Bundesverwaltungsgericht

Judgment of 25 September 2013 - BVerwG 6 C 13.12

ECLI:DE:BVerwG:2013:250913U6C13.12.0

Headnotes

1. When determining the costs of efficient service provision that are material for rates approval under telecommunications law, the regulatory authority has a margin of appreciation for the selection of the method for calculating the fixed assets as a basis for determining interest and depreciation; the court must verify the use of such a margin of appreciation also in terms of whether the authority argued in a manner that was plausible and exhaustive (further development of the Senate's jurisprudence, see BVerwG, judgment of 23 November 2011 - 6 C 11.10 - (...)).

2. A rates approval under telecommunications law may as a matter of principle only be annulled by a court in response to the successful action for annulment of an interconnection partner of the regulated undertaking insofar as the approval impacts the legal relationship established between the parties by contract or interconnection order.

Sources of law

Basic Law	GG, *Grundgesetz*	articles 3 (1), 12 (1), 19 (4), 20 (3)
Code of Administrative Court Procedure	VwGO, *Verwaltungsgerichtsordnung*	section 113 (1) first sentence
Telecommunications Act 2004	TKG, *Telekommunikationsgesetz*	sections 2 (2), 13 (1) first sentence, 27 (1) and (2), 28, 29 (1) and (2), 30 (1) first sentence, 31 (1) first sentence, (2) first sentence, (6) third sentence, 35 (2) and (3), 37 (1) and (2), 125 (1) first sentence
Treaty on the Functioning of the European Union (TFEU)		article 288 (5)
Regulation (EC) No 2887/2000		article 3 (3)
Directive 97/33/EC		article 7
Directive 2002/19/EC		articles 5, 8, 13
Directive 2002/21/EC		articles 8, 19

Summary of the facts

The claimant and the third party summoned to attend the proceedings as a party whose rights may be affected (hereinafter summoned third party) operate public telephone networks which are interconnected on the basis of a contractual agreement. By regulatory order of 5 October 2005, the Federal Network Agency (*Bundesnetzagentur*) instructed the summoned third party amongst other things to enable operators of public telephone networks to establish an interconnection with its public telephone network and to provide connection services via the interconnection. At the same time, it stipulated that the rates for the provision of access were subject to approval.

At the request of the summoned third party, the Federal Network Agency approved rates for certain connection services from 1 December 2008 onwards by order of 28 November 2008. The approval is time-limited until 31 May 2009 with regard to individual rates, and until 30 June 2011 as for the rest.

In response to the claimant's action, the Administrative Court (*Verwaltungsgericht*) repealed the order of the Federal Network Agency with regard to some rates for specific connection services. It stated as grounds that the calculation of the costs of efficient service provision would depended amongst other things on the value of the fixed assets. It would be possible to calculate this basis for determining interest and depreciation in a variety of ways. When selecting the methods, the Federal Network Agency would be afforded a margin of appreciation. The use of such a margin of appreciation would be contingent on weighing as to which of the methods is most suited to cope with the goal of protecting interests of users, and consumer interests in particular, the goal of ensuring equal and sustainable competition, as well as the goal of encouraging efficient infrastructural investments and innovations. In this process, the actual evaluation by the authority was also to be reviewed by the administrative courts in terms of whether it had argued plausibly and exhaustively with regard to the criteria. The challenged order would not to meet these requirements.

The summoned third party objects to this with the appeal on points of law, which was admitted by the Administrative Court.

Reasons (abridged)

13 The appeal on points of law of the summoned third party is unfounded, and is therefore to be dismissed (section 144 (2) of the Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*)). The challenged judgment is not based on a violation of law subject to an appeal on points of law (section 137 (1) VwGO). The part of the order of the Federal Network Agency of 28 November 2008 that was annulled by the Administrative Court is unlawful for the reasons set out in the challenged judgment, and violates the claimant's rights (section 113 (1) first sentence VwGO).

14 1. The ruling of the Administrative Court does not violate the rules on rates regulation under telecommunications law.

15 According to section 35 (3) first sentence of the Telecommunications Act (TKG, *Telekommunikationsgesetz*) of 22 June 2004 (hereinafter TKG 2004) (...), the approval is to be granted in full or in part insofar as the rates meet the requirements contained in sections 28 and 31 in accordance with section 35 (2) TKG 2004, and no grounds for refusal apply in accordance with section 35 (3) second or third sentence TKG 2004. There are no indications of such grounds for refusal here. According to the provision of section 31 (1) first sentence TKG 2004, which is therefore the only provision to be taken into consideration here, rates which require approval in accordance with section 30 (1) first sentence or (3) first sentence TKG 2004 are eligible for approval if they do not exceed the costs of efficient service provision. In accordance with section 31 (2) first sentence TKG 2004, the costs of efficient service provision arise from the long run incremental costs of the service provision plus an appropriate mark up for volume-neutral common costs, including reasonable interest on the capital invested, insofar as such costs are necessary in order to provide the service in each case.

16 The rates continuing to constitute the subject-matter of the dispute in the proceedings on the appeal on points of law were certainly subject to approval at the time when the order was issued by the Federal Network Agency. The obligation to obtain approval originally arose from the regulatory order of 5 October 2005, which has become legally binding, based on section 30 (1) first sentence TKG 2004, with which the Federal Network Agency called upon the summoned third party to enable operators of public telephone networks to interconnect with their public telephone network and to provide connection services via the interconnection, and stipulated that the rates for granting access and collocation were subject to approval in accordance with section 31 TKG. (...)

17 With regard to the standard for rates concerning the costs of efficient service provision, both for the characteristic of long run incremental costs of service provision, and for reasonable interest on the capital invested as an element of the mark up for volume-neutral common costs within the meaning of the legal definition contained in section 31 (2) first sentence TKG 2004, the value of the fixed assets as a basis for the calculation of interest and depreciation constitutes the central initial value. The fact that the Administrative Court has presumed in this context that a margin of appreciation was granted to the Federal Network Agency when selecting the methods to determine the value of the fixed assets stands up to a review on the part of the court of appeal on points of law (a), as does the determination of the requirements to be made with regard to the use of the margin of appreciation (b), and the finding that the challenged order of the Federal Network Agency fails to meet these requirements (c).

