

3.3 GERMANY

1. REGULATORY FRAMEWORK

1.1. National Regulatory Authority

Under the Telecommunications Act (TKG), all regulatory tasks in the telecommunications sector are assigned to RegTP (Regulierungsbehörde für Post und Telekommunikation). This includes taking measures to safeguard competition, in particular to prevent abuse of a dominant position. RegTP must consult the Federal Office of Competition on decisions concerning the definition of the relevant markets and the determination of a dominant position (Section 82 of the TKG), as well as on decisions relating to tariff approval, access and interconnection. The views of the Federal Office of Competition is binding for RegTP with regard to defining significant market power.

The Interconnection Directive gives the NRA powers to intervene, on its own initiative, at any point in the negotiations leading up to an interconnection agreement (Judgement of the Court of Justice in case C-221/01, No 33 of the grounds). The TKG empowers RegTP to define, on its own initiative, interconnection conditions under the abuse-of-dominant-position procedure (Section 33 TKG). In respect of this latter power, Germany's Supreme Administrative Court (Bundesverwaltungsgericht) ruled on 25 April 2001 that it is not limited to a dispute settlement context. In any event, RegTP has not used these powers. As regards the setting of conditions for local loop unbundling, RegTP relied in certain cases on the Section 33 procedure for dispute settlement in accordance with the local loop unbundling regulation.

The TKG sets out a procedure for settling interconnection disputes (Section 37 TKG), but the provisions in question do not give RegTP sufficiently clear powers in this area. This is highlighted by their application by the courts which, inter alia, deny RegTP powers to set interconnection tariffs within the dispute settlement procedure. In its decision of 3 May 2001, the Higher Administrative Court for North Rhine-Westphalia (OVG Münster) stated that DT must be given the possibility to file a request for tariff authorisation. RegTP may only set interconnection tariffs as part of a two-step procedure, the conditions of which have not yet been clarified by the courts. RegTP's powers to resolve disputes have been further limited by the decision of 10 October 2002 of the Cologne Court (VG Köln) (see also point 2.1.4). RegTP has appealed against those court decisions.

RegTP's lack of powers to set interconnection tariffs and to order interconnection agreements as part of a dispute settlement, which is a consequence of the jurisprudence, seriously affects its powers to settle disputes in conformity with the Interconnection Directive. It is also doubtful whether the German framework adequately safeguards the principle that the party requesting dispute settlement has a right to obtain a decision within six months. Although the jurisprudence gives scope to RegTP to set tariffs in the framework of an own-initiative tariff approval procedure if DT fails to file a request for tariff approval in good time, the German procedural framework does not guarantee that those time limits will be observed.

This also highlights the need for a statutory period within the abusive-positions procedures, where there are currently no time limits for rendering a decision.

With regard to tariff disputes, RegTP currently sets tariffs for interconnection and local loop unbundling in a two-step procedure: the technical conditions are determined in the first step, and tariffs are then set in the light of the decision taken. The first step often consists of an abuse-of-dominant-positions procedure which does not specify time limits. This two-step approach results in an unduly lengthy procedure to set interconnection conditions, including tariffs, and leads to delays in completion of all interconnection and unbundling conditions.

Furthermore, with regard to the setting of conditions under the dispute settlement procedure (Section 37 TKG), RegTP considers that it has powers to set interconnection conditions only if negotiations between parties have failed.

RegTP has used its powers under the TKG to impose penalties on DT to enforce time limits set for the provision of leased lines and unbundling. DT appealed against both decisions, in particular against the imposition of penalties. With regard to the unbundling penalties, RegTP has suspended the obligation to implement its decisions until 15 November 2002, while the decision relating to penalties in the context of leased lines has been suspended by the courts (see under point 2.6). Consequently, the decisions on penalties are currently not being implemented.

RegTP considers that it does not have the power to deal with complaints regarding the fees charged for the provision of subscriber data to providers of directory services. In particular, the arbitration procedure under the Consumer Protection Ordinance (Section 35 TKV, see point 4.4) does not cover application of the relevant provision of the TKG (Section 12 TKG). The Federal Office of Competition has powers to handle competition issues not covered by RegTP's remit and has recently opened a proceeding relating to the conditions of subscriber data provision.

The length of appeal procedures because of confidentiality rules constitutes one of the most substantive market entry barriers in Germany. The German law on court proceedings provides for the right of parties to consult all documentation filed by the other party. RegTP cannot, therefore, submit documents in court which are protected by confidentiality rules. This is particularly relevant as regards the incumbent's cost accounting data.

