

**V. DTAG's Anti-Competitive Behavior is not kept in Check by the Regulator.**

As most recently evidenced in the Ministry's Position Paper, the RegTP, although established under German Telecommunications Act as an independent body, has come under increased pressure from the German Government to protect DTAG's interests and financial well being. As a result, even though the RegTP touts the "achievements" of liberalization of the German telecommunications market, its regulatory practices prove increasingly otherwise.

**1) DTAG Is Not Prevented from Engaging in Cross-Subsidization.**

In Germany, the Ministry has publicly declared that it wants to lift the long-standing "*ex ante*" price control in certain sub-markets, meaning the RegTP will no longer review DTAG's prices before they enter into force. This measure will almost certainly encourage DTAG to engage in below cost pricing for special customer groups, which will lead to a customer migration from the competitors back to DTAG. There is no control over DTAG's prices because the Ministry and the RegTP are not advocating accounting separation of DTAG to the extent that markets (both regional and products) under price control are separable from markets without price control. This is particularly true if the German market will be divided into several regional markets, as suggested in the Position Paper.<sup>20</sup> According to the Paper, DTAG may be released from the price control regime in several of these markets, even though it is within the purview of the German Cartel Office and the RegTP, not the Ministry, to determine the relevant markets. Without proper cross-subsidization control through separated accounts, this measure will allow DTAG to reinforce its dominant position in these markets. This is especially the case because DTAG has not been forced to compete through bifurcating its local network and other local and

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<sup>20</sup> VATM Report at 5.

long distance services. Among other things, DTAG may be able to cross-subsidize its international business if it penetrates the U.S. market by imposing high access and local charges in Germany.

This behavior is encouraged by the RegTP's practice of determining price caps for DTAG's access charges. Currently, the RegTP only differentiates between residential and non-residential services, and curiously places international, national long distance, local and access services into the same basket. Consequently, DTAG is in the position to comply with the price cap by offering low rates for its long-distance and international services, where competition is emerging, and by keeping the prices for its local access services (where competition is embryonic) artificially high. The end customers using DTAG's local services, and the competitive carriers, will end up bearing the burden of this regulatory policy.

**2) DTAG is Following a Strategy of Strategic Pricing in New Markets.**

From a traditional point of view, strategic pricing prevents competitors from entering into a field because a dominant company can artificially keep prices low until the competitors are driven from the market, after which point the prices for the products concerned are raised. Over the past several years, the RegTP has not sufficiently discouraged behavior that has elements of strategic or predatory pricing. The most recent example is the RegTP's conditioned approval of a DTAG flat rate (making calls and surfing the Web on Sundays). Bowing to Government pressure, the RegTP approved this DTAG service over the strenuous protests of DTAG's competitors. Most recently, the RegTP did not seek to suspend DTAG's offer to provide DSL services to residential end-users for less than \$5 a month. This price, in the view of many

competitors is clearly predatory and is much lower than in the United States where the DSL equipment is already significantly less expensive.

By engaging in this strategic pricing, DTAG seriously impairs competitors from entering the promising DSL market. It is true that strategic pricing may not work if a company is required to raise the prices for these specific products after a certain time period to finally cover its costs. However, a Party may decide to raise the prices for related products such as content if it has a dominant position in the means to access these products. Therefore consumers may pay less for access to the content, but much more for the content than in a competitive market situation without strategic pricing in the developmental phase of the market.

The following gives two concrete examples of DTAG's strategic pricing.

(a) The RegTP has allowed DTAG to provide a rebate to a customer who is already an ISDN customer and subscribes to the flat rate of DTAG's Internet provider "T-Online" (for \$ 41 per month). The ISDN connection "AktivPlus" (including a 50% rebate for voice telephony) currently costs DM 54.88 (US\$ 27) per month. In total, Internet via ISDN amounts to DM 133.88 (US\$ 68). If the same customer subscribes to DTAG's new T-DSL service as of September 1, 2000, the customer will only be charged:

- DM 54.88 for the ISDN connection AktivPlus
- DM 14.89 (T-DSL)
- DM 49 (Flatrate T-Online DSL)

TOTAL: **DM 118.77 (US\$ 55)** including the high speed and higher bandwidth of a DSL line.

(b) The RegTP recently issued an order permitting DTAG to introduce a flat rate XXL (DTAG's first flat rate offer) for a test period of 7 months beginning on June 1, 2000. This is good for Sundays and holidays only. Accordingly, DTAG's ISDN customers may choose to accept an increase in their monthly fee of DM 14.89 (\$8) in order (without additional costs):

- (1) To have unlimited surfing of the Internet via DTAG's provider T-Online; and
- (2) To make unlimited telephone calls within Germany.

Further, customers may not be preselected to a competitor to use this service. Also, prior to this order DTAG was only permitted to charge for its services on a per-minute basis.

Competitors widely criticized this rate package unsuccessfully arguing that it materially increases the price squeeze between DTAG's interconnection charges (calculated on a per-minute-basis) and its end-user charges. Significantly, DTAG did not offer competitors comparable flat-rate services (such as interconnection) to enable them to offer their own flat rates. Competitors expect significant customer migration as a result of this pricing policy. The offer also blurs the line between DTAG's fees for voice telephony, where the RegTP's prior price approval is required, and Web communication, where this is not the case. It is already foreseeable that the XXL flat rate will lead to further congestion on DTAG's network because heavy users, who are no longer charged on a per-minute-basis, will remain connected to DTAG's network for the entire day. In addition, DTAG will be in the position to present bundled offers (for instance, combining voice and Internet services) which will undermine any efficient price control by the regulator.<sup>21</sup>

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<sup>21</sup> *Id.* at 3.