18 a) In accordance with section 31 (1) first sentence TKG 2004, rates which require approval in accordance with section 30 (1) first sentence or (3) first sentence are eligible for approval if they do not exceed the costs of efficient service provision. With regard to article 13 of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), the provision is to be interpreted such that the regulatory authority has a margin of appreciation when selecting the method for calculating the value of the fixed assets as a basis for determining interest and depreciations (which is positioned on the borderline towards regulatory discretion). This emerges from the following considerations:

19 Section 31 TKG 2004 serves to transpose article 13 of the Access Directive (Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*), judgment of 25 November 2009 - 6 C 34.08 - para. 22). Article 13 (1) first sentence of the Access Directive provides that the national regulatory authority may, in accordance with the provisions of article 8 of the Directive, impose obligations on an operator relating to cost recovery and price controls for the provision of specific types of interconnection and/or access, including obligations for cost orientation of prices and obligations concerning cost accounting systems, in situations where a market

analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users. The stipulation regulated in section 31 (1) first sentence TKG 2004 that rates requiring approval may not exceed the costs of efficient service provision constitutes a concretisation of the cost orientation principle contained in article 13 (1) first sentence of the Access Directive. In accordance with article 13 (3) second sentence of the Access Directive, for the purpose of calculating the cost of efficient service provision, national regulatory authorities may use cost accounting methods independent of those used by the undertaking. This wording indicates that the EU legislature relates the obligation regulated in article 13 (1) first sentence and (3) first sentence of the Directive to orientate prices towards costs to the compliance with the standard of the costs of efficient service provision (...). The case-law of the Court of Justice of the European Union (CJEU) also points in this direction. In the judgment of 24 April 2008 - C-55/06, Arcor - para. 145, 149 - it made clear that the predecessor provisions of section 31 TKG 2004 (...) constitute a detailed application of the principle of cost orientation underlying article 3 (3) of Regulation (EC) No 2887/2000 (see also on this BVerwG, judgment of 23 November 2011 - 6 C 11.10 - (...)). The same applies to section 31 TKG 2004; (...).

20 The Court of Justice of the European Union has deduced from the provision of article 3 (3) of Regulation (EC) No 2887/2000, according to which the prices charged by notified operators for unbundled access to the local loop must be set on the basis of cost orientation, that in particular the interest on the capital invested and the depreciation of fixed assets are to be taken into account as costs that were used when creating the local loop (CJEU, judgment of 24 April 2008, see above, para. 70 et seqq.; see on this BVerwG, judgment of 23 November 2011, see above, para. 17). The value of the fixed assets as the basis for the determination of interest and depreciation can be calculated such that either the original production and procurement costs are taken as a basis, taking account of depreciation already made ("the historic cost"), or those costs are taken as a basis which need to be expended for the replacement of the fixed assets - either minus the depreciation (net replacement value) or without deducting them (gross replacement value) ("the current cost"). Since each of these methods may have a disadvantageous impact on the goals pursued with Regulation (EC) No 2887/2000, intensifying competition through the setting of harmonised conditions for unbundled access to the local loop in order to foster the competitive provision of a wide range of electronic communications services, in accordance with the stipulations of the Court of Justice it is at the "discretion" of the national regulatory authorities to define the detailed rules for determining the calculation basis (CJEU, judgment of 24 April 2008, see above, para. 109, 116 et seq.; see on this BVerwG, judgment of 23 November 2011, see above, para. 19, 22).

21 These stipulations of the Court of Justice of the European Union on the characteristic of cost orientation in article 3 (3) of Regulation (EC) No 2887/2000 can be transferred to the interpretation of the term "cost orientation of prices", which the regulatory authority may impose on an operator in accordance with article 13 (1) first sentence of the Access Directive (...). (...) The fact that no material differences in terms of content exist between the principle of cost orientation of prices for unbundled access to the local loop in accordance with article 3 (3) of Regulation (EC) No 2887/2000 and the term "cost-orientated prices" which the regulatory authority may impose on an operator in accordance with article 13 (1) first sentence of the Access Directive (...) emerges from the following considerations:

22 Where article 13 (1) first sentence of the Access Directive regulates the power of the national regulatory authority to impose price control on an operator, including cost orientation of prices there are - just as in article 3 (3) of Regulation (EC) No 2887/2000 - no differentiated regulations on the approach to be taken in price control and on the standard for rates to be applied (...). Over and above the principle of cost orientation set out in article 3 (3) of Regulation (EC) No 2887/2000 with regard to the cost standard, article 13 of the Access Directive does contain a requirement to consider a "reasonable rate of return on investment" ((1) second sentence and (3) first sentence), as well as the clarification that only the costs of an efficient operator may be recovered ((2) first sentence); the provision also contains stipulations on the procedure for calculating costs, such as the operator's burden of proof ((3) first sentence) and the power available to the regulatory authority to take account of comparable markets or to carry out independent cost accounting methods ((2) second sentence and (3) second sentence). Article 13 of the Access Directive is however no less amenable than article 3 (3) of Regulation (EC) No 2887/2000 to the question of what costs are to be taken into account and which calculation methods are to be applied (...).

