

Organisational overview

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The VATM welcomes the opportunity to become involved already at an early stage in the process of analysing and possibly revising the EU legal framework for electronic communications networks and services, and points to the following matters which it feels should receive particular attention¹:

A. General topics

I. Minimum scope of the regulation

The provisions of the existing directives with regard to regulation of compensation and access should remain, since they are still necessary to promote competition in the telecommunications markets. Given this fact, it is important to maintain ex ante regulation, since without this minimum amount of regulation there is risk of renewed monopolisation of the telecommunications markets. To safeguard the level of competition already achieved, it is also necessary to anchor concrete rules for controlling ex post abuse in the European legal framework. Likewise, the conditions stated in the Annex to the EU Authorisation Directive must be preserved, in combination with Article 8 of the EU Access Directive, in order to maintain the existing legal certainty.

Furthermore, when revising the market recommendation at least the markets defined there should be retained. There are no indications at the present time that they no longer need to be analysed according to the three criteria which are used to identify the markets that potentially require regulation.

II. Regulation of new markets

The conditions under which new markets should be regulated and the manner in which this regulation should occur is still unclear, as is the question of when a new market or a newly evolving market even exists. But these questions are of fundamental importance for the development of competition and for the competing firms. The diverse aspects linked to these

¹ In December 2005 the Federal Ministry for Economics and Technology (BMWi) prepared a strategy paper entitled "Perspectives on regulation of the European communications markets," which is intended to serve as the basis for discussion in the coming EU review process. The paper must be regarded as a clear change of direction in German telecommunications policy, and was subjected to a critical evaluation by the VATM in conjunction with a detailed response (title: Assessment by the VATM of regulatory policy in response to the BMWi strategy paper 'Perspectives on regulation of the European telecommunications markets'). In conjunction with the present EU review process the VATM refers to the entire content of its response and the statements made there.

questions do not pertain to just a single legally relevant act of the EU legal framework for electronic communications networks and services, but to the Framework Directive and the Authorisation Directive, as well as to the Commission guidelines on market analysis and the assessment of significant market power and the Commission recommendation on relevant markets.

1. Caution when dispensing with regulation in the case of new markets

In the view of the VATM, in terms of the economics of regulation the existence of a new market should not be assumed except with the utmost caution, if this is to lead to the conclusion that regulation can be forgone. The reason for this is that it is not regulation but waiver of regulation in the telecommunications markets that is the assumption which requires justification. The assumption that essential functional competition exists still does not hold true for these markets, as it does in other sectors. Instead, competitive processes still remain to be initiated in the telecommunications sector through regulation. In response to the question of whether regulation in telecommunications markets should be retained or done away with, it is therefore necessary to point to a status quo argument and an option argument.

The uncertainty from changing the regulation is greater than the uncertainty from retaining the status quo. That is due to the fact that the future will be influenced by the regulation and by environmental variables. But the effects of this regulation (status quo regulation) on changing environmental conditions can be predicted better from experience with existing regulation than the effects of a change in regulation on the likewise changing environmental conditions. This tends to be an argument for retaining the regulation, i.e. for caution when defining new markets if that will be followed by a waiver of regulation. The second argument is based on the consideration that doing away with regulation is very difficult to reverse. In consequence, through deregulation the state in fact deprives itself of the option of retaining regulation at first and doing away with it only at a later point in time. This option has a value which argues, where all other probabilities and effects of error are equal, for continuing to retain regulation until it is sufficiently certain that the advantages which come with eliminating it outweigh the foreseeable disadvantages.

The fact that retaining regulation in the telecommunications market is by no means an option of little value in the economics of regulation is ultimately confirmed in practical terms through empirical investigations of the connection between effective regulation, intensity of competition and total investments in the telecommunications market. The ECTA Regulatory Scorecard published on December 2, 2005 shows for example that member states of the European Community with especially effective regulatory structures at the same time achieve the highest per capita investments in the telecommunications market.

2. Differentiated view of innovations

Furthermore, in the view of the VATM not every technical or product-directed innovation can lead to the assumption that there is a new market, or in general to an improvement in the regulatory position of the company in question. The thought that underlies such an improvement, according to which setting incentives for innovation necessitates forgoing or offering the prospect of dispensing with regulation, is based on a problematic consideration in regulatory practice. It is undoubtedly true that regulation can lead to impairment of the innovative activity of the regulated company. The benefits of forgoing regulation are difficult to prove in a concrete case, however.