### **3) DTAG Has No Outside Incentive to Open Its Local and Long Distance Markets**

As the incumbent carrier for local, long distance and international services, there is not one line of the telecommunications business that DTAG does not dominate. DTAG already has telecommunications facilities in virtually every building in Germany, and has long-established relationships with most businesses. In contrast, in the United States the Bell Operating Companies (“BOCs”) historically have been precluded from providing long distance service. Under Sections 251 and 271 of the 1996 Telecommunications Act, Congress was able to create a large incentive for BOCs to open their local markets, and provide interconnection and unbundled local loops, by making the BOCs entry into the long distance market conditioned on their complying with the regulations and safeguards needed to open the local markets. This is a powerful tool that the U.S. Government has for fostering competition. Unfortunately, the RegTP does not have such a competitive mechanism and there are few, if any, incentives for DTAG to affirmatively open their market. Therefore, it is even more critical that the RegTP be totally independent from the influences of the German Government, and can take an aggressive role regulating DTAG. So far, the RegTP has, after initial tough actions under another government, increasingly not been able to do so. As a result, DTAG continues to dominate the markets, succeeds in dominating new ones, and competition remains embryonic.

### **VI. Proposed EU Legislative Measures Will Not Change the Picture.**

In many cases, gaps exist between national laws and EU laws as its Member States unequally interpret EU directives. The most recent EU proposed directives which intend to spur competition and close the “digital divide” with the United States generally will not take effect until the end of 2001 and have not yet passed the EU Parliament. Past experience has shown that

EU Directives are implemented quite unevenly within the Member States. In the aforementioned Position Paper, the Ministry already warned the EU that “the adoption of the additional legal standards in compliance with the development of competition must not be obstructed by EU law.” The “principle of subsidiarity” (safeguarding the priority of national law over EU law) “must be strictly adhered to.” The goal is that “the German legislator should have sufficient room for maneuvering to ensure the competitiveness of *German* [emphasis added] carriers on the European and global level.”<sup>22</sup> Therefore, one should not expect that pro-competitive missives from Brussels will improve the competitors’ situation in Germany.

## VII. Proposal.

In order to evaluate which measures the U.S. Government should adopt to encourage open market environments, the matter should be addressed on a country-by-country basis. In the case of Germany, DTAG’s behavior as a whole has been anti-competitive, and the German Government’s response has not been in congruence with its WTO obligations. Moreover, the competitive situation has actually worsened during the last year. Because DTAG’s share price has plummeted by approximately 60% since the beginning of this year, there is mounting pressure from the political level public on the Federal Government to interfere with market and competitive forces to bolster DTAG’s stock.

- In general, a key goal should be to ensure that U.S.-based and financed companies have an open market environment and the opportunity to compete, as set forth by the WTO agreements, particularly as to cost based interconnection and access to end users. The RegTP and the Ministry are obviously under political pressure to protect DTAG. However, there is

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<sup>22</sup> *Id.* at 2.

no valid reason that a highly industrialized country with an advanced telecommunications regulatory regime like Germany should not be able to abide by the WTO standards.

Therefore, DTAG can and should make the necessary commitments to change its anti-competitive practices in order to create an open environment and adequate opportunities for meaningful competition in Germany. In addition, regulators must actively enforce these commitments by DTAG. Provided that these commitments are made and enforced, the United States should allow DTAG to own U.S. telecommunications companies.

- Although the German regulatory authorities will take a primary role in enforcing DTAG's commitments as they relate to its actions in the German telecom market, U.S. regulatory authorities also should play a role. The U.S. Government has both expansive and flexible competencies in the sector of merger approvals. Merger approvals should be granted under the condition that the U.S. Government supervises the performance of DTAG and has the power to impose stiff penalties upon backsliding and failure to adhere to any commitments it makes. The following are the minimum commitments to the regulators that DTAG should make to ensure open competition in the German telecom market.

- 1) DTAG must timely publish and monitor its internal and external provisioning intervals for all products it offers to competitors such as unbundled local loops, collocation space, interconnection lines, etc. (including all milestones, for instance the intervals for preparing the offer). The information should be published for each month by the end of the first week following that month.
- 2) DTAG must accept considerable contractual penalties for provisioning lapses and other service deficiencies in their agreements with their competitors. Penalties for failure to

meet the benchmarks should be assessed in accordance with terms contained in the interconnection agreement. A pre-established matrix should be used and made publicly available to determine the penalty for failure to comply with a given benchmark.

- 3) DTAG must provide convincing evidence that it complies with the provisioning intervals by observing a benchmark of at least 98.5% of all orders (presenting the order collocation space, delivery of collocation space, reaction period for a loop order or interconnection port order, and delivery of the loop or the interconnection port order). Each order should be delivered free from defects. If DTAG falls below this benchmark during a certain month, DTAG must make good for this difference during the following month if it wants to avoid predetermined considerable penalties.
- 4) DTAG must make available its internal data which serves as DTAG's basis for loop provisioning to competitors so that both competitors and DTAG must commence discussions as soon as possible on how to streamline the process. The target deadline should be sufficiently in advance of the RegTP's review on DTAG's ULL charges by March 31, 2001. Electronic bonding, meaning a state-of-the-art online connection between DTAG and the competitors for ordering and monitoring of the competitors' orders, must be part of the process. The RegTP should review the ULL charges on the basis of the streamlined process. The goal is significant reduction of DTAG's inflated fees for unbundled loops.

## **VIII. Conclusion**

DTAG and their government appointed managers have calculatedly and deliberately made it onerous for U.S.-based carriers to compete in the German market. DTAG should shake

off its bodyguard of Government investors and managers and compete fairly in the marketplace with privately owned competitors. Therefore, DTAG should be allowed to invest in the U.S. telecom market if it meets two conditions that will serve to help pry open the German market to competition. First, DTAG must make specific binding commitments to cease immediately all its anti-competitive practices. In this regard, DTAG should commit to timely publish and monitor its provisioning intervals on a monthly basis; to accept a state-of-the-art ordering and benchmark system via electronic bonding as well as severe contractual penalties and other prompt and predictable enforcement action for provisioning lapses and service deficiencies; to make available its internal planning data for loop provisioning; and to significantly reduce its inflated fees for unbundled local loops. Second, DTAG's regulators must enforce these commitments vigorously, promptly and in a manner that displays no favoritism toward DTAG.