23 When interpreting the principle of cost orientation of the prices for unbundled access to the local loop in accordance with article 3 (3) of Regulation (EC) No 2887/2000, the decisive basis to be taken is Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP). As is indicated by its recital 15, Regulation (EC) No 2887/2000 served to complement the previous Directive. The Court of Justice of the European Union found this to be the case in the judgment of 24 April 2008 (see above, para. 110 et seqq.), and the Administrative Court accurately stressed this. Article 7 (2) of Directive 97/33/EC provides that charges for interconnection shall follow the principles of transparency and cost orientation (first sentence), and that the burden of proof that charges are derived from actual costs including a reasonable rate of return on investment shall lie with the organisation providing interconnection to its facilities (second sentence). This standard is largely in compliance with article 13 (1) second sentence and (3) first sentence of the Access Directive (...). Prices are to continue to be calculated on the basis of costs, including a reasonable rate of return on investment (in the German version of the provision, "including" is worded - potentially misleadingly - as "sowie" ("as well as"), however the distinction is lost in re-translation as the meaning in English is unambiguous) (...). True, article 13 of the Access Directive does not refer to the "actual" costs, which are taken up by the Court of Justice of the European Union (CJEU, judgment of 24 April 2008, see above, para. 115 and 119). In accordance with the case-law of the Court of Justice, the term "actual costs" is however not to be understood as a separate cost category, but only as an umbrella term for the historic costs and the costs likely to be calculated on the basis of the replacement value (see on this BVerwG, judgment of 23 November 2011, see above, para. 28). It can be concluded from the obligation incumbent on the operator to prove where necessary that the prices are calculated on the basis of the costs that, also within the scope of article 13 of the Access Directive, only the actual costs of the operator can form the basis for the control of the costs. The power of the regulatory authority to take account of comparable markets or to carry out independent cost accounting methods, which is provided in article 13 (2) second sentence and (3) second sentence of the Access Directive - unlike in article 7 (2) of Directive 97/33/EC -, also does not lead to any change in the material standard for the control of the costs, but relates solely to the methods applied when calculating the costs of efficient service provision (...).

24 The presumption that the principle of cost orientation in accordance with article 13 of the Access Directive could have a content different than the principle of cost orientation in accordance with Regulation (EC) No 2887/2000 and Directive 97/33/EC is furthermore precluded by recital 14 of the Access Directive. The latter provision refers to the obligations stipulated in Directive 97/33/EC to be imposed on undertakings with significant market power, among them "price control including cost orientation" (first sentence), and goes on to state that this range of possible obligations "should be maintained but, in addition, they should be established as a set of maximum obligations that can be applied to undertakings" in order to avoid over-regulation (second sentence). Had the EU legislature wished to derogate from the content of the principle of

cost orientation in accordance with the law as it previously stood, it would have made sense to make this point at that juncture (...).

25 Furthermore, no considerable differences which might preclude the stipulations made by the Court of Justice of the European Union being transferable arise between the interconnection charges and the prices for unbundled access to the local loop. In the general view, the capital costs consisting of the costs of depreciation and interest as a rule constitute the largest block of costs in the telecommunications sector (...). This applies not only with regard to unbundled access to the local loop, in which cable conduit systems and copper cables are the major cost factors, but also with regard to interconnection services where the capital costs particularly depend on the transmission and switching technology that is deployed (...).

26 The Court of Justice does not derive the different calculation methods for the value of the fixed assets as a basis for determining interest and depreciation from Regulation (EC) No 2887/2000, but largely from the fact that Annex V of Directive 97/33/EC refers with regard to the method for calculating the costs to the historic cost based on actual expenditure incurred for equipment and systems and the costs calculated based on estimated replacement costs of equipment or systems. Given that, as has been explained, the standard for the control of the costs in accordance with article 13 (1) second sentence, (3) first sentence of the Access Directive and article 7 (2) of Directive 97/33/EC is identical in terms of its content, there is no substantive reason not to also include the abovementioned calculation methods in the control of the costs in accordance with the Access Directive.

27 The stipulation of the Court of Justice that a "margin of discretion" was granted to the national regulatory authorities when selecting the calculation methods can also be transferred to the control of the costs within the scope of article 13 of the Access Directive. True, the Court of Justice refers to the goals pursued with Regulation (EC) No 2887/2000 as reasoning, on which any of the cost calculation methods available for selection could have a negative impact. These goals, which the Court of Justice largely derives from the 6th and 11th recital of Regulation (EC) No 2887/2000, are on the one hand to rapidly open the telecommunications sector to competition (CJEU, judgment of 24 April 2008, see above, para. 101), and on the other hand to ensure the long-term development and upgrade of the local infrastructure by operators with significant market power (CJEU, judgment of 24 April 2008, see above, para. 106). The same goals are however also based *de facto* on article 13 of the Access Directive. Recital 20 of the Access Directive refers to the goals of promoting competition and investment and the interests of consumers. It states in detail that price control may be necessary when market analysis in a particular market reveals inefficient competition (first sentence); where competition is not sufficiently strong to prevent excessive pricing, the regulatory intervention may entail an obligation that prices are cost orientated to provide full justification for those prices (second sentence second half-sentence); the method of cost recovery should be appropriate to the circumstances taking account of the need to promote sustainable competition (fifth sentence). At the same time, in accordance with the fourth sentence of recital 20, when a national regulatory authority calculates costs incurred in establishing a service mandated under this Directive, it is appropriate to allow a reasonable return on the capital employed including appropriate labour and building costs. A further goal stipulated by recital 20 of the Access Directive is that the method of cost recovery should maximise consumer benefits (fifth sentence at the end). The abovementioned goals are taken up in the general provision contained in article 5 of the Access Directive. In accordance with article 5 (1) first subparagraph of the Access Directive, the national regulatory authorities, acting in pursuit of the objectives set out in article 8 of the Framework Directive (Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services), are to encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and interoperability of services, exercising their responsibility in a way that promotes efficiency and sustainable competition, and gives the maximum benefit to end-users. In addition to other goals, article 8 of the Framework Directive lists encouraging competition (see in particular article 8 (2) (b)), encouraging efficient investment in infrastructure (article 8 (2) (c)), and the interests of users (article 8 (2) (a), (4)).

