service provider. § 15 PMG generally defines the so-called net costs (*Nettokosten*) as all costs related to the universal service. The exact determination of these costs is effected according to the detailed provisions of § 15 (2)–(4) PMG. What is striking, of course, is that also costs based on legal provisions (regardless of the PMG) that prevent the Post AG from carrying out its business efficiently are net costs. Apparently, the high staff costs for civil servants with permanent employment status assigned to the Post AG by § 17 PTSG are taken into account.⁴⁸

To compensate for the costs of universal service, the regulatory authority on application by the Post AG has to establish a fund (§ 14 (1) PMG). This fund is financed by licensed postal service providers with an annual turnover of more than 1 million euro (§ 14 (2) PMG).⁴⁹ *Schneider*⁵⁰ criticizes the method of calculation of the particular contributions. He points out that it favors the Post AG over small companies, which constitutes an infringement of European law.⁵¹ He, however, admits that the compensation is constitutionally required.⁵² That could eventually lead to coverage by the national budget.⁵³

2.3. The duties of the universal service provider

Section 3 of the PMG lists the duties of the universal service provider.⁵⁴

§ 16 PMG prohibits the universal service provider from charging for some sorts of postal items according to the Geneva Conventions. In accordance with § 17 PMG, the universal service provider has to distribute postal items of the courts or the administration whose delivery is regulated in the Act on postal

46 *Feiel*, ZÖR 2011, 436.

47 *Feiel*, ZÖR 2011, 437.

48 *Schneider*, ÖZW 2010, 7; *Feiel*, ZÖR 2011, 438, who doubts that such provisions are in accordance with the Postal Directive.

49 In accordance with § 26 (2) PMG, the Post AG also is a licensed postal service provider. It has to contribute to the fund as well (ErläutRV 319 BlgNR XXIV. GP 9).

50 *Schneider*, ÖZW 2010, 7 f.

51 CoJ, case C-340/99, *TNT Traco SpA/Poste Italiane SpA*, report 2001, I-4109, 4163 margin no 58.

52 *Oberndorfer/Binder*, *Strompreisbestimmung aus rechtlicher Sicht* (1979) 38. Compare also the jurisdiction of the Administrative Court (VwSlg 10491 A/1981) and the Constitutional Court (VfSlg 12.564/1990) on price fixing for consumer goods by public authorities.

53 For example, if there are no other licensed postal service providers than the Post AG.

54 The title suggests that all duties are covered by this section. In fact, Section 2 contains some duties as well (for example § 10 (1) PMG).

deliveries⁵⁵. In this case, the universal service provider acts with public authority.⁵⁶ The sender of the postal item (the state or a public body) is hence liable for damages caused by the universal service provider.⁵⁷

The universal service provider fulfills Austria's responsibilities under the Universal Postal Convention. It exclusively produces and sells stamps with the words "Austria" or "Republic of Austria" on it (§ 18 PMG). The universal service provider's obligation to contract with everybody based on the General Terms and Conditions (§ 19 PMG) shows the important role of postal services for the country's infrastructure. The regulatory authority has to be notified of the General Terms and Conditions prior to publication. If they are not compatible with the legal provisions enumerated in § 20 (4) PMG, and the regulatory authority rejects them, the General Terms and Conditions cease to be in force.⁵⁸

In accordance with § 21 (1) PMG, the tariffs for each of the services that are part of universal service have to be affordable, cost-oriented, transparent and non-discriminatory. A uniform tariff shall be applied to all users (§ 21 (2) PMG). That does not exclude the right of the universal service provider to conclude individual agreements on prices with users. These agreements have to be indicated to the regulatory authority which checks if the conditions of § 21 PMG are fulfilled. § 22 PMG contains special provisions for single piece tariffs.⁵⁹

To determine the net costs of the universal service, the universal service provider has to keep separate accounts within its internal accounting systems for the universal service and for the other provided services (§ 23 PMG).⁶⁰

2.4. Other postal service providers

Section 4 regulates the rights and duties of postal service providers that do not provide universal service.

2.4.1. Market entry

§ 24 (1) PMG generally authorizes everybody within the restrictions by the PMG to provide postal services. The Trade Regulation Act⁶¹ does not apply to these services (§ 24 (2) PMG).