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### VATM LIST OF MEMBERS



ACC Telekommunikation GmbH  
Alpha Telecom GmbH  
Bertelsmann New Media  
Broadnet Deutschland GmbH  
BT Telecom Deutschland GmbH  
Cable & Wireless Deutschland GmbH  
Callino GmbH  
Carrier 1 AG  
Carrier 24 GmbH  
COLT Telecom GmbH  
Completel GmbH  
KDD Conos AG  
debitel AG  
D Plus Telecommunications GmbH  
Drillisch AG  
Econophone GmbH  
E-Plus Mobilfunk GmbH  
European Telecommunication Holding E.T.H. AG  
EWE TEL GmbH  
FirstmarkCommunications Deutschland GmbH  
First Telecom GmbH  
Gigabell AG  
Global TeleSystems (Deutschland) GmbH  
HanseNet Telekommunikation GmbH  
Hermes Europe Railtel  
Hutchison Telecom GmbH  
Interoute Telecom Deutschland GmbH  
isis Multimedia Net GmbH  
KKF.net AG  
Level 3 Communications GmbH  
Mannesmann Arcor AG & Co.  
Mannesmann AG  
MCI WorldCom Deutschland GmbH

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mcn tele.com AG  
MobilCom AG  
Netcologne GmbH  
NETnet Telekommunikationssysteme GmbH  
NETZTEL Plus AG  
One.Tel GmbH  
QS Communications AG  
RSL COM Deutschland GmbH  
Star Telecommunications Deutschland GmbH  
Talkline GmbH  
Talkline Infodienste GmbH  
Tangens GmbH  
TeleBeL Ges. Für Telekommunikation Bergisches Land mbH  
Telegate AG  
Teleglobe GmbH  
Telia Telekommunikations GmbH  
tesion Kommunikationsnetze Südwest GmbH & Co. KG  
Versatel Deutschland GmbH  
Viatel Global Communications  
Victor Vox GmbH & Co. KG



**PROPOSITIONS REGARDING THE COMPETITIVE AND REGULATORY  
SITUATION IN THE GERMAN TELECOMMUNICATIONS MARKET  
(ENGLISH TRANSLATION)**

**CONDITIONS FOR FAIR COMPETITION NO LONGER EXIST –  
REGULATION OF THE GERMAN TELECOMMUNICATIONS MARKET  
THREATENS TO FAIL**

1. **Deutsche Telekom (“DTAG”) increasingly determines the rules of the game.**

**The Regulator (“RegTP”) is threatening to lose control.**

**A clear policy favoring competition is required.**

**DTAG’s strategy ranges from massively influencing political and regulatory decisions to systematically delaying and obstructing the development of competition.**

(The following merely outlines some of the more important instances out of an extensive repertoire of competition-obstructing practices by DTAG. Due to their complexity only their highlights are presented in the following.)

**DTAG Consistently Abuses Its Market Power**

Various services which are of substantial significance to competition in telecommunications are being offered solely to DTAG subsidiaries or its retail customers, but not to its competitors. One example of a technical service not being offered to competitors is automatic quality assurance measures in cases of network overload or switch failure (overflow and emergency rerouting services). Certain services and pricing terms, too, local flat rate calling for example, are being exclusively offered to DTAG’s IP subsidiary T-Online, consequently harming the development of the Internet market. DTAG responds to innovative service offerings by competitors, as for example xDSL, with massive predatory pricing campaigns.

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### **DTAG Prevents The Implementation Of RegTP's Regulatory Decisions**

Even where DTAG has been forced to compete fairly, DTAG is openly obstructing the implementation of regulatory decisions, or is circumventing such decisions in practice through new obstructive behaviors. In response to DTAG's complete refusal to offer billing and collection services to competitors, the regulator more than one year later ordered DTAG to submit a new draft contract addressing such service. Instead of a full contract and much later than required, DTAG merely submitted a set of general terms and conditions which would prevent the offering of dial-around ("Call-by-Call") services. Not only does this offer substantially raise prices, it also requires the submission by the competitive carrier for each end customer wishing to take advantage of dial-around services while having these charges appear on his regular phone bill, of a prior written authorization for withdrawals from his account. It is in the *ad-hoc* nature of the dial-around offering that the carrier does not know who his customers will be.

### **DTAG Prevents The Implementation Of Court Orders**

Even court orders, including threatened fines, are being ignored by DTAG. A court order threatening to impose fines of approximately \$ 22,000 upon DTAG for the continuing refusal to offer a service vital to competition (billing for competitive value-added services) showed no effect. In March of this year, DTAG for the first time was fined for contempt. In several cases it took temporary injunctions to force DTAG to compete fairly.

### **DTAG Prevents Customer Acquisition By Dial-around Service Providers**

The principal inroad into the residential market has been through dial-around, rather than through pre-subscribed carrier choice. Central to the viability of dial-around services is the ability to offer simple usage and billing options without prior written agreements. As some 60% of the population to date has never utilized a competitive provider to make even a single phone call, DTAG is doing all it can to make the use and billing of dial-around arrangements as difficult, or at least as expensive, as possible. The complete refusal to offer billing services to dial-around providers would mean for the customers to receive and pay a multitude of bills, at least some of which will be for pennies only. Even as competitive carriers will be obliged to establish and operate their own customer care and collection services, DTAG is now trying to raise the price of its remaining billing services (billing and initial payment acceptance) by up to 600%.

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### **DTAG Prevents Customer Acquisition By Preselection Of Long-distance Providers**

Since more and more customers are opting for preselection, instead of dial-around, DTAG is increasingly delaying the switching over of such customers to competitors, wrongly or never informing customers and carriers about impending transfers, with over 10% of transfers being switched to the wrong carrier or not switched at all. Customers interested in switching over are subjected to unfair win-back marketing strategies including rebates. New tariffed offerings by DTAG (for example the new XXL Flat Rate) include terms and conditions, which preclude subscribers from pre-selecting a competitor, thus leveraging DTAG's 97% market share in local exchange to additionally impair the newly emerged competition in long-distance telephony. Through these so-called "bundled offerings", DTAG is able to use its overwhelming market dominance to once again monopolize markets which were believed to be safely on the road to competition.