28 Recitals 2 ("bringing maximum benefit to users", "affordable access"), 10 ("maximum benefit for end-users") and 14 ("competitive provision of an inexpensive, world-class communications infrastructure and a wide range of services for all businesses and citizens in the Community"), as well as article 1 (1) ("competitive provision of a wide range of electronic communications services") of Regulation (EC) No 2887/2000 indicate consumer interests. The latter are not explicitly mentioned by the Court of Justice of the European Union in this context. It may however be left undetermined whether the consumer interests suggested there did not also necessarily have to be taken into consideration in the context of the control of the costs in accordance with this Regulation. Even if, within the scope of the Access Directive, a further goal were to be taken into account accommodating consumer interests in the selection of the cost calculation method, thus tending to oppose the goal of developing and upgrading the network infrastructure in the long term, this would not preclude the transfer of the stipulation of the Court of Justice that a "margin of discretion" was granted to the national regulatory authorities when selecting the calculation methods, but would tend to further underline the need for comprehensive weighing of the contradictory goals.

29 The stipulations of the Court of Justice of the European Union regarding the characteristic of cost orientation in article 3 (3) of Regulation (EC) No 2887/2000 may be transferred to the interpretation of the term "cost orientation of prices", which the regulatory authority may impose on an operator in accordance with article 13 (1) first sentence of the Access Directive without there being a need for a reference to the Court of Justice of the European Union via a preliminary ruling in accordance with article 267 (3) of the Treaty on the Functioning of the European Union (TFEU). The correct application of EU law is so obvious within the meaning of the "acte claire doctrine" as to leave no scope for any reasonable doubt (see on this CJEU, judgment of 6 October 1982 - 283/81, CILFIT - para. 16). For the above reasons, it appears to be ruled out from the outset that the Court of Justice could interpret the margin of appreciation of the national regulatory authorities when interpreting the term "cost orientation of prices" which the regulatory authority may impose on an operator in accordance with article 13 (1) first sentence of the Access Directive differently than the principle of cost orientation of prices for unbundled access to the local loop in accordance with article 3 (3) of Regulation (EC) No 2887/2000.

30 Where the Court of Justice speaks in its judgment of 24 April 2008 of discretion being granted to the regulatory authority by article 3 (3) of Regulation (EC) No 2887/2000, the Senate has already ruled that, in accordance with the German legal terminology, there is a margin of appreciation with regard to the characteristic of cost orientation in article 3 (3) of Regulation (EC) No 2887/2000, and corresponding to this in section 24 (1) first sentence TKG 1996 (BVerwG, judgment of 23 November 2011 - 6 C 11.10 - (...)). In accordance with the above, the same applies with regard to the characteristic of "cost orientation of prices" in article 13 (1) first sentence of the Access Directive and - related to the selection of the method for calculating the fixed assets forming the basis for the calculation of interest and depreciation - the determination of the costs of efficient service provision according to section 31 (1) first sentence and (2) first sentence TKG 2004.

31 In accordance with section 31 (1) first sentence TKG 2004, rates which require approval according to section

30 (1) first sentence or (3) first sentence are also eligible if they do not exceed the costs of efficient service provision. This principle is to be interpreted with regard to article 13 of the Access Directive such that the regulatory authority has a margin of appreciation when selecting the method for the calculation of the fixed assets as a basis for the calculation of interest and depreciation. (...).

32 b) On the basis of the presumption that the regulatory authority has a margin of appreciation when selecting the method for the calculation of the fixed assets as a basis for the calculation of interest and depreciation when determining the standard for the calculation of rates with regard to the costs of efficient service provision, the Administrative Court determined the judicial review standard in a manner to which no objection can be raised in the proceedings of the appeal on points of law (aa). The reduction of the requirements for the reasoning favoured by the summoned third party and the defendant is not justified (bb).

33 aa) EU law only grants a margin of appreciation to the regulatory authority, but beyond this does not make any stipulations for the extent of judicial review. In accordance with the case-law of the Court of Justice of the European Union, it is a matter solely for the Member States, within the context of their procedural autonomy, to determine, in accordance with the principles of equivalence and effectiveness of judicial protection, the competent court, the nature of the dispute and, consequently, the detailed rules of judicial review with respect to decisions of the national regulatory authorities concerning the authorisation of the rates of notified operators for unbundled access to their local loop (CJEU, judgment of 24 April 2008 - C-55/06, Arcor - para. 163 et seqq., 170). No indications are recognisable that this could be different for the interconnection prices falling within the area of application of the Access Directive. In accordance with the jurisprudence of the Senate, it follows from this that the control standards can be derived from the principles developed by the Federal Administrative Court on German administrative law, which differ according to whether it is a matter of reviewing a margin of appreciation within the constituent elements of the provision, or of reviewing (regulatory) discretion within the legal consequences (BVerwG, judgment of 23 November 2011 - 6 C 11.10 - (...)). The usage of a margin of appreciation is classically reviewed as to whether the authority has adhered to the valid procedural provisions, has taken as a basis a correct understanding of the applicable legal term, has ascertained the relevant facts in full and correctly, and has adhered to generally-valid evaluation standards in the actual assessment, and in particular has not violated the prohibition of arbitrariness (BVerwG, judgment of 2 April 2008 - 6 C 15.07 - Rulings of the Federal Administrative Court (BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*) 131, 41 para. 21). The exercise of regulatory discretion is objected to by a court if there has been no weighing at all (failure to weigh, *Abwägungsausfall*), if the weighing has not been based on concerns that should have been included in it under the respective circumstances (deficiency in weighing, *Abwägungsdefizit*), if the significance of the concerns in question has been neglected (false assessment in weighing, *Abwägungsfehleinschätzung*), or if the balancing between them is disproportionate to the objective weight of individual concerns (disproportionality of weighing, *Abwägungsdisproportionalität*; fundamentally BVerwG, judgment of 2 April 2008, see above, para. 47).

34 Based on these principles, the Senate ruled that the Federal Network Agency is subject to special requirements for the reasoning when using its margin of appreciation of the kind at hand. (...) Moreover, with such a margin of appreciation, which to some degree is on the borderline towards regulatory discretion, the actual assessment of the authority should certainly be examined as to whether it has argued plausibly and exhaustively with regard to the criteria which are explicitly underlined in the legal provision, or indeed have become established in it (BVerwG, judgment of 23 November 2011, see above, para. 38, referring to the judgment of 23 March 2011 - 6 C 6.10 - BVerwGE 139, 226 para. 38).