RegTP is therefore not in a position to submit the relevant documents to justify its decisions on tariff approval. As a result, many appeals cannot be dealt with by the courts (approximately 350). A number of court actions exclusively concern the confidentiality aspect (three before the Supreme Administrative Court) and must be decided before the cases can be heard in substance. No definitive judgement has so far been rendered in these confidentiality proceedings. One judgement on tariffs has been rendered to date, annulling the setting of tariffs by RegTP owing to the absence of supporting documents to justify the decisions.

Germany took legislative action to address the problem of lengthy appeal procedures due to confidentiality rules. Section 75a of the TKG, which was added to the TKG by an amendment of 7 May 2002 (*Post und telekommunikationsrechtliches Bereinigungsgesetz*), now gives the regulatory authority the power to decide on confidentiality. However, under the new rules, RegTP must first clarify – as the Ministry of Economic Affairs was previously

required to do - which parts of the documentation can be submitted to the court. The new legislation is therefore not sufficient to unblock the appeal proceedings.

1.2. Management of Numbers

RegTP is responsible for structuring the national numbering space, setting the conditions for allocating and using numbers, and processing applications for numbers and number blocks.

1.3. Frequency Management

RegTP is responsible for the assignment of frequencies.

The TKG empowers RegTP to assign frequencies under a tender, auction or competitive bidding procedure in cases where demand exceeds the number of frequencies available.

Three regulations on frequency allocation were issued on the basis of the TKG: the frequency allocation plan (Frequenzbereichszuweisungsplanverordnung, FreqBZPV) specifies at a general level which radio services are allocated to certain frequency bands. This serves as a basis for a more specific plan to allocate frequencies (Frequenznutzungsplan). That plan is drawn up on the basis of the regulation on the frequency usage plan (Frequenznutzungsplan-aufstellungsverordnung – FreqNPAV). Finally, the scope of usage for frequency users is defined in the frequency assignment regulation (Frequenzzuteilungsverordnung – FreqZutV). The three regulations provided for in the TKG were adopted by the government on 26 April 2001. The government intends to revise its frequency allocation plan and has published a bill on the web site of the Ministry of Economic Affairs and Technology (Entwurf einer Neufassung der FreqBZPV as of 26 July 2002).

All frequencies available for GSM, WLL and 3G services have been assigned by RegTP on the basis of tender, auction or competitive bidding procedures.

2. INTERCONNECTION AND ACCESS REGIMES

2.1. Interconnection

2.1.1. Reference Interconnection Offer

Completion of the RIO has been achieved on the basis of several individual decisions which RegTP then declared to be applicable to all contracts (Erklärung zum Grundangebot). Delays in the inclusion in the RIO of further elements decided by RegTP are due to the fact that RegTP is awaiting the conclusion of the urgent appeal procedure before declaring certain elements to be part of the RIO.

The right and an obligation to interconnect all operators, in accordance with the Interconnection Directive, have been ensured by RegTP's adoption of administrative rules on 17 October 2001, published in its Official Journal. However, there is still concern that the right to interconnect with DT is subject to the interconnected operator's obligation to establish up to 23 further interconnection points once a certain capacity of traffic (48.8 Erlang)¹ routed into

¹ Erlang: A measure of telecoms traffic. 1 Erlang corresponds to a circuit carrying one call for one hour.

a given interconnection point is exceeded (“migration obligation”). No complaints with regard to this requirement have been filed to RegTP or to the Commission since the introduction of EBC (see under 2.1.2).

2.1.2. Interconnection charges [cost-orientation; cost standard]

On 12 October 2001 RegTP set interconnection tariffs, applicable with effect from 1 January 2002, based on element based charging and comprising 475 POIs at a local level and 23 POIs at a regional level. Those tariffs are charged according to the level of interconnection provided.

DT appealed against RegTP’s decision. In its decision of 17 December 2001, the administrative court (Verwaltungsgericht (VG) Köln) rejected DT’s request for a suspension of RegTP’s decision, a ruling endorsed by the Münster Higher Administrative Court on 8 May 2002. Proceedings continue as to the substance.

RegTP based its decision on the principle of the obligation under the TKG to provide an efficient service, and on Commission Recommendation 98/195/EC² suggesting that the regulatory authorities take an approach to interconnection pricing based on the costs of an efficient operator and forward-looking long-run average incremental costs. Furthermore, a network having 475 POIs at the lowest level of interconnection, the basis for the charging system, was considered by RegTP to be the best possible compromise between DT’s approach and that of other operators regarding the appropriate network configuration.

With regard to interconnection charges which new entrants may request from DT for terminating tariffs, DT imposes reciprocity, i.e. new entrants can charge for terminating DT traffic on their own networks as if they had a network architecture similar to DT’s.