This is due in part to the fact that dynamic efficiency is hard to measure, and in part to the fact that it is to evolve only through deregulation (or through dispensing with regulation) and is therefore hypothetical in nature. In most cases it is impossible to determine with certainty whether a particular innovation will also take place under the condition of regulation. In particular, even in a regulated field an innovation can enable the company in question to make additional profits, or at least to acquire new customers. But it can even be used as an instrument of market misuse, if the introduction of new techniques and products is used to create new possibilities for obstructing competitors ("misuse by obstruction through product innovation"). The regulated company therefore has a special incentive, particularly in regulated areas, to employ innovation as a strategy for circumventing regulation. Furthermore, the focus must not be narrowed down to innovations at the level of the regulated products. That would limit the economics of regulation, since regulation through ensuring access to a network product can be the very thing that enables the competition to introduce innovations at later stages of the value-added sequence.

Given these circumstances, it is scarcely possible to analyse empirically whether and to what extent regulation really impedes innovation, so that reducing regulation promotes innovation. From the perspective of the economics of regulation, one should exercise great caution before practicing regulatory restraint because of supposed innovative activity. Particularly in areas where monopolies are widespread – such as the area of subscriber connections in the fixed network – it will therefore generally be appropriate in terms of the economics of regulation to dispense with regulation in order to promote innovation. Therefore neither the emergence of a new market nor the decision to use less aggressively intervening regulatory measures should be justified simply by referring to the supposed innovative activity of the regulated company.

3. Conclusions for the revision of the legal framework

It is important to make sure that new markets or new market segments are only released from sector-specific regulation when there is no fear of negative effects of competition on existing markets. Regulation of new (advance performance) markets and market segments must be retained, if absence of regulation would prevent competitors from being able to offer competitive products at the same time on the corresponding end user markets. For this purpose, one could consider adding the following passage to Article 15 of the Framework Directive or the marketing recommendation:

“Imposition of ex ante obligations is justified even in new markets, if otherwise there is risk of the new market becoming segregated or if competition could be expected to have a negative effect on existing markets. Furthermore, imposition of ex ante obligations on new advance performance markets is also justified any time their absence would prevent competitors from being able to offer competitive products at the same time on the corresponding end user markets.”

At the same time, additional criteria for guiding judgment should be included in Article 12 Par. 2 of the Access Directive, which the national regulatory authorities must take into account when analysing whether an access requirement is justified. The following criteria could be considered:

- “g) the susceptibility of the end customer products in question to imitation;*
- h) the degree of utilisation of advantages from the earlier telecommunications monopolies;*
- i) the significance of the advance performance product for future innovations and investments in the relevant telecommunications markets;*
- j) the infrastructure underlying the advance performance product and the possibility of replicating it universally.”*

These changes would also be consonant with the existing requirements of EU law, which specifically do not provide for complete exemption of all new markets from regulation. For example, the intent is specifically not to forgo imposing all (authorisation) requirements on new markets, but only *inappropriate* requirements (see Consideration 27 sentence 5, Framework Directive). The requirements in Community law also explicitly emphasize the need to prevent exclusion of competition in newly emerging markets by the leading company (Text Index 32 of the guidelines on market analysis and the assessment of significant market power).

III. Structural separation of the former monopoly networks

The network area that results in persistent dominance of the market by a single provider, and hence ultimately necessitates comprehensive, sector-specific regulation, is the subscriber connection to the fixed network, which was originally opened up throughout the Community by a state monopoly operator (incumbent). The simultaneous control of this bottleneck and the activation in downstream service and product markets opens up the potential for discrimination and abuse by the now-privatised incumbents, making severe regulation necessary even in market segments where it would not be necessary when considered in isolation under the premise of efficient regulation of the bottleneck. If the appropriate political will exists, a structural separation of the former monopoly networks would eliminate this potential for discrimination and abuse and thereby lead to more competition. At the same time, it would be possible in this way to achieve the regulatory policy goal of reducing regulation, which is being pursued by the governments of some member states. In the end

that would also counter the notions of the incumbents, who regularly point to the regulation in the USA as a model for refining the regulatory system in their own countries. This implies that structural separation of the former monopoly networks will occur as the prerequisite for correspondingly looser regulation, as in the USA. The latest developments in connection with “BT Openreach” in Great Britain also argue for the attractiveness of such a measure as regulatory policy.