35 It is solely the reasons for the decision by the authority which are decisive in this case to the judicial review of the margin of appreciation granted to the regulatory authority. (...)

36 Because of the particular proximity to regulatory discretion, the court must also review the actual assessment of the authority in terms of whether it has argued plausibly and exhaustively with regard to the criteria which are explicitly underlined in the legal provision, or are indeed established in it. For this reason, it must be possible to ascertain from the grounds for the decision that the regulatory authority has weighed up the conflicting interests and reviewed which costs standard - firstly - the interests of users, - secondly - the goal of ensuring equal competition and - thirdly - the goal of ensuring efficient infrastructural investment and innovation, performs best in each case. The authority must then assess the different concerns in detail and explain that and why, in its view, overriding reasons ultimately speak in favour of the method that has been selected (BVerwG, judgment of 23 November 2011, see above, para. 39).

37 bb) The points of view stated by the summoned third party and the defendant in the proceedings for the appeal on points of law do not justify any reduction in the requirements for the reasoning that have been stated.

38 (1) The fact that the Federal Network Agency, in accordance with section 31 (6) third sentence TKG 2004 (see now section 31 (4) third sentence TKG 2012), must decide *ex officio* on applications regarding charges within ten weeks after receipt of the submission of the charge, or after initiation of the proceedings, does not have the effect of reducing the requirements for the reasoning.

39 The requirement to give a plausible, exhausting reasoning when using the margin of appreciation granted to the regulatory authority in the rates approval procedure follows from ensuring effective legal protection in accordance with article 19 (4) GG, and must apply without exception if only because of the considerable relevance of this decision in terms of basic rights. The obligation to obtain rates approval interferes with the scope of protection of the freedom to practice an occupation (article 12 (1) GG) of the summoned third party; the basic right of occupational freedom includes the freedom to negotiate on the rates for professional services with the interested party (see Federal Constitutional Court (BVerfG, *Bundesverfassungsgericht*), chamber decision of 8 December 2011 - 1 BvR 1932/08 - (...); BVerwG, judgment of 9 May 2012 - 6 C 3.11 - BVerwGE 143, 87 para. 34). The fact that the regulatory authority must take decisions on rates approvals despite an undoubtedly comprehensive review programme, which includes not only the costs documents of the regulated undertaking, but as a rule also comprehensive statements by the regulated undertaking and by third parties, under considerable time pressure, must not impair the efficiency of judicial review. (...)

40 What is more, the Federal Network Agency must, admittedly, in each case decide and reason anew on the fundamental question of whether interest and depreciation are to be calculated on the basis of procurement and production costs, or of restoration costs, in the context of the respective rates approval procedure, but can base its decision and reasoning on preliminary considerations which it already conducted prior to the start of the deadline for a ruling in accordance with section 31 (6) third sentence TKG 2004 on the occasion of previous procedures, or indeed independently of the procedure. (...)

41 (2) The jurisprudence cited by the summoned third party to examine alternatives when weighing individual concerns within a planning decision (*planerische Abwägung*) does not lead any further in the context at hand. (...)

43 (3) The Senate furthermore does not concur with the view of the defendant that a reduction in the requirements as to the level of detail to be provided in the reasons for the rates approval is already justified

as a matter of principle because, in accordance with the regulatory system of the Telecommunications Act 2004 - unlike in accordance with the Telecommunications Act 1996 -, the Federal Network Agency was already able to decide at the level of a regulatory order on individual aspects which were relevant to the subsequent rates approvals, and that it therefore made no sense to demand that the rates approval once more contain an argumentative debate on these aspects. (...)

46 (4) The reduction in the requirements for the reasoning called for by the appeal on points of law also does not follow from the consideration of Recommendations by the Commission.

47 In accordance with article 288 (5) TFEU, Recommendations of EU institutions have no binding force. In accordance with the case-law of the Court of Justice of the European Union, Recommendations of the Commission are however subject to increased pressure for national authorities and courts to take them into consideration where they cast light on the interpretation of national measures adopted in order to implement EU law or where they are designed to supplement binding Community provisions (CJEU, judgment of 13 December 1989 - C-322/88, Grimaldi - para. 18). This indirect legal impact does not however rule out that the national authorities and courts may deviate from the Recommendations. In accordance with the jurisprudence of the Senate, this even applies to the special case that secondary EU law explicitly requires that the Recommendations be complied with "to the greatest possible extent". For instance, despite the increased obligation to take into account the Recommendation on relevant product and service markets (Markets Recommendation), handed down by the Commission in accordance with article 15 (1) of the Framework Directive on the basis of article 15 (3) of the Framework Directive, the Federal Network Agency is obliged to carry out an "understanding evaluation", which on the one hand suitably takes into account the tendency emanating from the presumption, and on the other hand also and in particular accommodates national characteristics deviating from the European standard (BVerwG, judgments of 2 April 2008 - 6 C 15.07 - BVerwGE 131, 41 para. 24 et seq., of 29 October 2008 - 6 C 38.07 - (...) and of 1 September 2010 - 6 C 13.09 - (...)). The regulatory authority may hence not omit a separate examination and reasoning, even if it complies with a Recommendation of the Commission as a result.