55 Bundesgesetz über die Zustellung behördlicher Dokumente (Zustellgesetz – ZustG) Federal Law Gazette 1982/200.

56 Walter/Kolonovits/Muzak/Stöger, Grundriss des Verwaltungsverfahrensrechts (2011) Rz 201/1.

57 Schneider, ÖZW 2010, 8.

58 Schneider, ÖZW 2010, 9.

59 Feiel, ZÖR 2011, 448 f.

60 Schneider, ÖZW 2010, 9.

61 Gewerbeordnung 1994 – GewO 1994 Federal Law Gazette 1994/194 (WV).

In accordance with Art 9 (1) Postal Directive⁶², § 25 PMG introduces a system of general authorization for the provision of postal services.⁶³ When a postal service provider starts operating, it has to indicate that to the regulatory authority. For reasons of transparency, the regulatory authority has to publish a list of these postal service providers on the internet (§ 25 (2) PMG).⁶⁴

This general rule does not apply to postal services regarding postal items up to 50 grams. § 26 PMG thereby introduces a system of individual licenses. The universal service provider is granted a certain license by law (§ 26 (2) PMG). The others have to apply for a license at the regulatory authority which shall decide on the application within six weeks. A license is awarded (§ 27 (2) PMG)

- if the applicant proves the capability, reliability, and operating skills that are required for the license-based provision of postal services (No. 1)⁶⁵ and
- if it complies with national working conditions⁶⁶, particularly regarding the payment of its employees (No. 2).

According to *Schneider*⁶⁷, the Austrian license-based system is not covered by the provisions of the Postal Directive. He points out that some conditions for the award of a license⁶⁸ do not conform with Art 9 (2) Postal Directive⁶⁹. In particular, he criticizes the fact that the universal service provider is granted a license without an authorization procedure. *Schneider* considers that a violation of the principle of equality (Art 7 Federal Constitutional Act⁷⁰), as well as a limitation of the license system on postal items up to 50 grams.

§§ 29, 30 PMG contain provisions regarding the transfer, modification and the termination of the license. What is striking is that the license for the provision of postal services can be transferred to third parties if prior agreement from the competent authority has been obtained. § 29 (1) PMG thereby deviates from the principle that licenses for certain professions constitute personal rights.⁷¹

By analogy with § 25 (2) PMG, the regulatory authority has to publish a list of the licensees on the internet (§ 27 (4) PMG).⁷²

62 Directive 97/67/EC as amended by Directive 2008/6/EC.

63 *Feiel*, ZÖR 2011, 440.

64 As per 7 March 2012, twelve undertakings have become postal service providers in accordance with § 25 (1) PMG.

65 § 28 PMG gives an extensive definition of these three conditions.

66 In accordance with ErläutRV 319 BlgNR XXIV. GP 11, this should prevent negative social effects by wage dumping.

67 *Schneider*, ÖZW 2010, 10 f.

68 He refers to § 27 (2) No. 1.

69 Directive 97/67/EC as amended by Directive 2008/6/EC.

70 Bundes-Verfassungsgesetz (B-VG) Federal Law Gazette 1930/1 (WV).

71 *Raschauer*, Allgemeines Verwaltungsrecht³ (2009) Rz 1125.

72 As per 19 September 2011, four undertakings have become licensees in accordance with § 26 (1) PMG.

2.4.2. The duties of the postal service providers

The provisions regarding the General Terms and Conditions for the postal service providers (§ 31 (1)–(3) PMG) are generally⁷³ in conformity with those for the universal service provider. § 31 (4) PMG even establishes an obligation to contract.⁷⁴

The postal service providers have to make sure that their employees and the transported postal items can be distinguished from competing companies (§ 32 (1) PMG). They have to ensure the forwarding and the return (§ 32 (5) PMG) as well as the deposit (§ 32 (2) PMG) of postal items. § 32 (4)–(6) PMG obliges them to set quality criteria for its services and to publish the results of a yearly evaluation. For reasons of quality assurance, the regulatory authority has to assign an independent institution to measure the ordinary routing times of postal items on a yearly basis (§ 33 PMG). The postal service providers also have to establish a complaint management service (§ 32 (3) PMG).

2.4.3. Access to the postal network

The PMG concedes other postal service providers only limited access to the facilities of the universal service provider. In accordance with § 36 PMG, postal service providers have free access to the current postcode system.⁷⁵ § 35 (2) PMG obliges the universal service provider to provide transparent, nondiscriminatory access to its address database. The conditions are to be negotiated in the first place between the universal service provider and the other postal service provider (§ 35 (3) PMG).⁷⁶ If an agreement between them has not been reached within three months, the regulatory authority on application by the postal service provider replaces the contract according to its order (*Bescheid*) (§ 35 (4) PMG).⁷⁷

§ 34 PMG contains detailed provisions regarding post-office boxes and delivery boxes. Postal items are delivered to the addressee by dropping it into these boxes. For this purpose, the addressee generally has to provide a post-office box.⁷⁸ In buildings with more than four households on more than two floors, the house owner provides adequate delivery boxes. Delivery boxes are adequate if they at least fulfill the requirements laid down in § 34 (2), (4) and (5) PMG. These requirements have to be respected in the case of the construction of new

73 However, a specific regulation on tariffs like § 21 PMG is missing.

74 Following *Schneider*, ÖZW 2010, 12, it may be questioned if such interference with a person's right to property is really justified. In fact, everybody's access to postal services is already ensured by the universal service provider.