### **DTAG Prevents Customer Acquisition by Change Of Local Exchange Network Operator**

The greatest difficulties are those encountered in changing the local exchange network operators permanently. Here, DTAG has, and continues to, massively delay or prevent the necessary physical switch-over of the customer loop (claiming that no collocation space is available), a practice which at various times has been found to be an abuse of dominant market power by the RegTP. Since those regulatory rulings however, no measurable improvement has occurred; rather the situation is worsening. Now as before, competitive carriers are paying more for the unbundled customer loop than end customers of DTAG are paying for complete local exchange services. Before this background, and at prices which cannot be matched due to the high prices competitive carriers are being charged, DTAG is currently offering bundled Internet and broadband connections far below its own cost (offering such service for a mere approximately \$4 extra, despite initial deployment costs of about \$300 per customer).

### **DTAG Intentionally Constrains the Supply Of Resources Vital To Competition**

The spectrum of such actions reaches from the firing of DTAG technical personnel and their replacement by qualitatively inferior subcontractors to the deficient or delayed provisioning of required network elements and collocation spaces. In doing so, DTAG is pointing fingers at the alleged difficulties of component suppliers, which these suppliers are usually unable to confirm. Increasingly, DTAG even argues that its own real estate subsidiary is unwilling to provide the necessary collocation spaces.

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### **DTAG is Firing Personnel Urgently Required for Competitive Carrier Provisioning**

Increasingly, DTAG claims that personnel bottlenecks are to blame for massive delays in processing and provisioning orders. Nevertheless, personnel is being reduced in the very areas in which demand will, due to the network build-out activities of competitive carriers demanded by DTAG itself, continue to be high and increase further. This situation is leading to extreme overwork of individual DTAG employees who are, despite their own enthusiastic efforts, not able to make up for these personnel shortages.

### **DTAG Is Preventing The Economical Utilization Of Existing Resources**

In spite of existing capacity constraints which are only going to increase on a going forward basis, for example with regard to available collocation spaces, DTAG is preventing the efficient use of such network capacities on a level which in other countries is routine and even according to DTAG technically unproblematic. With reference to the alleged lack of any legally binding obligation to do so, DTAG is refusing to divide existing collocation spaces among competitors, or even to simply permit the installation of air conditioning (of course, at the expense of the competitive carriers). To date, DTAG has not even bothered to respond to a request for a statement on that matter from RegTP dating back to January; nor has DTAG replied to concrete proposals for the better utilization of existing collocation capacities made by competitive carriers in March of this year.

### **DTAG Is Preventing Reasonable Network Planning By Competitors**

Even where improved network planning on the part of the competitive carriers would help to prevent over-subscriptions and therefore at least some instances of capacity constraints, DTAG has refused to cooperate in such undertakings, by stating that it is under no legal obligation to provide existing network planning information to competitors, much less prior to their placing orders with DTAG for interconnection and collocation space.

### **DTAG Is Preventing Improvements In Internal Processes**

Even the processing of applications for carrier preselection or switching over of individual customers is being consistently obstructed, and processing times are being massively exceeded in constantly changing locations (up to three times the agreed-

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upon time frames). Only 10% of applications are being processed in a timely manner. Many applications still have to be submitted by fax rather than via electronic interfaces. Many potentially cost-saving processing methods adopted, for instance in the British or U. S. context, are not being implemented to the detriment of competition in telecommunications.

### **DTAG Is Preventing The Implementation Of Higher Quality-Of-Service Standards By Competitors**

Delivery of the highest quality service is a precondition for successful competition. The competitive carriers are dependent in many areas upon DTAG's quality-of-service standards. Requests for higher quality-of-service standards have not only been rejected, for example with respect to the availability of circuits, but even been met with attempts to reduce existing quality-of-service commitments. DTAG is even attempting to avoid making available to competitors its overflow and emergency re-routing services. Only the intervention of RegTP forced DTAG into, for example, offering restoration-of-circuit services on par with the terms available to DTAG's end customers.

### **DTAG Is Preventing Effective Network Build-Out By Competitors**

DTAG had always claimed that the competitive carriers are attempting to run their businesses at the expense of DTAG and its legacy infrastructure, cherry-picking customers with minimal investment in technology and without investing in their own networks. Instead, the current structure of interconnection pricing has predictably lead to massive investment in the competitors' networks, which are carrying increasing loads. Even today, DTAG is neither able to timely provide competitors with the requested interconnection to the long-distance network, nor to comply with requests for interconnection at the local loop within the contractually specified time frames. The new structural cost model planned to be implemented in 2001 would, if one were to apply the assumptions being made by DTAG, not only worsen these existing problems, but will also result in substantially increased but useless investments in additional switching and transmission infrastructure.

### **DTAG Is Preventing Transparency In Cost Accounting**

The data underlying DTAG's cost-basis models being submitted to the regulator is so restricted in nature as to make nearly impossible the appropriate review of these cost-models for infrastructure elements and services. Despite repeated requests by RegTP, DTAG has often failed to provide additional data, so that diverse regulations have had to be written on the basis solely of international comparative cost models. In the area of

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end-customer price controls, RegTP has been forced to work on the basis of dubious modeling assumptions because of this lack of actual data, such as a 20 to 25% minimum cost differential between wholesale and retail pricing. The increasing emergence of bundled pricing without any transparency of the underlying cost renders these simple assumption useless for reviewing DTAG's pricing.

### **DTAG Favors Obstruction Rather Than Cooperation**

After more than a decade of competitive regulation, the former monopolists in the U.S. (AT&T) and the U.K. (BT) have developed completely different business philosophies in which their fellow carriers are treated as customers. Carrier service offerings have become profit centers, *i.e.* seek to sell to competitive carriers as comprehensive a service offering as possible, especially network capacity. Thus BT today has a significantly higher share of revenue attributable to the carrier services market than DTAG at significantly lower prices for leased lines and other services.