Likewise, the current discussion in Germany about the structural separation of the railroad network shows that competition *and* growth can be invigorated by structural separation. But growth impulses fail to appear if the old monopoly network remains in the hands of the former state monopolists. That would threaten attainment of the Lisbon goals for 2010. In concrete terms, the consultancy *Booz Allen Hamilton* anticipates in its study for the German Federal Government that if the railroad network is completely separated from Deutsche Bahn AG a growth rate of 41% in freight transport (between 2005 and 2020) is realistic. But if the rail network remains in the hands of Deutsche Bahn AG the growth rate would be only 23%.²

When the EU legal framework for electronic communications networks and services is reviewed and revised, consideration should therefore be given to the possibility of a specification for separation of the incumbents in terms of ownership, or at least of company law, as foreseen by the EU Directives. The unbundling regulations of the acceleration directives for Electricity 2003/54/EC and Gas 2003/55/EC could serve as an example.

IV. Establishment of a European regulatory authority

The present institutional form of the regulatory procedure has turned out in practice to be rather inefficient. The boundaries of responsibility are unclear, the decision making procedures at the level of the member states and of the Union are complicated and tedious. The result is that so far the legal framework has contributed very little to the goal of creating a single domestic market for electronic communications – instead the harmonisation approach of the EU legal framework, which leans strongly to the material aspects on the procedural side, promotes the emergence of a non-uniform regulatory landscape and

² The study can be retrieved at http://www.bmwbw.de/Anlage/original_948433/Gutachten-Privatisierungs-varianten-der-Deutschen-Bahn-AG-mit-und-ohne-Netz.pdf.

individual efforts by member states, with which the interests of “national champions” are to be protected.

Given this fact, thought should be given to whether fundamental questions about regulation and the associated decisions should be moved up from the member states to the EU level. Establishment of a European regulatory authority could be an expedient solution to ensure high-quality regulatory decisions. On the other hand, misgivings about a process under even greater bureaucratic control must be taken into account. Assurance is therefore needed that the establishment of a European regulatory authority will not lead to a more complicated and bureaucratic procedure, particularly in regard to the processes of market definition and analysis. It must also be kept in mind that the participatory rights of the competitors must not be restricted by reinforcement at the level of the Union.

V. Procedures for controlling abuse

Ex post control of abuse – in contrast to ex ante regulation – merely represents a tool for preventing discriminatory and other abuse behaviours of the regulated company. In the time-critical telecommunications markets it regularly comes too late, if a company with significant market power misuses it in an essential area – such as access to the subscriber line. Furthermore, it offers only slight legal protection to the market participants, and only limited freedom to the state regulatory body to design the legal consequences. Regulation of telecommunications therefore must still continue to remain ex ante regulation at its core in the future. Nevertheless, control of abuse after the fact is of enormous practical significance for protecting the level of competition already achieved, especially since it is totally impossible for the state regulatory body to foresee all possible types of abusive behaviour. This significance is not reflected in the design of the EU Directives. Instead, as a result of the lack of regulation at the EU level, control of abuse after the fact in the regulatory systems of the member states is not adequately attuned to the procedure of sector-specific advance regulation. This can lead to duplications of responsibility, but also to uncertainty about the applicability of abuse control under the general laws on competition of the particular member state. The hesitation that has prevailed in this respect in the directives to date should therefore be reconsidered.

In view of the great significance of even ex post monitoring of abuse for safeguarding and promoting competition in the telecommunications markets, the VATM feels that there are strong arguments for defining an explicit obligation of the member states, under which they must ensure that abuse control measures in telecommunications markets must be fulfilled just as efficiently as in other markets, irrespective of any ex ante obligations. To attain this goal, a deadline for decisions in the area of abuse control must be established already on the level of the EU Directives, which must also be observed by the regulatory body that is responsible under national law. The VATM is endorsing sector-specific abuse control here, since the sector-specific regulatory authorities are closer to the issue in their supervisory activities than general cartel authorities. As part of this sector-specific abuse control, it should also be specified in the directives that not only is abusive behaviour prohibited, but at the same time non-abusive behaviour can be ordered. If the national regulatory authorities should fail to meet the deadline set in the directives, the Commission or a possible newly established European regulatory authority should have the additional possibility of taking proceedings that have not been decided by the deadline into its own hands.

VI. Allowing for the consequences of a conversion to IP communication

The telecommunications market will change profoundly by the year 2012. The majority of services will be handled on the basis of IP networks. In that world there is a natural separation between network operation and end customer products. Technically there will no longer be any compelling reason to have the network and the products offered by one integrated provider, since products and service will then no longer require intervention in the network technology. Services and products will be operated on IT platforms. Regulation should not impede this development. Safeguards to that effect should be provided in the directives.