48 Regardless of the question relating to the binding legal nature, the Recommendations of the Commission that are cited by the summoned third party do not reveal that the regulatory authority is obliged to carry out a cost calculation on the basis of replacement values as a rule in the context of "price controls, including obligations for cost orientation of prices" in accordance with article 13 (1) first sentence of the Access Directive. With regard to the Commission Recommendation of 19 September 2005 on accounting separation and cost accounting systems under the regulatory framework for electronic communications (2005/698/EC), primarily cited by the summoned third party, based on article 19 (1) of the Framework Directive, the material scope is already not affected. According to its recital 2, the Recommendation is based on operators designated as having significant market power on a relevant market, as a result of a market analysis carried out in accordance with article 16 of the Framework Directive, being subject, Inter alia, to obligations concerning the preparation of separated accounts and/or implementation of a cost accounting system to make transactions between operators more transparent and/or to determine the actual cost of services provided. In accordance with no. 2 (3) of the Recommendation, the obligation to implement a cost accounting system is imposed in order to ensure that fair, objective and transparent criteria are followed by notified operators in allocating their costs to services in situations where they are subject to obligations for price controls or cost-orientated prices. In accordance with its unambiguous wording, the Recommendation hence refers to the power of the national regulatory authority, laid down in article 13 (1) first sentence of the Access Directive, to impose specific obligations on an operator with regard to cost accounting systems subject to the requirements mentioned by the provision (see section 29 (2) TKG 2004), but not to the power of the regulatory authority, which is independent of this, to impose on the operator in question obligations relating to cost recovery and price controls, including obligations for cost orientation of prices (see sections 30 et seqq. TKG 2004).

49 In other respects, in terms of its regulatory content, the Recommendation also does not reveal the unmistakeable preference to apply (gross) replacement values alleged by the summoned third party. True, recital 8 of the Recommendation, which is incompletely quoted by the summoned third party, does mention a "forward-looking approach", which is "based not on historic costs but on current costs". This is however recognisably only one possible alternative decision. Only in the event that the regulatory authority selects a forward-looking approach, in which therefore "assets are revalued based on the cost of using a modern equivalent infrastructure built with the most efficient technology available" must it then be able to "adjust the parameters of the cost methodology in order to achieve these objectives". An unmistakeable preference for using current costs can also not be derived from no. 3 of the Recommendation, further cited by the summoned third party. As far as subsection 3 states that "evaluation of network assets at forward-looking or current value of an efficient operator, that is, estimating the costs faced by equivalent operators if the market were vigorously competitive, is a key element of the 'current cost accounting' (CCA) methodology", this description does not affect the power of the regulatory authority to opt for a completely different approach based on historic costs. Only in the event that the regulatory authority opts for an approach related to current costs ("This requires that"...) can the stipulations contained in no. 3 (3) of the Recommendation be applied that "the depreciation charges included in the operating costs be calculated on the basis of current valuations of modern equivalent assets", that "reporting on the capital employed also needs to be on a current cost basis", that "other cost adjustments may be required", "to reflect the current purchase cost of an asset and its operating cost base", and finally that "evaluation of network assets at forward-looking or current value may be complemented by the use of a cost accounting methodology such as long run incremental costs (LRIC), where appropriate".

50 No other evaluation emerges insofar as the national regulatory authorities are recommended in no. 3 (5) of Recommendation 2005/698/EC to "take due regard to further adjustments to financial information in respect of efficiency factors, particularly when using cost data to inform pricing decisions since the use of cost accounting systems (even applying CCA) may not fully reflect efficiently incurred or relevant costs", where "efficiency factors may consist of evaluations of different network topology and architecture, of depreciation techniques, of technology used or planned for use in the network". These statements too are contingent on the decision of the regulatory authority to opt for a cost accounting system based on current costs, but do not affect the possibility of opting for a different cost accounting system based on historic costs.

51 The fact that the Commission Recommendation only takes as its basis the option of the regulatory authority for a cost accounting system based on current costs emerges furthermore from no. 3 (2), in accordance with which the national regulatory authorities "having adopted a decision on a cost accounting system based on current costs" are recommended to "set clear deadlines and a base year for their notified operators' implementation of new cost accounting systems based on current costs". A margin of appreciation on the part of the regulatory authority between the different cost accounting systems, which is not restricted by the Recommendation, is especially favoured by subsection 4 of no. 3 of the Recommendation - which in particular is not quoted by the summoned third party. Insofar as the national regulatory authorities are thus recommended to "have due regard to price and competition issues that might be raised when implementing CCA, such as in the case of local loop unbundling", the Commission makes it quite clear that opting for a cost accounting system based on current costs may negatively impact individual regulatory goals, so that the

regulatory authority needs to be aware of such goals. This obligation to take this into consideration would be devoid of purpose were the Commission Recommendation to pursue the goal of tying the regulatory authority to a specific cost accounting system from the outset.

52 Commission Recommendation of 8 January 1998 on interconnection in a liberalised telecommunications market (Part 1 - Interconnection pricing) (98/195/EC), further mentioned by the summoned third party, based on article 7 (5) of Directive 97/33/EC, is also not applicable; its legal basis, namely Directive 97/33/EC, is repealed with effect from 25 July 2003 in accordance with article 26 and 28 (1) subparagraph 2 of the Framework Directive, and its provisional application has been terminated in accordance with article 27 (1) of the Framework Directive by the regulatory order of the Federal Network Agency of 5 October 2005. Independently of this, Recommendation 98/195/EC is also unsuited in terms of its content to support the view of the summoned third party. A preference of the Commission for a calculation method based on the current cost method can at best be recognised in no. 6 of the Recommendation. According to the latter provision, "the use of forward-looking, long-run average incremental costs implies a cost accounting system using activity-based allocations of current costs, rather than historic costs". The Recommendation, which is addressed to the national regulatory authorities, follows on from this, namely to "set deadlines for their notified operators for the implementation of new cost accounting systems based on current costs, where such systems are not already in place". It however emerges from the overall context of the Recommendation, in particular from recital 7, in accordance with which no "particular cost accounting system" is specified, that the cost accounting system based on current costs is, in the view of the Commission, only a particularly well suited method, but not one which is clearly preferable.

53 This assessment concurs with the case-law of the Court of Justice of the European Union. Although, amongst other things, the summoned third party of the present proceedings had already claimed in the proceedings underlying the judgment of 24 April 2008 before the Court of Justice that, in accordance with no. 6 of Recommendation 98/195/EC, there were significant indications that the Community legislature had opted for a calculation method based on current costs (CJEU, judgment of 24 April 2008 - C-55/06, Arcor - para. 89 et seq.), the Court of Justice did not mention this in its ruling. In fact, it explicitly found that Regulation (EC) No 2887/2000 and Directives 97/33/EC and 98/10/EC of the old legal framework do not contain any indication of a calculation method based exclusively on current costs or on historic costs (see above, para. 109).