2.1.3. Fixed to mobile call termination

The mobile termination rates for peak time of the two major mobile operators Vodaphone and T-Mobile are situated within the EU average, with four countries (Austria, Finland, Luxembourg, Sweden) having lower rates (see Annex II Chart 47).

RegTP published its conclusions on the mobile and the national interconnection market in its Official Journal of 8 March 2000 (OJ 5/200, Verf. 21/2000). RegTP found that mobile operators did not have SMP in any market, arguing that they were not in a position to act independently (in any market) as, from the point of view of end users, termination was part of an overall mobile package offered. End-users would react to price increases by shortening their call duration and, in addition, take account of the prices from fixed to mobile networks when considering a possible subscription to a mobile operator. No mobile operator has been notified as having significant market power in the national interconnection market.

² (Commission Recommendation of 8 January 1998 for interconnection in a liberalised telecommunications market (part 1 - interconnection payment).

The sensitivity of end-users to the pricing of mobile termination has not been subject to an empirical survey, however. New entrants do not have a procedural right to appeal against the decision.

2.1.4. FRIACO

The Interconnection Directive gives the NRA powers to set conditions for interconnection corresponding to market needs (regardless of whether conditions are set in the process of dispute settlement or on the initiative of the NRA) and explicitly refers in this respect to capacity-based charging (tenth recital).

DT offers competitors and its own subsidiary T-Online access to its internet platform, including connection to the internet platform (T-InterConnect Online Connect, TICOC), which is priced at a flat rate (OVF - Online Vorleistungsfltrate PMX), and requires connection at 1622 points. However, in practice, new entrants are not able to connect at all 1622 PMXAs and internet access is generally provided to competitors via interconnection. Furthermore, DT does not itself use OVF at all 1622 PMXAs.

In its decision of 11 June 2002, RegTP ruled that DT is obliged to offer competitors interconnection for internet services at a flat rate (FRIACO) and set the number of local POIs at 475, which corresponds to the number of POIs at the local level under EBC.

RegTP based its decision among other things on the principle that SMP operators must make an offer corresponding to market demand and must offer competitors services similar to those it provides to its subsidiaries. As set out above, those criteria are also compulsory under the Interconnection Directive.

RegTP expected DT to submit an application for approval of rates, but as DT challenged its decision, no application has been submitted to date. In its decision of 10 October 2002, the VG Köln has, in an emergency court action, suspended the obligation to implement the decision on grounds that RegTP is not empowered to set conditions for interconnection under the dispute settlement procedure, but only under the abuse-of-dominant position procedure (see also under NRA/powers). RegTP and the operator requesting FRIACO have appealed against the Court's decision. In its decision of 13 November 2002, the Münster Higher Administrative Court decided that RegTP cannot force DT to submit a request for tariff authorisation. The obligation to implement RegTP's decision of 11 June 2002 is still subject to appeal before the Münster Higher Administrative Court within the urgency procedure.

2.2. Interconnection leased lines/partial circuits

2.2.1. Availability

Interconnection leased lines are not regulated as part of the RIO, but are covered by the tariff authorisation for carrier leased lines ("Customer sited-IC leased lines"). In its decision of 12 June 2002, RegTP laid down detailed rules to ensure their availability in non-discriminatory terms (see below under leased lines).

2.3. Unbundling

2.3.1. RUO

By 1 October 2002, 91 agreements on full unbundling had been concluded and 855 404 fully unbundled lines provided by DT, compared to 549 167 lines on 1 October 2001. By 1 October 2002, three contracts had been concluded on shared access, with 336 lines ordered and 13 actually operational. No sub-loop has been unbundled so far (see details below).

As in the context of negotiating interconnection agreements, negotiations to conclude agreements on access to the unbundled local loop are unnecessarily lengthy and cumbersome, because not all conditions set by RegTP in its decisions are declared to be part of the RUO, and must therefore be re-negotiated or requested via dispute settlement, although already decided by RegTP.

DT failed to published its RUO in time at the beginning of 2001. It published a RUO on full unbundling only on 1 March 2002 after having been ordered to do so by RegTP in a decision of 1 February 2002.

In its decision of 1 February 2002, RegTP ordered DT to integrate in its RUO conditions for access to sub-loops. This covers the rental of copper sub-loops regardless of whether the part between the cable distribution frame (Kabelverzweiger, KVz) and the main distribution frame (Hauptverteiler, HVt) is copper or fibre (ISIS/OPAL-lines). DT included access to sub-loops in its RUO published on the internet on 1 March 2002. Sub-loop unbundling is regarded as a precondition for providing VDSL-services. However, neither new entrants nor DT provide VDSL-services.