B. EU Framework Directive 2002/21/EC

I. Strengthening the independence of the regulatory authorities (Article 3 of the Framework Directive)

To date Article 3 Par. 2 p. 2 of the Framework Directive has prescribed only effective structural separation of the sovereign function from operational activities when member

states continue to be involved in companies that supply or control the electronic communications networks and/or services. Based on practical experience, this does not appear adequate, however. At least as long as a member state continues to be by far the largest owner of such an enterprise there is a constant danger of conflicts of interest, so that exertion of political influence on regulatory decisions is a topic that must be taken seriously, and remains so under the existing institutional conditions. This also applies upstream to the implementation of the model directives by the national lawmakers.

When the Framework Directive is revised, the independence of the regulatory authorities from the interests of individual economic units should therefore be strengthened further. This could be done by opening up the option to member states to either design the regulatory authority as a government agency free from orders from outside or – if this cannot be brought into harmony with the constitutional requirements of the particular country – of reducing participation in electronic communications companies to below a maximum influence limit, the details of which remain to be defined, by a certain effective date. A maximum ownership participation of 5 percent of the total shares could be considered.

II. Application rights and third party protection (Article 4 of the Framework Directive)

Sector-specific regulation falls into an area of conflict between the interests of the regulated companies, the general interest in a competitively structured market, and the interests of the competitors, which are closely tied to the latter. But the present legal framework forms principally only the relationship between the regulatory authorities and the regulated companies, leaving it largely to the national regulatory authorities to shape the rights of competitor companies. In Germany that has meant that formal and material rights of competitors are recognized by the courts only under very limited conditions. That makes it very difficult for competitor companies to carry out the general interest through functioning competitive structures. When the legal framework is revised, application rights for competitors should therefore be prescribed in the individual procedures. Furthermore, it should be made clear in Article 4 of the Framework Directive that not only the company against which a regulatory measure is directed has a position that has a right to legal protection, but that the companies which will be favoured by the effects of such a measure also have corresponding subjective rights.

III. Uniform consolidation procedure for market definition, market analysis and imposition of ex ante obligations (Article 7 of the Framework Directive)

Article 7 of the Framework Directive allows the national regulatory authorities to not announce the planned ex ante obligations simultaneously with the intended market definition and analysis. This provides for several months of delay in the process, which is already very time-intensive anyway, if a regulatory authority makes use of this possibility. To increase the efficiency of the process, the directives should therefore prescribe that market definition and analysis must always be announced together with the planned remedial measures. That would also be in harmony with the internal connection which according to Article 15 Par. 1 of the Framework Directive exists between the market definition and the ex ante obligations that are to be applied, and with corresponding requirements that were raised by the monopoly commission in its latest special report ("Development of competition in telecommunications in 2005: Dynamics under new framework conditions").

IV. Extending the veto right to the decision on ex ante obligations (Article 7 of the Framework Directive)

Up until now the EU Commission has only been able to bring a veto against the market definition and market analysis, not against the decision on the ex ante obligation being imposed (Article 7 Par. 4 of the Framework Directive). The danger of this is that the national regulatory authorities will make use of their discretionary freedom of action specifically in regard to the decisions which shape the duties and rights of the individual market participants in a manner that runs counter to the goal of a single domestic market. In particular, there is risk of special privileges for "national champions" which cannot be justified in terms of the economics of regulation. In order to ensure that appropriate measures, for example imposing a requirement for approval of remuneration, are also taken in individual cases where there is substantial market strength, thought should be given to extending the veto right of the Commission also to the planned imposition of ex ante obligations.

If a uniform consolidation procedure for market definition, market analysis and the imposition of ex ante obligations were prescribed together with this point, the internal systematics of the consolidation process would be increased: The scope of the drafts to be announced

(simultaneously) would then correspond fully to the scope of the veto right of the Commission.

V. Augmenting the veto right with a dispositive right (Article 7 of the Framework Directive)

So far the EU Commission has limited itself to preventing the acceptance of draft measures that it considers detrimental to the single domestic market or contrary to EU law, and to presenting specific – but non-binding – suggestions for amending the particular draft to the appropriate national regulatory authority (Article 7, Par. 4 of the Framework Directive). This mechanism turns out to be unsatisfactory in terms of legal policy: If the national regulatory authority does not follow the proposals of the EU Commission, but makes different adjustments which may possibly also be objectionable, the needed regulation does not come about at present, but instead even a regulatory measure which may be inadequate as such completely fails to come about. But if the national regulatory authority instead does follow the suggestions of the EU Commission, that usually happens not because of the persuasive force of the factual arguments, which otherwise would be able to unfold its effect during the examination period after the serious doubts have been reported, but solely from the perspective of at least arriving at some form or other of regulation. But in that case the regulatory decision supposedly made by a member state is in fact a decision of the EU Commission.