### **DTAG Seeks To Destabilize Rather Than To Shape The Market**

DTAG systematically creates planning uncertainty for competitive carriers. Important information, for example about planned customer transfers, the making available of interconnection technologies, or simply the necessary planning materials are being provided by DTAG with the greatest possible delay. Issues agreed upon for planning purposes are never confirmed in writing even when explicitly requested. Commitments made by DTAG personnel in regional offices are being in part or entirely revoked by DTAG's headquarters. Agreed-upon provisioning dates are often repeatedly rescheduled at the last minute. Short contract terms and brief termination windows create constant insecurity from a legal and business perspective, hampering the development of new products and the development of business plans.

### **DTAG Selectively Discriminates Among Competitors**

DTAG seeks to establish a contracting practice skewed in its favor by pushing one-sided agreements on specific carriers who share overlapping interests with DTAG, or by exploiting inexperienced small carriers who are under considerable pressure to get a foothold in the market. The jurisprudence of RegTP institutionalizes the bias created by this practice, in that larger or more experienced competitive carriers in anti-trust proceedings will find themselves faced with the argument that these very same practices and rules have become the "market standard."

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### **DTAG Is Waging An All-out Lobbying And Public Relations Campaign To Relax The Regulatory Framework In Spite of Increasing Competitive Obstacles**

DTAG has framed the debate by portraying itself as the last enterprise of national pride worth protecting. A campaign on this level, in combination with the fact that DTAG remains majority-owned by the public, makes for a solid emotional appeal to the public. This campaign seeks to make the public forget the significant impact that the billions in foreign investment have had on the economy, in addition to the millions of jobs, which have been created by the competitive carriers and their suppliers in the German telecommunications market. This year, the order volume for network equipment placed by competitive carriers will overtake for the first time the volume of orders placed by DTAG, for instance with Siemens. Meanwhile, DTAG is even trying to blame the domestic regulatory framework for its repeated failures in international ventures. Its campaign for relaxed regulation culminates in its application to be considered non-dominant on the Berlin route even as DTAG still holds 97% of all end-user connections to the fixed network nationwide.

**RegTP is under significant political pressure to relax the regulatory framework in favor of DTAG, despite of DTAG's massive obstruction of competition.**

**In addition, RegTP does not use its authority to counter the subtle obstructionism being practiced by DTAG .**

**The flood of technically and economically complex proceedings are overwhelming the limited staff and budget of the regulator.**

### **RegTP Is Not Preventing DTAG's Abuse Of Its Market Dominance:**

Even as DTAG has to this day never offered to competitive carriers "all essential network services" as demanded by the Telecommunications Act, RegTP is avoiding defining this core criterion, prevents decisions from being taken or delays making them. In contrast to the regulatory practice in the U.S. which can look back to ten years of competitive regulation, the RegTP occasionally lacks an understanding of the economic significance of seemingly minor irritations, like the refusal of DTAG to offer fast circuit restoration, the ability to switch business customers outside of business hours, automatic traffic rerouting and overflow routing in emergencies and other services which DTAG is providing only to itself and its subsidiaries. DTAG itself, according to its

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internal strategy memoranda, increasingly seeks to push competitors out of the market through predatory pricing of its products.

### **RegTP Does Not Prevent Predatory Pricing:**

RegTP usually refuses to allow competitive carriers to join as parties the tariff review proceedings of DTAG, since their interests are allegedly not at stake -- even as this is in fact the heart of their matter. Predatory tariff structures are often not even noticeable to the regulator, due to the limited knowledge and experience of RegTP (for example, the Internet access tariffs). Evermore complex tariff structures are being classified as not requiring approval and are approved up-front without sufficient review and lacking any factual basis for such classification (DTAG's digital subscriber line tariff or "T-DSL"), sometimes even being allowed to go into effect for several month on a "trial basis" without geographic limitation (e.g. DTAG'S "XXL" tariff). RegTP clearly does not have in hand any useful instruments to prevent predatory pricing.

### **RegTP Is Totally Overwhelmed Due To The Multitude And Increasing Complexity Of Violations:**

The number of proceedings before the RegTP dealing with detailed technical matters has steadily increased since the beginning of liberalization. All agreements which DTAG had initially voluntarily negotiated with competitive carriers have been terminated unilaterally by it. Following the initial struggle to force DTAG to provide basic services to competitors, RegTP is now tasked with deciding upon details of service offerings and network elements without which effective competition is doomed to fail. DTAG's bundled tariff filings are growing ever more complex, strategically mixing different services. They can no longer be effectively reviewed for predatory pricing due to the decision-making principles thus far established (for example, the minimum 25% span assumed to exist between the price for some offering charged the end customer and the corresponding wholesale price of such offering for competitors). The provision of incomplete and redacted data by DTAG, which cannot be challenged by competitors, renders the situation even more difficult.

### **RegTP Is Not Consistently Using Its Existing Authority To Enforce Its Decisions**

In several instances, RegTP has failed to ensure that its decisions with respect to DTAG are in fact being complied with. For instance, DTAG initially ignored the timeframes of the regulator's decision ordering the incumbent to continue to offer billing services to

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competitors and submit a corresponding offer for this service; substantively the revisions ordered to be made on DTAG's part are being ignored to this day. Similarly, RegTP determined that the significant delays in transferring local service customers from DTAG to be a clear abuse of market power; yet the regulator has failed over the past three months to enforce its order in the face of still-increasing delays in processing customer transfers. With respect to retail price tariffs, RegTP has failed to enforce the legal requirement that DTAG present evidence of cost-based pricing. Rather than to reject tariff submissions by DTAG lacking such required proof, the regulator is aiding and abetting DTAG's behavior by institutionalizing the recourse to makeshift approval processes (tariff approvals based on benchmarking or rule-of-thumb measures like wholesale price-plus-25-percent) rather than to insist on regularizing such approvals as envisioned by the law.