In its decision of 30 March 2001, RegTP ordered DT to submit a binding offer for shared access as part of the reference offer by 30 May 2001. However, RegTP did not enforce those decisions in due time. On 15 March 2002, RegTP set prices for shared access. Finally, on 5 April 2002, DT published its RUO, including conditions for shared access.

In its decision of 1 July 2002, RegTP stated that DT must offer access to its electronic information system on the correspondence of subscriber addresses to specific distribution areas, as well as on collocation sites, virtual collocation and on the situation of OPAL-lines. DT has appealed against the decision of 1 July 2002. DT does not offer access to an electronic information system for ordering. The AKNN is currently drawing up a specification for an interface that is due to be finalised at the end of 2002. As the AKNN is a working group that relies on reaching a consensus of all operators, including DT, it is not certain that this time limit will be met. Billing is offered by DT in electronic form.

In its decision of 30 March 2001, RegTP reduced the tariff for access to the local loop applicable until 31 March 2003. For the most common type of access to the customer, the unbundled copper pair, the monthly rental charge was set at €12.48. In its decision of 11 April 2002, RegTP reduced the one-off fees applicable until 30 June 2003. However, the price reduction has not fully allayed concerns about a price squeeze (see under universal service, tariffs).

In all its decisions, RegTP used a costing model based on current costs and long-run incremental costs (see cost accounting).

2.3.2. Collocation conditions and effective implementation

Conditions for collocation, including the price of room rental and air conditioning, have been set by RegTP and were declared to be part of the RUO.

Delivery periods for local loop unbundling and collocation had been set by RegTP in its decision of 7 June 2000 at 16 weeks for a new collocation room and 7 weeks for enlargement of an existing collocation room. On 1 July 2002, RegTP set penalties at €20/calendar day for exceeding the time limits set for the provision of local loop access and €250/calendar day for exceeding the time limits for the provision of collocation. It also imposed penalties on competitors of €10 for each local loop ordered under a planning system but no longer required. The penalties for competitors only apply if a competitor's planned order exceeds 100 local loop lines per month and if the deviation from the plan exceeds +/-20%. RegTP also decided on guarantees, cancellation, access to collocation areas and competitors' means of obtaining information.

However, the decision has not been implemented following a decision of the Cologne Administrative Court of 12 November 2002 suspending the obligation to implement it on grounds that DT may offer competitors only those conditions which it offers itself internally and that RegTP had the burden of proof with regard to the existence and content of internally offered conditions. The Court in particular interpreted the unbundling regulation in such way as to require DT to offer unbundling within the same periods as the subscription. As a result of this suspension, there is currently no applicable rule on penalties. DT appealed against the decision, however. RegTP has suspended the obligation to implement its decision until 15 November 2002 pending the outcome of the emergency procedure. It could not be clarified whether DT actually complies with the time limits set by RegTP in its decision of 7 June 2000. No data are available as to the factual delivery periods as DT is not implementing its reporting obligations until the emergency procedure is completed. RegTP is currently examining a possible appeal against the Court's decision.

2.4. Bitstream access

2.4.1. Non-discriminatory access

In 2001, a new entrant requested interconnection with DT at the level of the ATM switches with a view to offering DSL to residential and business users. In its decision of 8 May 2001, RegTP stated that DT is not obliged to offer competitors interconnection of their ATM networks with DT's ATM network for the purpose of routing DT's ATM –DSL traffic directly into their own networks. No further request has been filed to RegTP with regard to access at the ATM level since then.

New entrants questioned whether it was indeed technically impossible to interconnect to DT's ATM-network . DT has since transformed its ATM network so that it is no longer possible to interconnect at the ATM level. This raises the question as to whether the SMP operator in the fixed market should be required to design its network to allow interconnection and access for new services with a view to securing the development of competition in new markets.

DT offers ISP a number of possibilities for taking over internet traffic at one or more of the 74 "BBPoP (broadband-points of presence).

Previously expressed concerns that DT's network does not allow further roll-out of DSL beyond a certain saturation level (10% of lines) may be addressed. At the hearing of 8 October on the status of the telecommunications market in Germany, DT stated that as a result of technical progress, up to 50% of its lines could now be used for DSL from a technical point of view.

2.4.2. Tariffs

In its decision of 30 March 2001, RegTP considered that some variants of DT's DSL-offer were below cost. However, RegTP did not reject the pricing scheme since a predatory effect had not been proven. DT increased its monthly charge for DSL as from 1 May 2002. The new prices apply to new customers who subscribe to those services from 25 February 2002 onwards.

Following this price increase, RegTP closed an abuse-of-dominant-position procedure without, however, determining whether the increase had removed the pricing below costs. The closure of the abuse procedure with regard to DSL pricing does not therefore give sufficient safeguards as to the absence of predatory pricing.