It should help in getting around these objections to have transparent allocation of the respective responsibilities of the EU Commission which assigns not only a veto right but also a dispositive right. The EU Commission should then not only have the power to require the national regulatory authority to withdraw the draft, but should also be in a position to take the planned action form itself in a directly binding.

VI. Ensuring adequate consultation in conjunction with the consolidation process (Article 7 of the Framework Directive)

The ties between the consolidation process and the consultation process according to Article 6 of the Framework Directive are poor at the present time. In consequence, there is a risk that sufficient participation of the interested parties prior to planned regulatory measures

will not be guaranteed. According to the applicable directives, this pertains to changes that are made to the draft measures by the national regulatory authorities on the basis of responses from the Commission or the other regulatory authorities, since those changes are no longer subject to the process of national consultation. The regulatory process in Germany has shown that the draft measures announced after the conclusion of the consultation process according to Article 7 of the Framework Directive often have been less broadly formulated than the original draft versions. That deprived the competitors of the opportunity to respond to these additional regulatory limitations. The same would be true if the Commission or a European regulatory authority which perhaps still remains to be created should itself make defining regulatory decisions. Nothing would be gained if subsequent changes to nationally consulted drafts detrimental to competition were no longer made by a national regulatory body but by a European one without giving the competitors an opportunity to point out the consequences of such changes. Provisions should therefore be made to conduct an additional consultation process, at least for such changes to drafts already discussed at the national level according to Article 6 of the Framework Directive which will have a significant effect on competition.

VII. Requirement of technology-neutral regulation (Article 8 of the Framework Directive)

The commitment to strict technological neutrality of regulation is softened at present in Article 8 Pars. 1 and 2 of the Framework Directive by the fact that this specification is only *supposed to be considered* (insofar as possible). It would be desirable here, in view of the ever increasing convergence of technologies, to place regulation in general under the principle of technological neutrality, and not to leave the application of this principle to the discretion of the regulatory authorities. Technology-neutral regulation would thus have to become an obligatory principle of regulation to a greater degree.

VIII. Application rights for numbers and addresses (Article 10 of the Framework Directive)

According to Article 10 Par. 1 of the Framework Directive, the national regulatory authorities must define objective, transparent and non-discriminatory procedures for allocating the national numbering resources. Paragraph 2 is focussed explicitly on equal treatment of all

providers of publicly accessible electronic communications services. This makes it clear that the Union intends no differentiation between providers with and without network infrastructure. In Germany, in contrast, the right to apply for example for IMSIs and phone numbers for public cellular mobile telephone services is tied to ownership of frequencies for the operation of a public cellular mobile telephone network. The new legal framework should retain the equal treatment regulation from Article 10 of the Framework Directive and state the considerations more concretely, in order to prevent member states from not (correctly) implementing this regulation.

IX. Specifying regular reviews of market definition and analysis to take account of convergence and technical progress (Article 15 f. of the Framework Directive)

New positions of market strength can emerge through convergence products. For example, a terminating network operator can offer a convergence product that consists of services of a connecting network operator, a terminating network operator and a mobile telephone network operator. But at the same time the possibility exists that there is no right of access vis-à-vis the relevant suppliers, so that competitors are excluded from offering a convergence product. The same is true of the offer of new products that could not be considered yet in earlier market definitions because of technical progress, so that the regulatory regime is not applied to the suppliers in question. The goal of regulatory policy in both cases must be to prevent monopolisation that is more than temporary. For this reason, the need for regulation of corresponding market structures must be clarified as soon as possible. For this purpose, an obligatory review of the previous market definitions and market analyses within a brief, defined time period should be prescribed already at the level of the directives.

X. Replacing the term “effective competition” (Article 16 of the Framework Directive)

The term effective competition contained in Article 16 of the Framework Directive is misleading, since it evokes the impression of a concept of competition that is to be realised in the markets of telecommunications. But in reality it is only a parameter for again taking up regulation in markets which are (potentially) in need of regulation for other reasons. The question of whether markets have characteristics that can justify the imposition of sector-specific ex ante obligations, in contrast to the existence or absence of effective competition, is not investigated only at the level of market analysis but already upstream at the level of the

market definition (see Article 15 Par. 1 of the Framework Directive). The misleading term effective competition should therefore be replaced by an explicit and exclusive reference to the absence of substantial market strength, which according to consideration 27 of the Framework Directive is equivalent to the absence of effective competition.