### **RegTP Is Not Using Its Authority To Actively Shape The Telecommunications Market**

Even as many competitively problematic issues have long since been visible (and RegTP has in fact been informed numerous times of these issues) the regulator has to date continued to rely exclusively on reactive, quasi-judicial processes for each individual dispute. To date, no coherent, overall regulatory plan or rule making for the market is evident which would avoid the regulator having to make *ad hoc* decisions under time pressure, and to allow for more predictable planning by competitors. Additionally, the decisions made by RegTP limit themselves to the bare minimum and do not even begin to address future problem-solving approaches. Suggestions made by competitors, such as for example with regard to the proposal for more economical utilization of limited existing collocation spaces or the provision of automatic emergency overflow and rerouting services, were being rejected by the regulator as late as December of 1999 as unnecessary. The competitors had pointed RegTP to these emerging problems as much as one year previous to that date.

## APPENDIX 2 TESTIMONY A. LIPMAN

### **Demands for a Future Pro-Competitive Regulatory Policy:**

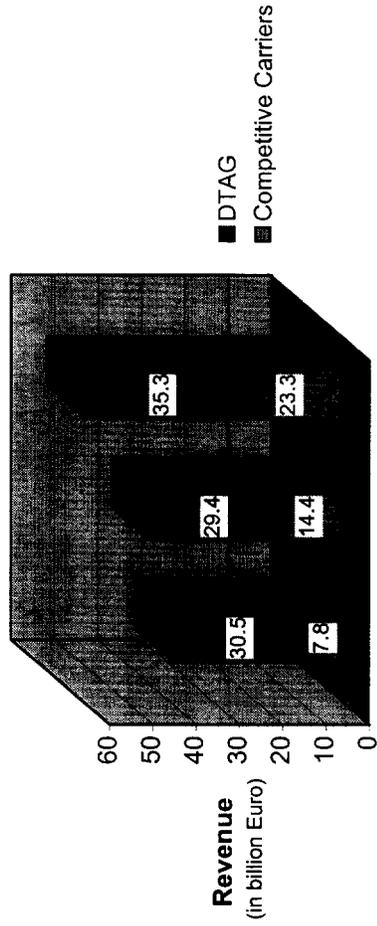
1. **Competition must be the driving force of:**
  - lower prices,
  - innovative services,
  - rapid infrastructure deployment,
  - more jobs,
  - large-scale foreign investment**in the telecommunications market.**
2. **The regulation of the still absolutely dominant incumbent is only in its infancy and must be recognized as the necessary precondition for fair competition.**
3. **Predatory market behavior with the aim of eliminating competition as a deliberate strategy by DTAG, based on centralized monopolistic structures, must be met by stronger regulatory efforts and responses.**
4. **Only a reliably stable regulatory framework can create:**
  - future investment,
  - innovative technology,
  - new jobs with carriers and suppliers, and
  - an efficient and consequently cheaper communications infrastructure.
5. **Not the interests of only *one* company, but functioning competition as a whole must be the key for the future competitiveness of Germany as a business location.**

**Annex 2:**

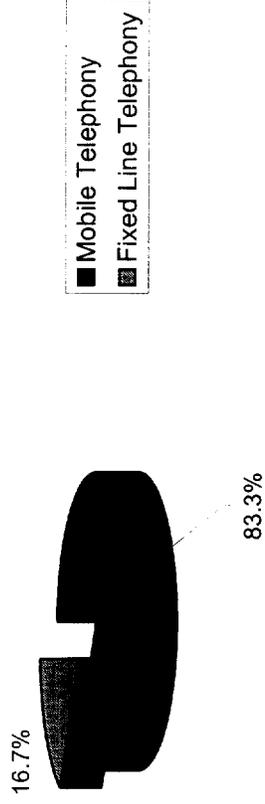
**VATM/Dialog Consult German Market Data**

# Chart 1: Total German Telecommunications Market - Fixed and Mobile

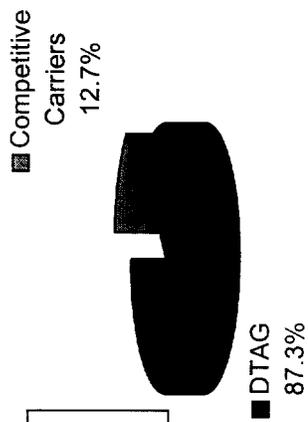
(Revenue without terminal equipment or broadband)



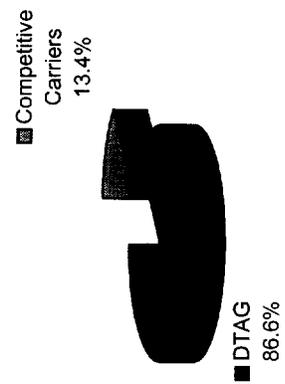
**Chart 1a: Competitive Carrier Services**



**Chart 2: The German Fixed Telephony Market by Volume**

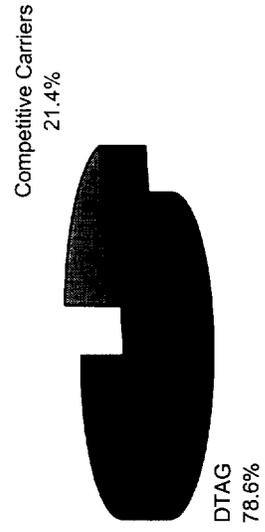
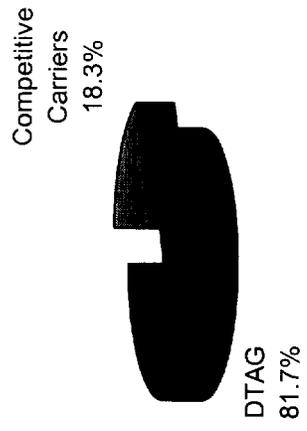