2.5. Situation of the (broadband) local access market

2.5.1. Status of DSL market, position of incumbent

The DSL market is one of the markets showing the highest growth. However, it is strongly dominated by DT.

DT had 2.5807 million DSL lines available as of 1 October 2002, while new entrants provided 19 000 DSL lines on the basis of their own infrastructure, 161 000 DSL lines via full unbundling, 210 000 on the basis of DT's offer « T-DSL-ZISP and TICOC » and 320 000 DSL lines on the basis of resale. New entrants also provided 13 DSL lines via shared access.

According to information provided by DTAG 450 000 customers of DSL have chosen an ISP other than T-Online as on 1 July 2002.

2.5.2. Development of alternative means of access

Alternative means of access are not widely available, but it is not possible to draw an overall conclusion, as the data are incomplete. There were more than 86 000 connections provided by new entrants through cable modem as of 1 October 2002. No data are available with regard to WLL-services. As of 1 October 2002 the incumbent had provided 5 400 connections by other means (satellite, optical fibre). More than 2 000 customers of new entrants were actually using powerline access by 1 October 2002, whereas more than 45 000 connections were on offer. Access via satellite is also provided by new entrants, but there are no figures on how many customers are using this form of access.

2.6. Leased Lines

2.6.1. Pricing

In its decision of 12 June 2002, RegTP set the tariffs for leased lines. Prices are in the lower range compared to other Member States. For example, the monthly rental for a 2Mbit leased line of 2 km is €168.75, which is the third lowest price across the EU.

2.6.2. Delivery periods and quality of service; non-discrimination

In its decision of 9 October 2001, RegTP set binding time limits for delivery of carrier leased lines (*Carrier-Fest-Verbindungen, CFV*): eight weeks if no work needed to be carried out, four months in the event of minor work and six months in the event of substantial work. The decision was supplemented by its decision of 31 May 2002 setting binding time limits for delivery to competitors of leased lines connecting end-users (*Standard-Festverbindungen, SFV*): 12, 15 and 30 working days for bandwidth of 64 kbit/s, 128kbit/s to 2 Mbit/s and over 2 Mbit/s respectively. In addition, DT was ordered to offer competitors all conditions and additional technical facilities offered to its own customers.

With regard to both types of leased lines, RegTP decided that DT must propose to competitors a precise delivery date situated within the time limits set, and offer penalties of five percent of the monthly rental payable per calendar day of overrun (over the agreed delivery date), applicable from the very first day on which a deadline is missed. DT can be released from its obligation to provide compensation if it can prove it was not at fault.

The decision of 31 May 2002 was taken on the basis of evidence gathered by RegTP on DT's discriminatory practice against competitors with regard to delivery of leased lines. RegTP inter alia concluded that there was discrimination by comparing contractual conditions offered by DT to its end-customers with the conditions offered to competitors, and by comparing data on delivery periods provided by DT for the ONP 2001 leased lines report with data on delivery periods provided by competitors. The decision appears to satisfy market needs and was welcomed in principle by new entrants.

However, the decision has not been implemented following a decision of the Cologne Court of 15 October 2002 suspending the implementation obligation, on grounds that DT may offer competitors only those conditions which it offers itself internally and that RegTP had the burden of proof with regard to the existence and content of internally offered conditions. RegTP has appealed against the Court's decision. Pending the emergency procedure, the time limits set by RegTP are not being implemented in practice.

2.7. Numbering

2.7.1. Carrier selection and pre-selection

The option of carrier selection and pre-selection at all levels is vital to open up all market segments. The Numbering Directive specifies that notified operators must provide carrier pre-selection to any interconnected operator from 1 January 2000. However, DT does not currently provide the option of local call carrier selection

and pre-selection. As a result, in Germany, only 33 % of subscribers to an access line connection (in relation to all access lines, including those of DT and alternative operators) can choose one or more alternative operators for local calls.

In June 2000, the Commission opened an infringement proceeding against Germany for failure to fully implement the Numbering Directive, and decided to apply to the Court of Justice on 20 December 2001.