C. Access Directive 2002/19/EC

I. Technology-neutral design of the access obligations (Article 9 of the Access Directive)

In Article 9 Par. 4 of the Access Directive and in Appendix II of the Access Directive the formulations “access to the subscriber line with copper loop T” and “access to the copper loop T of the subscriber” are used repeatedly. That sketches out a restriction to a particular technology already at the level of Community law, which is incompatible with the principle of technology neutrality. The formulations of the Access Directive should therefore be adjusted accordingly, for example by expanding them to the variants that may be found on the market (“access to the subscriber line with metal cable or glass fibre conductor” or “access to the metal or glass fibre conductor of the subscriber connection”), or formulating them so that they are entirely technology neutral (“access to the subscriber connection line”).

II. Expanding the equal treatment requirement to the marketing and sale of services by the regulated company (Article 10 of the Access Directive)

It is normal market practice throughout Europe for terminating network operators to sell value-added services to their end customers. In Germany the incumbent prevents this at the present time by means of interconnection regulations, and forces the connecting network operators themselves to sell the services to the end customers. This results in market entry barriers, due to the higher costs. In contrast, a regulated terminating network operator like the German incumbent is always in the position as the terminating network operator to sell value added services to its end customers, so that it has a competitive advantage in this market segment. It is therefore urgent to create the possibility for all value added services to be sold to the end customer by the operator of the terminating network and for the prior service to be purchased from the operator of the connecting network. For this purpose a

corresponding clarification should be made in the equal treatment requirement of Article 10 of the Access Directive.

III. Weighting of service and infrastructure competition when there are access requirements (Article 12 of the Access Directive)

The weighting of service and infrastructure competition should be more highly differentiated than in the past. Granted, Article 12 of the Access Directive provides in Par. 2 parts b and c that the available capacity and the initial investments of the owner are to be taken into account when access requirements are imposed. But that limits the perspective too one-sidedly to the interests of the regulated company. Comparable aspects can also be observed on the part of the competitors that are requesting access. The catalogue of criteria in Article 12 Par. 2 of the Access Directive should therefore be expanded so that these weighing parameters are also explicitly specified in the directive. This will make it possible to prevent misdirected regulatory controls.

At the same time, steps must also be taken to rule out the possibility of dispensing with the imposition of an access requirement merely because the enquirer after access has the possibility of expanding its own capacities to the appropriate extent. Instead, absolutely the only time such a possibility should stand in the way of imposing an access requirement is if the expansion of capacity by the competitor can contribute to attaining the regulatory goals in an economically meaningful way. Consideration should be given primarily to economies of scale and overcapacities. Inefficient investments in infrastructures that will ultimately in economically useless overcapacities must not be allowed to be demanded on the basis of erroneous regulatory signals (such as excessively high access charges). But at the same time there must be assurance that the owner of the infrastructure cannot escape the imposition of access requirements on its part by limiting capacity.

D. Authorisation Directive 2002/20/EC

The VATM has no comments on the revision of this directive.

E. Universal Service Directive 2002/22/EC

I. Better incorporation of universal service into the regulatory regime

Universal service, which also includes information and directory service, is the minimum portfolio of services that must be rendered (Article 2 part j of the Framework Directive). If delivery is not adequate, the state can impose services of this type on individual market participants. But as Article 1 Par. 1 of the Universal Service Directive states, these services should be rendered mainly in competition. Experience with the implementation shows, however, that the universal services, especially if they are not telecommunications services – such as information or directory services – are incorporated less than perfectly into the regulatory regime, which is intended specifically to promote and safeguard this competition.

So the regulatory measures in Articles 15 and 16 of the Framework Directive basically provide a prior market definition. In Germany, moreover, even sector-specific regulatory measures that apply only after the fact are made dependent on such a market definition. The markets for information services or directory services are not named in the market recommendation, however, so that a definition of these markets only occurs after the recommendation has been worked through – if at all. The consequence is that no regulatory protection of competition at all takes place. The Universal Service Directive encourages this interpretation by not specifically including the information and directory services in Articles 16 ff. but merely pointing to the provisions of the Framework Directive, which only mention markets for telecommunications services and products. So it is unclear to what extent the information and directory services are covered by the regulatory regime. Clarification would be desirable here.