75 That ensures that postcodes are only changed by the universal service provider to guarantee a consistent delivery system (ErläutRV 319 BlgNR XXIV. GP 13).

76 *Feiel*, ZÖR 2011, 445.

77 *Schneider*, ÖZW 2010, 12.

78 *Feiel*, ZÖR 2011, 445.

houses (§ 34 (6) PMG) as well as if the delivery boxes are renewed (§ 34 (7) PMG).

Those delivery boxes that do not fulfill the requirements have to be replaced by the universal service provider by 31 December 2012. The thereby installed new boxes become property of the house owners (§ 34 (8) PMG).⁷⁹ The replacement has to be financed in advance by the universal service provider.⁸⁰ These costs are reimbursed to the universal service provider proportionally on its application. Every postal service provider (including the universal service provider) with an annual turnover of more than one million euros has to contribute. Their exact contribution is determined on the basis of market share (90 per cent) and total number of postal service providers (10 per cent).⁸¹ The regulatory authority manages the replacement. Therefore, the universal service provider has to indicate its costs to the regulatory authority, enclosing all documents needed to prove the stipulated amount (§ 34 (10) PMG).

Who should bear the costs of the replacement has always been highly disputed. It was even brought before the VfGH. In 2006, the VfGH ruled that § 14 of the old PostG infringed the right to property of the house owners.⁸² They were then charged with the full costs of the replacement. On application by the Post AG, the VfGH had also to decide whether § 34 (8)–(10) PMG infringes the constitutional rights of the applicant. Given that a high quality postal service is in the public interest and that the postal service providers' business depends on functioning delivery boxes, the VfGH considered these provisions constitutional.⁸³

2.5. Public Authorities, supervision procedures

2.5.1. Competences and procedures

2.5.1.1. The postal authorities

The supreme postal authority is the Austrian Federal Minister of Transport, Innovation and Technology (*BMVIT*). The authority of first instance and subordinate to the *BMVIT* is the Postal Bureau (*Postbüro*).⁸⁴ The Postal Bureau's only responsibility is to conduct the administrative penal procedure (§ 37 (4) PMG).

⁷⁹ *Schneider*, ÖZW 2010, 13.

⁸⁰ ErläutRV 319 BlgNR XXIV. GP 12; VfGH 16.3.2012, G 97/11.

⁸¹ According to *Schneider*, ÖZW 2010, 13, § 34 (9) PMG discriminates against the other postal service providers as they are overcharged.

⁸² VfSlg 17.819/2006.

⁸³ VfGH 16.3.2012, G 97/11. *Schneider*, ÖZW 2010, 13, had pointed out before the VfGH's decision that the best solution would be if the state paid for the replacement.

⁸⁴ § 37 (1) PMG; *Feiel*, ZÖR 2011, 453.

2.5.1.2. The regulatory authorities

The Austrian regulatory authorities are the *Rundfunk und Telekom Regulierungs-GmbH (RTR)*⁸⁵ and the *Post-Control-Kommission (PCK)*. According to the “Austrian model”⁸⁶, the competences are allocated to an independent company and to a commission regarded as a tribunal within the meaning of Art 6 ECHR.⁸⁷ The RTR is generally responsible for all tasks based on the PMG if they are not assigned to the PCK (§ 38 (1) PMG) and acts as the PCK’s supporting body (§ 38 (2) PMG).⁸⁸

The PCK has three members (§ 41 (1) PMG). § 41 (2) PMG refers to § 118 (1)–(6) TKG 2003⁸⁹ on the Commission for Telecommunication Issues (TKK) and adopts its provisions with the necessary modifications. Two members (including the alternate members) of the TKK, a judge and a person with legal and economic knowledge, are also members of the PCK (§ 41 (2) No. 1 PMG). The third member has to be an expert in the postal sector and is nominated by the *BMVIT* (§ 41 (2) No. 2 PMG). The PCK is chaired by the judge (§ 42 (1) PMG); valid decisions require unanimity (§ 42 (3) PMG). In accordance with Art 20 (2) No. 5 Federal Constitutional Act, all members are independent in the performance of their duties and not bound by any instructions.