In its decision of 1 August 2000, RegTP stated that the German Telecommunications Act does not cover pre-selection for local calls. Subsequently, Germany took legislative action to empower RegTP to impose the option of local carrier pre-selection. The German authorities planned to introduce the facility before the end of 2002. After a difficult legislative process, an amendment to the provision on carrier pre-selection (Section 43(6) TKG) was finally adopted by the Parliament on 12 September 2002 and by the Bundesrat (second chamber) on 27 September 2002, providing that carrier selection and pre-selection must be provided for all types of calls from 1 December 2002. However, the new Act provides that RegTP, in its decision implementing the obligation to provide the facility, must ensure that incentives for efficient investment in infrastructure facilities and to promote long-term competition are not removed, and that the existing network is used efficiently in respect of short-distance interconnection. It also provides that the network operator chosen by the user must make an appropriate contribution to the cost of providing the subscription line. The new Act also allows RegTP to suspend the obligations partially or in full to the extent and as long as this is justified for technical reasons. Those limitations raise a number of concerns as to the possibility of imposing network architecture requirements on the interconnected party as a condition for obtaining carrier selection and pre-selection, the means of ensuring the technical availability of the facility, compliance with the principle of cost-orientation for the provision of pre-selection and interconnection and the compensation arrangements for an access deficit. In its Communication No 463/2002 of 16 October 2002, RegTP launched a public inquiry and asked for comments to be filed before 22 November 2002 regarding the manner in which the new law is to be implemented.

Carrier selection and pre-selection for long distance and international calls appear to work satisfactorily.

2.7.2. Number portability

Fixed number portability was introduced on 1 January 1998.

Introduction of mobile number portability (MNP) was mandated by RegTP from 1 November 2002. Mobile network operators handle calls to ported numbers by direct routing. The fixed network operator decided to implement - at least for the moment - indirect routing.

According to the TKG, the customer can be charged only the costs which are directly attributable to the change.

The porting of fixed numbers is currently free of charge to the customer. In future DT may introduce a fee. The fee is subject to ex-ante regulation.

The mobile operators are charging departing customers for MNP. RegTP recently asked the operators to provide cost calculation data. The TKG gives RegTP the

possibility of issuing administrative orders to ensure that only costs directly attributable to a change of customer are charged. A fine can be imposed to enforce these administrative orders.

2.8. Cost accounting and accounting separation

2.8.1. Cost accounting systems in place, statement of compliance

In its administrative rules of 14 March 2002 (Communication No 120/2001, Official Journal 5/2001, p. 647-648), RegTP stated that it is bound to authorise tariffs on the basis of cost accounting data submitted, and that in principle it will not base its decisions under Sections 2 and 3 of the Telecommunications Rates Regulation Ordinance (TEntgV) on the prices prevailing in comparable markets. The administrative rules also state RegTP's obligation to publish an annual statement of compliance.

On the basis of its administrative rules, RegTP specified the requirements as to the incumbent's cost accounting system in detail in its 2001 annual report (page 52-68). It explained how to apply the principle of showing specific costs as part of total costs and how to show the costs of the efficient service (Gesamtschau). RegTP also described the incumbent's cost accounting system "DELKOS", based on the "INTRA" calculation including a local network, core network, retail and other, and showing LRIC and current costs.

In its statement published on 6 March 2002 (Communication No 126/2002, Official Journal 4/2002, p. 374-376), RegTP noted a series of improvements. It concluded however that DT's cost accounting system still had some shortcomings.

3. AUTHORISATIONS

3.1. Licence conditions

Previous reports highlighted concern about the level of licence fees and their compliance with the principle of coverage of administrative costs. The former regulation on licence fees provided for a €1.52 million fee for a national licence for voice telephony and a €5.39 million fee for operating transmission lines. Following an infringement proceeding opened in 1999, the Commission decided on 18 July 2001 to appeal to the Court of Justice. Following the judgment of 19 September 2001 of Germany's Supreme Administrative Court annulling the regulation on licence fees, the Commission decided to suspend execution of its decision pending the adoption of a new regulation on licence fees.

On 9 September 2002, a new regulation on licence fees entered into force. It provides for licence fees covering the administrative costs of the award of the licence. As the one-off fee is the same regardless of the territory covered, operators applying for several territorial licences would be charged a higher amount than those applying for a national licence only.

The new regulation offers repayment and conversion of territorial licences into national licences only to those operators where either the validity of the administrative act in question can be challenged in the courts or where RegTP has suspended its definitive validity. Consequently, operators not having challenged the validity of the imposition of licence fees will have to pay a substantially higher amount than those which can obtain repayment and/or conversion of their licences

into national licences. However, the German authorities plan to transpose the new framework on fees for authorisations in such a way as to allow for offsetting the licence fees paid.

The Commission is currently examining whether the new regulation removes the grievances of the above mentioned infringement case, together with complaints filed by operators against lack of retroactive applicability of the new regulation with regard to valid administrative acts.

3.2. Rights of way - role of local authorities in infrastructure development

The TKG provides that licence holders are granted the right to use public ways for installing telecommunications lines free of charge. The entity responsible for maintenance of the public way must give its consent to the individual works. The TKG also sets out the principles for facility sharing and access to private land.