This can be achieved for example by naming the markets for information or directory services explicitly in the market recommendation. Another possibility would be to define the term telecommunications services in Article 2 part c or the term telecommunications products in Article 15 of the Framework Directive accordingly.

II. No expansion of consumer protection

The VATM does not consider an expansion of consumer protection to be necessary, since the existing regulations and products guarantee effective consumer protection even in regard to handicapped users (e.g. SMS, faxes for the deaf, telephone service for the blind).

III. Competition-compliant design of the universal service guarantee (Articles 3 ff. of the Universal Service Directive)

State measures to ensure universal service always include the risk of distortions of competition. One of the consequences of this is that the scope of the universal service must be restricted to the absolute minimum that will fulfil the common interest. For that reason the scope of the universal service must not be changed at this time in regard to information services and subscriber directories.

In addition, caution must also be exercised when imposing an explicit universal service requirement. For example, the VATM considers a universal service requirement for information services to be unnecessary in competitively organised markets. As expressed in Articles 3 and 5 of the Universal Service Directive in combination with the first and third considerations of the directive, the imposition of a universal service obligation must instead be strictly separated from the question of whether the member state guarantees the delivery of at least one comprehensive telephone information service (Article 5 Par. 1 part b of the Universal Service Directive). The ideal situation in Europe is naturally the assurance of multiple available universal services through competition (market solution). Only if no company offers an information service on the market voluntarily at affordable prices should the particular member state have the possibility (and duty) to intervene and impose an explicit universal service requirement (regulatory solution). So the priority of the market solution over the regulatory solution should be ensured already at the directive level – for example by modifying Article 3 or Article 8 of the Universal Service Directive.

IV. Online access to subscriber data for foreign information services (Article 25 of the Universal Service Directive)

In the view of the VATM there should be a clarification in Article 25 of the Universal Service Directive showing a requirement to enable international online access to subscriber data in order to provide foreign information services. According to Article 25 of the Universal Service Directive, the relevant information (subscriber data) must be made available to the providers of information and subscriber directory services in an agreed-upon format and under fair, objective, cost-oriented and non-discriminatory conditions. The format agreed upon here in the entire Union for so-called foreign information (provision of information on subscriber data for other EU member states) is online access to an information database with the data of all telephone service providers (carriers), which is made available – with the exception of a few member states – through the incumbent.

However, the access is frequently not available under fair, objective, cost-oriented and non-discriminatory conditions. Numerous incumbents use the access to the multiple-provider information database to discriminate against information service providers that are not at the same time telephone service providers, and charge access fees that are neither cost-oriented nor appropriate. This is justified by the incumbents with the argument that Article 25 of the Universal Service Directive refers only to the data of another provider, not to the multiple-provider information database.

In the opinion of the VATM, international online access to the foreign information constitutes an “essential facility.” Therefore the remarks of the European Court of Justice Attorney General in case C-109/03, to which the European Court of Justice fully adhered in its verdict, must be followed: After all, the access to subscriber data is not based only on the wording of Article 25 of the Universal Service Directive (or its predecessor regulation Article 6 ONP-RL 98/10/EC), but may also need to be examined under the specifications of the prohibition of abuse according to Article 82 of the EU Treaty. That is exactly the situation that exists here. Therefore access to the multiple-provider information database for the purpose of providing an international information service (foreign information) must also be provided under fair, objective, cost-oriented and non-discriminatory conditions. This should be clarified in Article 25 of the Universal Service Directive, in order to ensure more efficient sector-specific regulation in this respect.

F. Privacy and Electronic Communications Directive 2002/58/EC

I. Dispensing with special rules for unsolicited information (Article 13 of the Privacy and Electronic Communications Directive)

In the opinion of the VATM, the existing special rules for the telecommunications market concerning unsolicited messages are dispensable. There is no justification for telecommunications companies to be subject to more severe provisions than other businesses. Directive 2005/29/EC on dishonest business practices contains suitable and efficient provisions, and should also apply to the telecommunications market.