**1999 Total Volume:**  
**29.2 billion Euros**  
- DTAG: 25.5 billion  
- Competitors: 3.7 billion



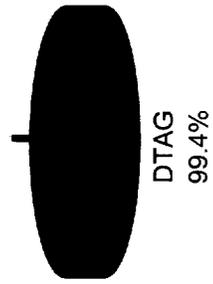
**2000 Total Volume:**  
**29.2 billion Euros**  
- DTAG: 29.1 billion  
- Competitors: 3.9 billion

**Chart 3: The German Fixed Telephony Market by Usage Volume**  
(includes Internet Access)



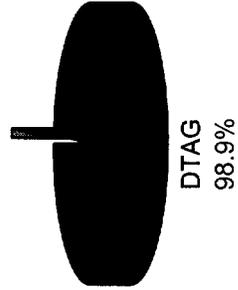
**Chart 4: The German Market for Local Fixed Line  
Telephony by Usage Volume**  
(local calling only)

Competitive  
Carriers  
0.6%



1999

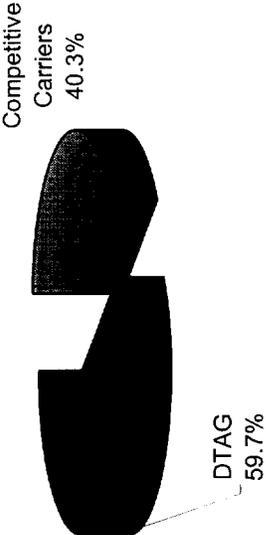
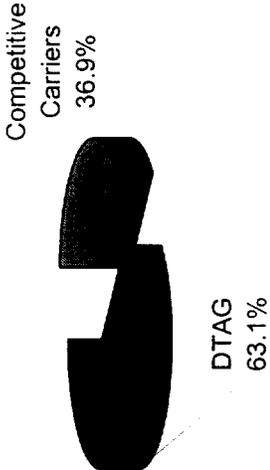
Competitive  
Carriers  
1.1%