4. UNIVERSAL SERVICE/CONSUMERS

4.1. Retail tariffs

In its decision of 21 December 2001, RegTP established a new price-cap procedure, applicable from 1 January 2002, creating four separate baskets for calculating prices: access lines, local connections, national long-distance and international connections. The price-cap procedure allowed DT to increase its monthly subscription fee for the local connection as from 1 May 2002.

The increased subscription fee is still below the price for full unbundling set by RegTP on 31 March 2001 at €12.48. On 8 May 2002, the European Commission sent DT a statement of objections setting out the preliminary conclusion that the German incumbent operator has, by maintaining a price-squeeze, abused its dominant position through unfair pricing regarding the provision of local access to its fixed network (local loop). On 31 October 2002, DT requested RegTP to authorise a further increase of the monthly subscription fee by €0.99.

Under the authorisation procedure for optional tariffs, RegTP does not examine cost orientation on the basis of cost accounting data submitted, but only verifies whether the optional tariff includes anti-competitive rebates and whether the difference compared to the wholesale prices is adequate.

However, the anti-competitive effects of some of DT's special tariff schemes for consumers have not been sufficiently addressed, in particular because RegTP did not, on the basis of a forward-looking estimate, determine the effects of those offers in the market, but postponed the examination of market impact.

In various decisions under tariff authorisation procedures, the latest dating from 28 June 2002, RegTP authorised DT's bundled tariffs based on a price scheme called "AktivPlus", which offers the customer various services for an additional fee on top of the subscription fee, such as reductions on local calls as well as on all national calls and fixed to mobile calls. They also offer a variant of this price scheme called "AktivPlus XXL" offering customers free national calls on Sundays and public holidays for a flat rate fee. RegTP had made those authorisations subject to revision if market data showed an adverse competitive effect. Between March 2001 and March 2002, the number of subscriptions to AktivPlus increased from 5.8 million to 9.2 million customers (see DT's first quarterly report for 2002),

which accounts for approximately 25% of the total subscriptions in the Germany. New entrants expect a further increase of Aktivplus users to more than 10 million before the end of 2002, resulting in a further loss of their market share and creating a high market entry barrier, in particular because of low customer acceptance of pre-selection.

RegTP commissioned a study on the effects of the AktivPlus price schemes on market developments which has not yet been completed. A tariff authorisation procedure is currently pending at RegTP for AktivPlus.

During the hearing of 8 October 2002 on the status of the telecommunications market in Germany, DT held that the AktivPlus price schemes were not bundled offers as every component could be obtained separately. It emerged, however, that in case of separate purchase, the retail tariffs would be different from those under the bundled offer.

New entrants also face difficulties with DT's special tariffs in the business market. DT offers business users large rebates under its tariff schemes "TDN (Telekom Designed Network)" and "T-VPN (Telekom Virtual Private Network) Best Price". In its decision of 15 October 2001, RegTP set the limits for the tariff options that may be offered to closed user groups, stating that only communications within closed user groups – not those offered to closed user groups over a public network – could be exempted from tariff authorisation. As a result, RegTP stated that all tariffs in TDN or T-VPN contracts which should have been made subject to ex-ante tariff authorisation, but which DT had not submitted for authorisation (and therefore had not been authorised by RegTP), were to be replaced by the authorised tariffs.

In its decision of 13 December 2001, the Cologne Administrative Court suspended the obligation to implement the decision, a ruling endorsed by the Münster Higher Administrative Court (OVG Münster) on 13 March 2002. This also leaves business users with legal uncertainty about their contract terms.

According to Section 30(2) TKG, RegTP has opened two tariff authorisation procedures on its own initiative with regard to certain of the TDN-agreements, which are due to be decided at the beginning of December 2002.

4.2. Funding – implementation of the ruling of the Court of Justice

Germany has not put in place a funding scheme for universal service.

4.3. Universal directory, itemised billing, quality of service

DT provides a directory in paper and in electronic form and an inquiry service. All operators are required to provide DT with subscriber data for inclusion in the database operated by DT.

Several alternative providers offer directory services. Under the TKG (Section 12(2)), DT must provide alternative directory service providers with information from its database against payment of a reasonable fee. RegTP does not consider it has the powers to implement this provision. In 1998, the Federal Office of Competition decided on a ceiling. New entrants have filed complaints to the Commission and the Federal Office of Competition to obtain a review of the

ceiling and the conditions under which those data can be obtained. The latter opened a proceeding on 5 September 2002.

Itemised billing, including a basic level of itemised billing free-of-charge, is offered in Germany.

