

The German telecommunications market is currently in intensive discussions concerning Voice over IP (VoIP) or Internet telephony. A number of companies already offer VoIP products for the mass market. Also the German Regulatory Authority (“RegTP”) is aware of the burgeoning importance of this technology and the market potential that go with it. RegTP recently held a public hearing of market participants on the topic in order to evaluate the market segment and to create the regulatory framework for taking advantage of the opportunities and possibilities that VoIP will bring about. The RegTP itself expects that VoIP will bring new impulses to competition, which will benefit all consumers in the form of innovative new services and applications. It also regards VoIP as a catalyst for broadband penetration.

However, the ongoing debate gives rise to a number of questions that must be clarified in the immediate future, to swiftly provide planning safety for all VoIP providers in the market. In particular, there are uncertainties concerning the regulatory treatment of VoIP products by the RegTP, and the implementation of legislative requirements in areas such as emergency calls, monitoring/surveillance and numbering. By this position paper, the VATM strives to carry the discussion about these conditions forward, while also calling on RegTP to swiftly determine the regulatory framework that applies to VoIP. Mainly, this means identifying and preventing predatory strategies by market-dominating companies as early as possible, while at the same time enabling alternative providers to offer their innovative services at reasonable terms.

Regulatory restraint in the VoIP sector would facilitate predatory elimination of competition and boost the potential for market-dominating companies to transfer their market power into the VoIP sector. This would harm competition and be against the law. In the past, regulatory restraint already enabled Deutsche Telekom (“DTAG”) to gain advantages by its product T-DSL, when RegTP accepted price dumping during its market launch. This resulted in a de facto monopoly for DTAG in the DSL sector and, as a result, in an extremely low rate of broadband penetration in Germany compared to the rest of Europe. This failure must not be repeated in the case of VoIP. From the beginning, this product must be subject to fair competitive conditions in accordance with the law. Otherwise, VoIP will become yet another victim of the lack of T-DSL regulation, given that DTAG with its de facto monopoly in DSL has by far the pole position to launch VoIP services.

1. Definition

The VATM defines VoIP services as publicly accessible telephone services, to the extent that VoIP services are comparable with conventional phone services from the end customer's perspective. Such comparability is given, in particular, if calls from and / or to E.164 numbers (Recommendation E.164 by the International Telecommunication Union ITU for national and international numbering plans) hosted by different providers can be made via VoIP, in other words, if VoIP participants can make calls to other public networks via an IP network and can be reached from other public networks via a VoIP service.

This definition is the starting point for the general issue which regulatory and legal rights and obligations set out in the German Telecommunications Act (“TKG”) apply, both in the areas of access and end-user regulation, emergency calls, interception and numbers administration of VoIP products. The following statements are VATM's attempt to ensure, starting from this definition, an appropriate application of the existing legal framework to the special implications of VoIP products. Any legal obligations should take into account the technical and industrial potential that derives from VoIP technology. They require regular review – especially in this dynamic and highly innovative VoIP sector – with special attention to what extent they can be technically implemented.

2. Access Regulation

The regulatory treatment of VoIP services is essentially governed by the assignment of VoIP products to a market. The main issue here is whether RegTP will assign VoIP products to an existing voice telephony market that the EU has recommended, or whether it creates a new market for these services.

RegTP is called upon to explicitly include VoIP products in conventional voice telephony markets. This should be done already now, while market analysis and market definition proceedings are still ongoing to offer market participants in this dynamic environment sufficient planning security as early on as possible and to reflect the current market conditions. Considering the technology-neutral approach taken in the TKG and the European Framework Directives, there is no justification for giving VoIP a “VIP” treatment: The tremendous technical potential of VoIP, which virtually no longer allow end users to distinguish between VoIP and conventional telephony, speaks for an equal treatment of VoIP and phone services that are based on currently established telecommunications networks (PSTN, Public Switched

Telephone Network). From this perspective, VoIP is not a new voice telephony service, but merely a new technology to facilitate voice telephony service. Another argument in favor of this is that VoIP products that build on using existing end user equipment are being given great prospects of success. Already, VoIP products are competing with conventional voice services for end customers. Therefore, these services should be assigned to the same market for regulatory purposes as well.