Their tasks are listed in § 40 PMG completely. Decisions on “civil rights” within the meaning of Art 6 ECHR and fundamental decisions are thereby reserved for the PCK.⁹⁰ For example, the PCK is responsible for measures concerning post offices operated by the universal service provider, measures concerning the financing of the fund to compensate the universal service provider or concerning the General Terms and Conditions. The remaining tasks for the RTR are limited: for example it has to publish a list of postal service providers (§ 25 (2) PMG) and licensees (§ 27 (4) PMG) on the internet.⁹¹

Apart from these two authorities, the Post Office Advisory Board is established at the RTR. It has three members. They are nominated by the *Gemeindebund* (Association of Municipalities), the *Städtebund* (Association of Cities and Towns) and by the *Verbindungsstelle der Bundesländer* (Liaison Office of the Fed-

85 It is established by § 16 (former § 5) Bundesgesetz über die Einrichtung einer Kommunikationsbehörde Austria (“KommAustria”) und eines Bundeskommunikationssenates (KommAustria-Gesetz – KOG) Federal Law Gazette I 2001/32. The RTR does also operate in the telecommunications and media sector.

86 Stöger, Die Energieregulierungsbehörden und das Energie-Versorgungssicherheitsgesetz 2006, in Raschauer (ed.) Aktuelles Energierecht (2006) 21 (21).

87 Raschauer, Verwaltungsrecht³ Rz 270.

88 Schneider, ÖZW 2010, 13.

89 Bundesgesetz, mit dem ein Telekommunikationsgesetz erlassen wird (Telekommunikationsgesetz 2003 – TKG 2003) Federal Law Gazette I 2003/70.

90 ErläutRV 319 BlgNR XXIV. GP 13.

91 Schneider, ÖZW 2010, 14.

eral Provinces).⁹² Its main task⁹³ is to advise the regulatory authority regarding the closure of post offices. Its statements are not binding.⁹⁴

2.5.1.3. Rules of procedure

Unless otherwise prescribed by this Act, the General Administrative Procedures Act⁹⁵ shall be applied by the PCK. The PCK's decisions are final; no administrative remedies are admissible (§ 44 (1)–(3) PMG). They can hence be subject to an appeal to the Austrian Administrative Court (*Verwaltungsgerichtshof* – VfGH).⁹⁶ According to *Schneider*⁹⁷, decisions of the RTR are also final and can be subject to appeals to the VfGH or VwGH. For reasons of transparency, the decisions of the PCK as well as the RTR shall be published in compliance with the data protection legal framework (§ 45 (1) PMG). In any case, the regulatory authority shall respect and protect the confidentiality of the commercial and industrial information (§ 47 PMG).

2.5.2. Supervision of postal service providers

The key task of the regulatory authority is to supervise the postal service providers. The supervision procedures are laid down in § 51 PMG and contain two steps. If it occurs to the regulatory authority that a postal service provider is violating the PMG or other legal acts based on the PMG, the regulatory authority has first to inform the concerned provider. The postal service provider has the opportunity to respond to the accusations or to rectify the identified shortcomings within an adequate period. In the case the postal service provider did not alter its conduct, the regulatory authority sets the necessary measures in train, so as to ensure the compliance with the PMG by individual administrative ruling (*Bescheid*).⁹⁸

In accordance with § 50 (1) PMG, the admissible measures are enquiries as to the universal service (No. 1), orders to correct the malfunctioning of the universal service (No. 2), to interdict envisaged measures by individual administrative ruling in case they would threaten the functioning of the universal service or are not in conformity with the PMG (No. 3, 4) and to interdict by individual administrative ruling the providing of a postal service to anyone who does not fulfill the requirements set by the PMG or ordinances (*Verordnungen*) and individual administrative rulings based on it (No. 5). Any such measures imposed must be

92 § 43 (2) PMG; *Feiel*, ZÖR 2011, 455.

93 According to *Stratil*, Postmarktgesetz 62, § 43 PMG lists its tasks completely.

94 *Schneider*, ÖZW 2010, 14.

95 Allgemeines Verwaltungsverfahrensgesetz 1991 – AVG Federal Law Gazette 1991/51 (WV).

96 In accordance with Art 133 No. 4 Federal Constitutional Act, the appeal to the VfGH has to be explicitly permitted. An appeal to the VfGH is admissible in accordance with general rules.

97 *Schneider*, ÖZW 2010, 15.

98 *Schneider*, ÖZW 2010, 15.

proportionate, taking into account the economic consequences for the postal service providers (§ 50 (2) PMG)⁹⁹.