G. Market Recommendation 2003/311/EC

I. Scope of the market recommendation

In conjunction with the revisions of the Market Recommendation, the VATM favours retaining the 18 markets currently specified there as the minimum range of markets requiring regulation. The earliest the range can be reduced is when the need of a particular market to be regulated is consistently denied, not only in individual member states but by the national regulatory authorities throughout the Community when carrying out the concrete market definition and market analysis procedures. Specifically the respective analysis at the national level represents an instrument with which the need for regulation of the markets contained in the recommendation can be continuously evaluated. In view of the market definitions and analyses that have actually occurred, there is no evidence at present that even a single one of the 18 markets would no longer be considered by an overwhelming majority of the national regulatory authorities to be in need of regulation. So the scope of the market recommendation has proven to be appropriate from the perspective of the economics of regulation, and must not be reduced by any means.

II. The criterion of tendency to effective competition

When revising the market recommendation, the criterion “markets that are not tending toward effective competition within the time period in question” must be defined more concretely. This feature results at the present time in great discretionary latitude for the regulatory authorities, and in the event of miscalculation will have serious consequences for the telecommunications sector. If it is erroneously assumed that the market in question is tending toward effective competition and it is therefore not analysed and regulated, competitors will be forced out of the market and remonopolisation will be promoted. In the opinion of the VATM, the telecommunications market must not become a guinea pig for regulatory experiments, even under the perspective of creating and maintaining jobs.

It must be made clear what conditions must exist in order for the prognosis of whether the market is tending toward effective competition to be as certain as possible. Thought could be given for example to specifying the following exemplary decision parameters:

- What indications are there that companies operating in this market will no longer behave independently of competitors, customers and consumers in the future?
- Why will this no longer independent behaviour be preserved even without regulation, if the market has been regulated so far? (the question of structural protection of competition)

Furthermore, the forenamed criterion of market recommendation needs to be revised linguistically, since it implies a lack of effective competition in the market in question. But this mixes the level of market definition (Article 15 of the Framework Directive), on which the three criteria are applied, with the subsequent level of market analysis, on which the existence or absence of effective competition is analysed (Article 16 of the Framework Directive). Instead of the tendency toward “effective” competition, the focus in the test of criteria could instead be on a tendency toward “lasting” competition. This would also correspond to the necessity mentioned earlier, of only considering structurally secured competition when removing markets from regulation. At the same time, that would ensure that markets are not released from regulation too early. Regulation specifically can lead to the dismantling of significant market power, so that where the thesis of equality anchored in

consideration 27 of the Framework Directive is in effect, efficiently regulated markets exhibit a tendency toward effective competition, without the underlying problems of competition really being solved. A tendency toward lasting competition, in contrast, could not be assumed until these problems are eliminated, so that the market does not immediately become monopolised again after regulation is eliminated.

III. Technology-neutral definition of the market for access to the subscriber line

Market no. 11 of the market recommendation is defined as the market for un-bundled access by large customers “to wire circuits and sub-circuits for delivering broadband and voice services.” That sketches out a restriction to a particular technology already at the level of Community law, which is incompatible with the principle of technology neutrality. The market definition must therefore be modified accordingly, for example by being expanded to include the “wire and glass fibre conductors” that are found on the market or by being formulated so that they are completely technology-neutral (“subscriber lines”).

IV. Inclusion of a market “end user markets for broadband access and internet access services”

The EU legal framework itself correctly recognizes that despite the existence of regulation of prior performance, sector-specific regulation in the downstream end user markets can also be necessary (Article 17 Par. 1 of the Universal Service Directive). A company that is regulated on the prior service markets can be in a position to drive its competitors in the final user segment out of the market again systematically through price or bundling measures. Specifically in the end user markets, which are especially significant for regulatory policy, justification should therefore be required for dispensing with regulation. The most important landline telephone markets have therefore rightfully been an object of the market recommendation to date (markets nos. 1 – 6). In view of the political goals of the EC telecommunications policy, an end user market for broadband access and internet access services should be added to this list. That would ensure that the national regulatory authorities must analyse the competitive conditions in those markets, and could not remain entirely inactive by pointing to non-inclusion in the recommendation. Furthermore, in this way

the Commission might be able to ensure in the consolidation process according to Article 7 of the Framework Directive that no national monopolies of the incumbents that dominate the prior service realm would arise in these markets.

Cologne/Berlin/Brussels, January 31, 2006

More than 50 of the telecommunications and service companies that operate in the German market are active in the VATM. All of them are in direct competition with the ex-monopoly Deutsche Telekom AG and are working for more competition in the telecommunications market – for the benefit of innovations, investments and employment. Since the year 2000 the competitors have made investments totalling over € 20 billion in the fixed network and cellular telephone areas. The new fixed network and cellular phone companies safeguard around 50,000 jobs in Germany, as well as about 50% of the employment in the supplier firms in addition.