The regulatory conditions for a successful roll-out of VoIP products is competitors' access to the upstream (wholesale) DTAG products that are essential for the provision of VoIP. VoIP products are mostly implemented via broadband network connections, i.e. via the end user's broadband lines, which in Germany are usually DSL lines and leased lines to the end user. DTAG holds a market-dominating position in these market segments (its DSL market share exceeds 90%). As every leased-line and DSL customer is a potential VoIP customer, DTAG can fully draw on these market shares and use them for its enhancing VoIP activities.

Given this situation, access to the last mile in the broadband market must be opened up to (all) providers of VoIP products. This requires bitstream access-based products be offered that fulfill the demand. Basically, this means the availability of broadband lines to end-users. In this context, the VATM demands that DTAG be ordered to offer “unbundled broadband access for wholesale customers” both based on IP and based on ATM network interconnection (cf. the VATM position paper on “Bitstream Access”).

In addition to the access on the levels of IP and ATM that the VATM has been demanding, a part of the VATM member companies demands a stand-alone bitstream product: The introduction of VoIP products will especially cause a strong demand for an optional stand-alone bitstream product. “Stand alone” means a bitstream product that is offered independent of the existence of an analogue/ISDN connection at DTAG. As of today, DTAG usually bundles its T-DSL or resale DSL products with its analogue/ISDN connections. In the future, it must be possible to offer end customers DSL via a stand-alone bitstream product that is no longer required to be bundled with a traditional telephone line of DTAG to satisfy customer demands for voice services by VoIP. This stand-alone bitstream product must fit seamlessly within a consistent charging concept. Unlike an add-on bitstream product that requires that the end customers also has a DTAG voice connection, the stand-alone bitstream product ensures that the provider is able use the customer loop alone. This will cause differences in the pricing because the charges for a stand-alone bitstream product are calculated on the basis of the costs for the unbundled local loop (“TAL”) and the costs for using the bitstream network

elements. The price for the product must also be calculated on the basis of the number of inter-connection points that are required for routing the DSL traffic. To this end, the pricing must comply with the standards foreseen by the law. Only when these conditions are given, VoIP will become a real success that will give the voice market a boost. Without a bitstream access product that accommodates the demands, there is the real danger that the quasi monopoly in the DSL market will persist and, consequently, will lead to DTAG dominating the VoIP technology as well.

Other VATM member companies, namely the group of regional fixed network operators, reject this demand for a stand-alone bitstream product, given their significant investments in infrastructure, in particular in the area of end user connections.

Without a bitstream access product that complies with the demand, there is the threat of perpetuating the quasi-monopoly of the leased line and DSL market. As a result, VoIP technology, too, would come to be dominated by DTAG. VoIP must not become another victim of flawed DSL regulation.

In this connection, it must also be ensured that no further VoIP-specific market entry barriers are created. In particular, the access to the DTAG/T-Online Call server and network coupling with sufficient capacity must be granted in a non-discriminatory manner.

RegTP is therefore called upon to identify and prevent, as early as possible, any improper transfer of market power by DTAG from the leased-lines and DSL-markets to the VoIP sector. This requires a prompt and effective access regulation for all necessary upstream (wholesale) VoIP products, and in line with the “synchronicity” clause in Section 39 § 4 of the TKG (Telecommunications Act) – which states that wholesale and end user products must be offered by the dominant player at the same time. In particular, this access regulation must be in accord with the necessary end customer regulation (see below). The “hands off” approach of leaving new markets to competition and to regulate them very gently, if at all, that RegTP and the German government repeat over and over, is doomed to fail if this restraint facilitates predatory abuse by market-dominating companies and the transfer of market power. As already mentioned: VoIP is a new technology only, it is not a new voice services market. The German Monopoly Commission noted, in its 29th Special Report (2001): In cases of predatory abuse, every day that is lost by the lack of a RegTP ruling contributes to the success of the predatory strategy. Time is always on the side of the company that pursues a predatory strategy (Report, page 98). This must be prevented.

3. End Customer Regulation

Irrespective of DTAG’s announcement in the press to complete the switch over of its voice network to IP only by 2012, DTAG already offers VoIP products today, according to its product information posted on the Internet. Thus, regardless of a complete transfer of the network in the backbone and the access sector, the technical prerequisites for VoIP services already exist on the level of every broadband network termination point at the customer’s premises: Thus, DTAG can already offer VoIP service virtually nationwide. Against this backdrop, compliance with the “synchronicity clause” as set forth now explicitly in Section 39 Par. 4 TKG must be ensured, and DTAG must be prohibited from demanding end user fees for VoIP as long as it fails to make an equivalent wholesale service available to the alternative providers.