The regulatory authority determines the committed violation by administrative ruling (§ 51 (4) PMG) as it is a prerequisite for the administrative penal procedure in accordance with § 56 PMG. The concerned postal service provider is party to the procedure (§ 51 (5) PMG).

Austria's utilities regulation is embedded in a European system. The PMG contains therefore some provisions regarding the interaction with the European Commission and the regulatory authorities of the other Member States. § 46 PMG obliges the regulatory authority to notify the European Commission with the information needed. § 48 PMG empowers the Austrian regulatory authority to cooperate with the European Commission and the regulatory authorities of the other Member States in cases of common interest. Regarding the interaction of several competition authorities, cooperation is compulsory.¹⁰⁰

The postal service providers are obliged to provide the information needed to the BMVIT at its justified request. The information has to be transmitted in written and electronic form in case it is required for the BMVIT to fulfill its tasks (§ 49 PMG). One of these tasks is to order by ordinance (*Verordnung*) the surveillance of the postal market regarding the development of competition (§ 52 PMG).

2.5.3. *Dispute resolution and complaint management*

Alongside the competences of the ordinary courts, the regulatory authority offers the possibility for dispute resolution between postal service providers and their clients. The regulatory authority will try to settle the conflict or at least point out its opinion on the case. The postal service providers are obliged to participate in this procedure and provide the regulatory authority with the documents and information needed (§ 53 (1) PMG). § 54 PMG offers municipalities and federal provinces a specific opportunity to file complaints. To ensure high quality postal services even in rural areas¹⁰¹, any upcoming interruption to the universal service can be indicated to the RTR. The RTR looks at the complaints and transmits justified complaints to the PCK, which can adopt measures in accordance with § 50 PMG.¹⁰²

⁹⁹ *Schneider*, ÖZW 2010, 16.

¹⁰⁰ Administrative cooperation between Austrian authorities is laid down in Art 20 of the Federal Constitutional Act.

¹⁰¹ ErläutRV 319 BlgNR XXIV. GP 14.

¹⁰² *Schneider*, ÖZW 2010, 17.

2.6. Penal provisions

Any infringement of the provisions of the PMG – as well as other legal acts based on the PMG – listed in § 55 (1) PMG constitutes an administrative offence. The fines can go up to 30 000 EURO. § 55 (1) PMG does not apply if the criminal courts are responsible for persecution or if stricter administrative penal provisions apply (§ 55 (2) PMG). The regulatory authority can rescind the penalty if the perpetrator resumes lawful status within a reasonable period (§ 55 (3), (4) PMG). § 55 (6) PMG destines fines for infringement to the federal government.

A company's economic advantages out of an infringement of the PMG can also be confiscated¹⁰³ on behalf of the regulatory authority. The regulatory authority thereby collaborates with the Vienna Cartel Court, which has to determine the sums of money proceeding from economic advantage (§ 56 (1) PMG). This amount is dedicated to finance the RTR (§ 56 (2) PMG).

As mentioned above, § 57 PMG ensures postal secrecy by punishing every infringement of § 5 PMG. This offence is open to criminal prosecution by the criminal courts.

2.7. Transitional and final provisions

Section 7 contains seven provisions (§§ 58–64 PMG). For instance, in accordance with § 61 PMG, all references to persons are to be understood to be gender-neutral, even if they are not given in a gender-neutral form. Apart from § 57 PMG¹⁰⁴, the BMVIT shall be entrusted with the implementation of the PMG.

3. Conclusion

According to the Postal Directive, the PMG shall implement the full liberalization of the postal service market in Austria. At the same time, it has to ensure a high quality postal throughout Austria, in other words to guarantee a functioning universal service. Given the Post AG's role in Austrian society¹⁰⁵, the Austrian legislator has in the first place tried to protect the former monopolist. It is obvious that thereby a complete opening of the Austrian postal market enforced by the Postal Directive is not easy to achieve. Following *Schneider*¹⁰⁶, the author thinks that the future jurisdiction of the ECJ will show if the provisions of the Postal Directive really have been fully implemented. Even the VfGH will have to ascertain that the provisions of the PMG fulfill all constitutional requirements.¹⁰⁷

103 Even extraordinarily high fines cannot fully prevent companies from violating laws if their economic advantage is many times higher (ErläutRV 319 BlgNR XXIV. GP 15).

104 The Federal Minister of Justice is entrusted with the implementation of § 57 PMG.

105 For example, the Post AG has always been the universal service provider and has numerous employees with a permanent employment status.

106 *Schneider*, ÖZW 2010, 17.

107 In a first case, the VfGH considered the provisions regarding post office boxes and delivery boxes (§ 34 PMG) constitutional (VfGH 16.3.2012, G 97/11).