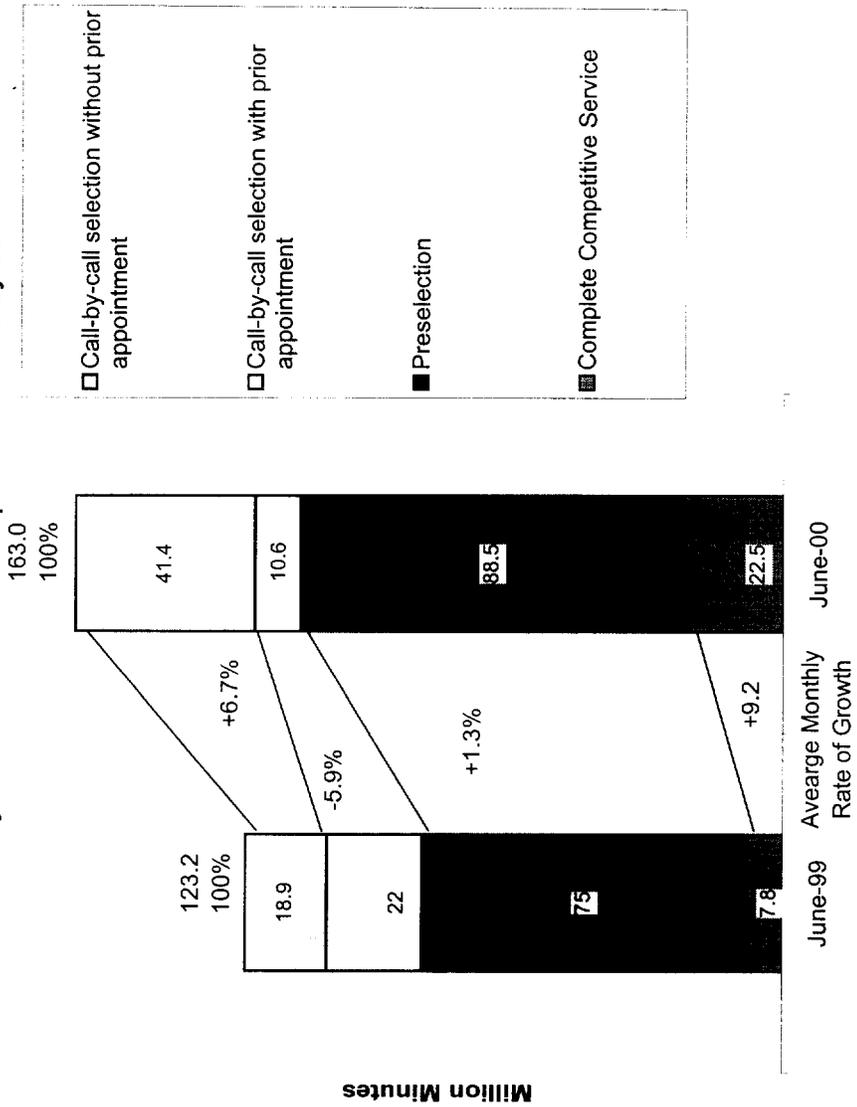
2000

**Chart 5: The German Market for Fixed Line  
Telephony (excluding local calling)**

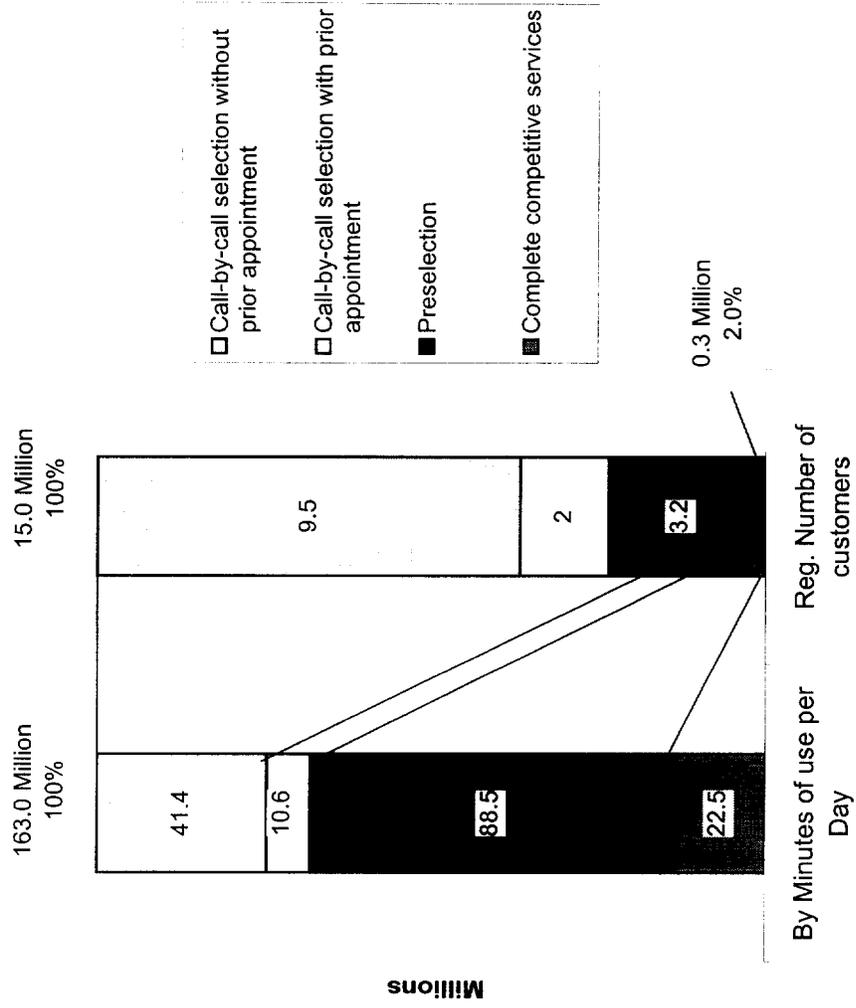
- including Internet Access -



**Chart 6: Daily Minutes of Use of Competitive Carriers by Service**



**Chart 7: Usage of Competitive Carrier Services in June 2000**



**Chart 8: Steady Customer Base of Competitive Carriers in Germany**

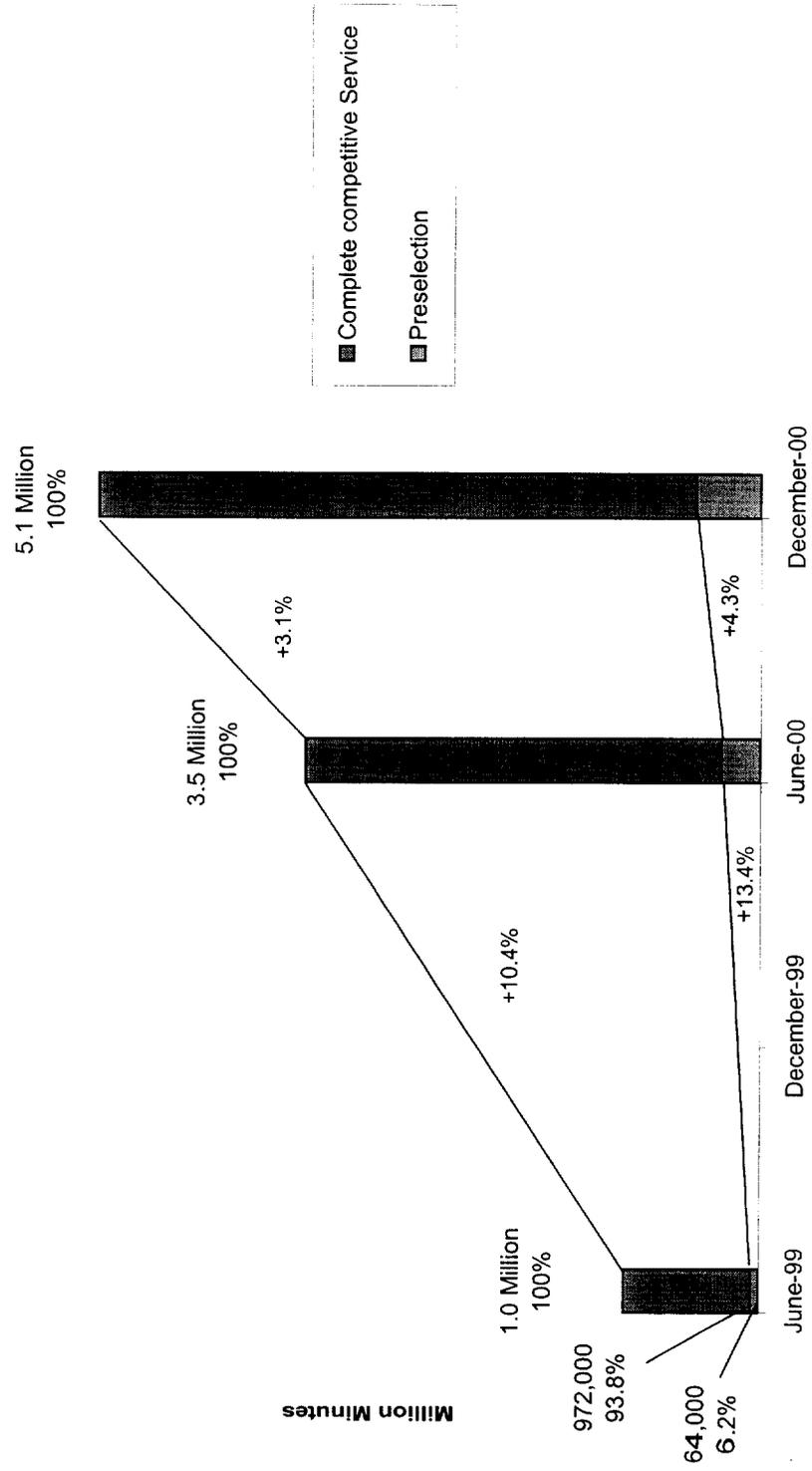


Chart 9: Employment Growth of Competitive Carriers