54 Because of the repeal of Directive 97/33/EC, Commission Recommendation of 8 April 1998 on interconnection in a liberalised telecommunications market (Part 2 - Accounting separation and cost accounting) (98/322/EC), also based on article 7 (5) of Directive 97/33/EC, is just as inapplicable to interconnection pricing in the present case as is the abovementioned Recommendation 98/195/EC. What is more, the Court of Justice of the European Union has also not derived any relevant indications from this Recommendation that a cost accounting system based on current costs was preferable, although the summoned third party of the present proceedings had already alleged in proceedings, which had been pursued before the Court of Justice, that significant indications emerged from no. 4 of Recommendation 98/322/EC that the Community legislature had opted for a calculation method based on current costs (CJEU, judgment of 24 April 2008, see above, para. 91).

55 (5) Finally, the submission of the summoned third party is ultimately unsuccessful that the requirements for the reasoning, to which the Federal Network Agency would be subject when using the margin of appreciation granted to it, were reduced due to its decision making practice to date according to the principle that the administrative authorities are bound by the rules which they themselves have laid down (*Selbstbindung der Verwaltung*), because it had so far always based the approvals of the rates for interconnection services on (gross) current values. True, it is recognised in the jurisprudence of the Federal Constitutional Court, as well as of the Federal Administrative Court, that the actual administrative practice may lead to the administrative authorities being bound by the rules they themselves have laid down (BVerfG, decision of 13 June 2006 - 1 BvR 1160/03 - Rulings of the Federal Constitutional Court (BVerfGE, *Entscheidungen des Bundesverfassungsgerichts*) 116, 135 <153>; BVerwG, judgments of 21 August 2003 - 3 C 49.02 - BVerwGE 118, 379 <383> and of 8 April 1997 - 3 C 6.95 - BVerwGE 104, 220 <223>), - both because of the right to equality (article 3 (1) GG) and of the principle of the protection of legitimate expectations anchored in the rule of law principle (article 20 (3) GG). It is however equally well established that the authority is able to change its practice for reasons which are free of arbitrariness, i.e. objective reasons (BVerwG, judgment of 8 April 1997, see above). The authority must re-examine in each case when using its margin of appreciation whether such reasons apply to a deviation from the previous decision-making practice. Should it fail to carry out this review, the decision-making procedure is incomplete. Regardless of the consistency requirement, which also needs to be taken into account in terms of time (section 27 (2) TKG 2004), this must apply to a special degree in an area such as rate regulation under telecommunications law, in which the technical, economic and legal framework is subject to rapid, continuous change.

56 Nothing else follows from those aspects concerning the protection of legitimate expectations that have been asserted by the summoned third party. (...).

57 c) The reasoning of the challenged order with regard to the question of whether the value of the fixed assets required to provide the connection services in question as a basis for interest and depreciation is to be calculated on the basis of historic costs or current costs fails to meet the requirements that have been put forward here. It does not reveal that the Federal Network Agency has weighed the conflicting interests and examined which cost standard performs best in each case - firstly - the purpose of ensuring interests of users, - secondly - the goal of ensuring equal competition and - thirdly - the goal of ensuring efficient infrastructural investment and innovation. The defendant has furthermore failed to plausibly and exhaustively state, by assessing the different concerns in detail, that and why - in its view - the majority of arguments ultimately favour the method selected. (...)

64 2. Counter to the view taken by the defendant, the challenged judgment also does not overstep the legal boundaries of the Court's decision-making power.

65 In accordance with section 113 (1) first sentence VwGO, the court is to annul the administrative act and any objection notice insofar as the administrative act is unlawful and the claimant's rights have been infringed. It follows from this that the court may only repeal a rates approval under telecommunications law in response to the successful action for annulment of an interconnection partner of the regulated undertaking insofar as the approval impacts the legal relationship contractually established between the parties or by means of an interconnection order established by the regulatory authority (a). There is however no breach of section 113 (1) first sentence VwGO here, given that the Administrative Court has not repealed the challenged order of the defendant to the extent stated in the operative part with effect towards everyone, but only with effect between the parties (b).

66 a) The court may only repeal an administrative act having effect on a large number of individuals in response to the successful action for annulment of a party concerned insofar as it takes effect between the parties. This is not a consequence of the final and binding effect of the judgment, which in accordance with

section 121 VwGO is restricted to the parties as a matter of principle, but emerges from section 113 (1) first sentence VwGO, in accordance with which the court annuls the administrative act and any objection notice insofar as the administrative act is unlawful and the claimant's rights have been infringed. The term "insofar as" makes clear that the annulment by the court in the case of administrative acts with divisible content must be restricted to those parts from which the infringement of the right ensues for the claimant regardless of the "*inter omnes*" effect of the annulment judgment that results from the direct modification or reestablishment of the substantive legal situation. A subjectively-restricted annulment is however contingent on the administrative act being divisible in personal terms. Insofar as nothing else emerges from the respective specialist law, it is decisive here whether or not the administrative act can only be complied with uniformly by all addressees.

67 On this basis, the court may only repeal a rates approval under telecommunications law in the present case of a successful action for annulment by an interconnection partner of the regulated undertaking insofar as the approval has effect on the legal relationship established between the parties by contract or by an interconnection order of the regulatory authority. According to the legal concept, the rates approval consists of personally divisible parts, and is not contingent on uniform compliance by all addressees. Substantial objections to a subjectively-restricted annulment decision can be derived neither from the impact of the rates approval regulated in the Telecommunications Act (aa), nor from spirit and purpose of rate regulation (bb), or from general aspects concerning legal protection (cc).