Given the tremendous economic potential of the VoIP segment, DTAG will also attempt to dominate the voice service market using VoIP technology through a clever product-bundling strategy. In this connection, it appears quite likely that DTAG may bundle VoIP products with its (DSL) lines for end users and introduce them to the market at a dumping price, if there are no regulatory restraints imposed in the overall context of the voice services market. Not only would alternative VoIP providers be denied the option of a competitive offer to retail customers, but DTAG would also be able to roll back any competitive gains in the voice services market unchecked. This is only one example of many possible anti-competitive bundling scenarios.

In addition to the bundled-product strategy, there is also an increased risk of price dumping on the part of DTAG if the sector VoIP remains unchecked. This danger is exacerbated by the concern that the new TKG will largely subject end user fees to ex-post (after-the-fact) regulation only. To avoid reliving a scenario, which market participants remember all too well from the regulatory history of DSL, it is necessary to apply effective end user fee regulation of VoIP services offered by the market-dominating company, in addition to the above-mentioned upstream product regulation. From that point of view, the RegTP is called upon to interfere against improperly bundled VoIP offers by DTAG as early as possible, through ex-ante regulatory measures. This also applies for bundling products combining conventional voice technology with the broadband lines necessary for VoIP services to succeed. In this connection, the various market-dominating positions of DTAG’s sub-divisions must be taken heavily into account (T-Com in the voice and DSL sector, T-Online in broadband Internet connectivity). In addition, there is a risk that DTAG will pursue an improper predatory strategy

beyond the VoIP sector e.g., by slashing prices and bundling narrowband offers, which would indirectly harm competition in the VoIP market.

4. Emergency Calls and Surveillance

The VATM supports the efforts to make emergency calls via VoIP services possible. Building on the definition of VoIP services as specified above, the crucial factor in the question of emergency call obligations is the substitutability of conventional voice telephony service by a VoIP service: If calls from and / or to E.164 numbers can be made using VoIP service, then the VoIP service is a publicly accessible phone service, with the result that VoIP providers who operate a public phone network must always make available the necessary emergency call options.

To technically implement these, joint industry solutions should be sought with the emergency call line operators. The VATM is optimistic about solving the technical and organizational problems that still exist, in coordination with these operators. In this connection, we refer to the success that was achieved in implementing the emergency number obligation in wireless telephony sector in the past. Beyond this, it should be noted that VoIP technology will support new innovative emergency call services in the future (e.g., immediate call forwarding to the physician on call). These features will make VoIP service even more attractive, but companies must be granted an appropriate timeframe for developing these innovations to market readiness.

The question of interception/eavesdropping regarding VoIP services is a similar case. While in principle it is technically possible to monitor VoIP services, it will be some time before viable concepts are ready for market. Therefore, here too, it is necessary to clear the technical details and their feasibility to implement them with the RegTP and (if applicable) the relevant authorities. However, in all cases where a legal obligation exists to provide for interception, it must be ensured that companies are not obliged to provide services that are technically and operationally impossible to comply with before market solutions have been reached.

5. Issues Pertaining to Numbering

The VATM is open to the current discussion about setting up a new area code (032) for services, with special features that are made possible by VoIP.

Irrespective of this, the use of geographic phone numbers must remain permissible for VoIP products. The currently applicable allocation guidelines already call for this. For VoIP to succeed in the market, and for future substitution, it is crucial to have the option of using the geographic phone numbers that end customers are familiar with. In particular, portation from PSTN to VoIP must be permissible and be mandatory.

When setting up a new area code, it must be prevented that the market dominating player discriminates competitors while implementing the numbering obligations. Thus, when creating a new area code, it must be ensured that all essential issues of interconnection, accounting, billing and collection of debts are clarified between DTAG and its competitors when the area codes are made available. Against this backdrop, RegTP must ensure that DTAG submit the appropriate standard offers as early as possible. This may be ensured by including deadlines for the implementation of necessary measures in the rules governing the number allocation.

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More than 50 telecommunications and service provider companies with operations in the German market are active in the VATM. All of them are in direct competition with the ex-monopolist Deutsche Telekom AG. Our members account for roughly 80 percent of the total revenue generated by private-sector providers in the German telecommunications market.