RegTP has published data on all the quality parameters of several operators, including the universal service provider/SMP operator (Communication No 332/2002, Official Journal 2002, p. 1020-1043). These are based on ETSI EG 201 769 and have been further specified by RegTP.

4.4. Dispute resolution

RegTP has set up an arbitration body under the Consumer Protection Ordinance (Section 35 TKV). This procedure applies to complaints from all types of end-users, including business users. RegTP laid down the rules of the procedure in its Official Journal (Communication No 643/2001, Official Journal 22/01 of 14 November 2001). According to its 2001 Annual Report, RegTP had handled 284 arbitration procedures by 30 June 2001. It also handles a large number of complaints (about 40 000/year).

5. DATA PROTECTION

5.1. Implementation/Traffic data retention

Under the Telecommunications Data Protection Regulation (TDSV), operators can keep traffic data necessary for billing purposes for a maximum of six months after invoicing. If, prior to expiry of the six-month time limit, the customer has disputed the amount billed, the traffic data may be stored until such time as the dispute has been finally settled.

Operators may also keep traffic data for network security purposes for up to six months.

Traffic data retention on security grounds can be imposed on operators only in individual cases and requires a court order.

5.2. Unsolicited calls and faxes

Unsolicited calls for commercial purposes are prohibited under the law on unlawful competition (*Gesetz gegen unlauteren Wettbewerb, UWG*). According to a number of court rulings, this also applies to unsolicited e-mails, but there has not yet been a ruling from the highest court on this matter.

A large number of complaints have been filed with RegTP about unsolicited faxes sent for the purpose of marketing premium rate services (PRS). On 28 August 2002, the Second Regulation amending the Telecommunications Customers Protection Ordinance (Telekommunikations-Kundenschutzverordnung, TKV) entered into force. The new Section 13a provides that any party who has provided customers with a number to access premium rate services, and who has knowledge that advertising material is sent to this number unlawfully, must immediately take appropriate measures to prevent the contravention. In particular, if a warning does

not produce results, the party must as far as possible block the premium rate number if it is aware that there is a repeated and serious contravention.

Following this amendment to the Telecommunications Customers Protection Ordinance, the customer can now make direct representations to the network operator which has transferred the premium rate number to a third party for use, and can request it to take immediate action against unlawful fax, e-mail or SMS messages sent for advertising purposes.

In the hearing on 8 October 2002 on the status of the telecommunications market in Germany, network operators and consumer associations took the view that the new regulation does not achieve the necessary improvements, as the scope for misuse of numbers remains unclear, with regard to unlawful advertising in particular. Network operators also pointed out that they are often not in a position to identify the premium service provider or to assess whether the latter is acting in conformity with the provisions. It therefore appears that the new legislation does not substantially improve the possibilities to withdraw PRS numbers on the above grounds.

6. MOBILE ISSUES

6.1. UMTS

The 3G Decision was implemented by RegTP's decision of 10 May 1999 and two decisions of 18 February 2000 setting out the conditions for the award of 3G licences. Six licences have been awarded as a result of an auction in August 2000.

Marketing of 3G services has been announced by one operator for mid 2003, and by another for the end of 2003. Another licence holder intends to launch 3G as part of trials within closed user groups before the end of 2002 and announced it would launch a commercial service in 2003.

6.2. Infrastructure sharing

Operators have the obligation to achieve the target of 25% coverage of the population before the end of 2003 and of 50% by the end of 2005. Every operator must ensure that it retains control over the management of its own network (so called "*Netzfunktionsherrschaft*").

In its interpretation of 5 June 2001, RegTP specified the details for facility sharing, stating that the running of core network must be self-managed, while the other elements of the network, such as antennae and masts, can be shared. Two infrastructure sharing agreements have been concluded.

7. PREPARATION FOR THE TRANSPOSITION OF THE NEW FRAMEWORK

The bills to transpose the new framework are in the process of being drafted. It is planned, inter alia, to address the issue of attributing full powers to RegTP in the this context, thus allowing RegTP to intervene, on its own initiative and in the context of dispute settlement, to set conditions and tariffs for interconnection as provided for under the new framework.

Under the Telecommunication Act, RegTP examines on a case-by-case basis whether an operator has SMP. It has the powers to publish a list of SMP operators. RegTP is not, however, empowered to carry out an SMP assessment on the basis of an abstract market analysis and lacks the powers to carry out the necessary inquiries.

In April 2001, RegTP launched a public consultation to establish rules for market analysis and published the results of the consultation (Communication No 547/2001, Official Journal 19/2001, p. 2931-2948). The overall finding was that general rules on how to carry out market analysis could not be established because market players had divergent positions. RegTP continues to decide on a case-by-case basis and in accordance with the principles of competition law.