68 aa) The legal effect as to changing an existing private law relationship (hereinafter private law effect) of the rates approval which leads in existing contracts to the substitution of the agreed rate by the approved rate (section 37 (2) TKG), does not exclude the presumption of the subjective divisibility of this administrative act. Insofar as this effect is contingent on the decision being taken uniformly towards the creditor of the rate and the debtors of the rate (see BVerwG, judgment of 25 March 2009 - 6 C 3.08 - (...)) and the parallel application of approvals of different rates for the same service is ruled out (see BVerwG, judgment of 9 May 2012 - 6 C 3.11 - BVerwGE 143, 87 para. 16), this relates only to the respective (bipolar) legal relationship between the creditor of the rate and a specific debtor of the rate. By contrast, the private law effect on the contractual relationship under civil law does not necessarily also lead to a need for uniformity with regard to all legal relationships falling under the rates approval between the rate creditor and all individual rate debtors. (...)

69 bb) It is also not possible to derive from spirit and purpose of rate regulation any imperative objections to the presumption that a rates approval under telecommunications law consists of parts which are personally delimitable, with the consequence that an annulment that is restricted to the legal relationship between the respective parties to the proceedings is possible. (...)

73 The disadvantageous impacts on competition in the case of a judicial annulment of the rates approval restricted on the legal relationship between the respective parties to the proceedings are furthermore faced by different types of disadvantage for competition in the converse case of unrestricted annulment. In accordance with the jurisprudence of the Senate (BVerwG, judgment of 9 May 2012 - 6 C 3.11 - BVerwGE 143, 87 para. 58), the regulatory goal of ensuring equal competition and encouraging sustainable competition-orientated telecommunication markets entails that the market participants have a sufficiently reliable foundation for calculation and planning for their investment decisions. If competitors of an undertaking with significant market power rely for their own end customer products on wholesales which are provided by this undertaking and are subject to rates approval, equal competition can only be ensured if, in relation to these wholesales, economic planning security exists for a period which is foreseeable in the medium term. Spirit and purpose of rate regulation require that both the regulated undertaking and the competitors be able to rely on its continued existence during the period of application of a time-limited rates approval. This protection of legitimate expectations would be impaired if the annulment of the rates approval by the court, which can lead to a renewed decision by the Federal Network Agency, and hence can also lead to the approval of higher rates should new information become available, were also to apply in the relationship between the regulated undertaking and those competitors which did not file an action, and hence permitted the rates approval to become legally binding.

74 Given this starting point, it does take account of the legal concept of rates regulation if the assessment as to which of the disadvantages that have been shown for the regulatory goal of ensuring equal competition and encouraging sustainable competition-orientated telecommunication markets are more acceptable is carried out by the regulatory authority in the respective individual case. It therefore appears to be appropriate in the case of judicial annulment to first of all presume the continued existence of the rates approval in the relationship between the regulated undertaking and those competitors which have not filed an action. In the final analysis, the Federal Network Agency is therefore left with the decision which is at its discretion in accordance with its legal obligations as to whether the rates approval which is unlawful in relation to the undertakings, which are not concerned by the proceedings, but remains legally binding, is to be withdrawn in accordance with section 48 (1) first sentence of the Administrative Procedure Act (VwVfG, *Verwaltungsverfahrensgesetz*), at least with effect for the future. Whether the Federal Network Agency has exercised its discretion with regard to the decision on the error-free withdrawal in earlier cases in which courts have annulled rates approvals restricted to the legal relationship between the respective parties to the proceedings, is irrelevant for the legal assessment.

75 cc) Pertinent objections against the subjective divisibility of the rates approval and the resultant restriction of the judicial annulment to the legal relationship between the respective parties to the proceedings in the present procedural constellation of the action for annulment of an interconnection partner also do not arise from the aspects concerning legal protection asserted in the oral hearing before the Senate, in particular by the claimant's counsels within the parallel proceeding BVerwG 6 C 14.12.

76 There is no objection to the subjectively-restricted annulment of the rates approval in the present procedural constellation of the action for annulment of an interconnection partner liable to a charge that, in cases of a decision granting the application of an action for the issuance of an administrative act lodged by the regulated undertaking against the rates approval, as a rule all legal relationships established by contract or by interconnection order between the regulated undertaking and the interconnection partners are covered by the annulment. It is, rather, a legally-imperative consequence of the different subject matter of the respective disputes. As a rule, the violation of own rights emanating from an unlawful rates approval, with the regulated undertaking whose action claims higher rates, covers all legal relationships in which the undertaking may only demand the approved rates from its interconnection partners. By contrast, the own rights of the interconnection partners are only violated as a rule insofar as the unlawful rates approval sets the amount of its respectively own obligation to pay charges for the services obtained from the regulated undertaking. (...)

77 In the respective individual case, the Administrative Court has to examine the degree to which the rates approval impairs rights of the undertaking filing the action. The fact that the subjective scope of the annulment of a rates approval by the court cannot be uniformly determined, but must be orientated in each individual case towards the subject matter of the dispute and the respective rights violated, emerges from the principle expressed in section 113 (1) first sentence VwGO that administrative court proceedings do not serve

the purpose of reviewing the objective lawfulness, but implementing subjective legal positions. The practical difficulties to which the review of the constituent element for annulment, namely the infringement of own rights, may lead in borderline cases, can be tackled just as straightforwardly in the field of rate regulation under telecommunications law as in other fields of specific administrative law. It is ultimately irrelevant for the subjective scope of the judicial annulment of a rates approval whether, given an interpretation of section 42 (2) VwGO in conformity with EU law, taking the case-law of the Court of Justice of the European Union into account, those undertakings may also file an action which do not have a contractual relationship with the regulated undertaking and whose rights are hence only potentially affected by the rates approval (see CJEU, judgment of 24 April 2008 - C-55/06, Arcor - para. 176 et seq.).

78 b) If, in the light of the regulatory goals just as in the statutory framework of the effects of approval, after all of that, there are no pertinent objections to the presumption that a rates approval under telecommunications law is divisible from a personal point of view and may only be repealed by a court in response to a successful action for annulment of a contracting party of the regulated undertaking insofar as it has an effect between the parties, however, no breach of section 113 (1) first sentence VwGO is asserted by the defendant here because the Administrative Court has limited its ruling within the operative part of the judgment accordingly. (...)