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New German Telecommunications Act, The

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THE NEW GERMAN TELECOMMUNICATIONS ACT†

*Axel Spies and Jan F. Wrede**

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† PLEASE NOTE: Because many of the citations used in this article are in German, these citations have not been verified by the staff of *The Michigan Telecommunications and Technology Law Review*.—Eds.

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INTRODUCTION

In the wake of the debate in Germany on how to weather the storms against the "marketplace Germany" (*Unternehmensstandort Deutschland*) the new German Telecommunications Act ("TA")¹ has been earmarked as a milestone.² Its supporters hail the TA to spur competition in Germany's telecommunications market, which they expect to have a turnover of over DM 100 billion (app. US \$66 billion) by the year 2000.³

1. „*Telekommunikationsgesetz*“—published in BGBl. I 1996, p. 1120.

2. Funke, *Grundgedanke des neuen Telekommunikationsrechts*, Handelsblatt, June 26, 1996.

3. Lindemann, "Expectations mixed on new telecoms law", *Financial Times* May 8, 1996. Even the German Commission on Monopolies (*Monopolkommission*), a panel of academics which advises parliament on industry concentration, expects the German telecommunications industry to reach the economic significance of the car industry. See 10th Report of the Monopolkommission dated July 22, 1994, Bundestags-Drucksache 12/8323, p. 19.

The core of this market, public voice telephone services, has so far been reserved for Deutsche Telekom AG, the third biggest telecommunications company in the world with more than 210,000 employees and revenues for 1995 in the amount of approximately DM 66 billion (app. US \$44 billion).⁴

The monopoly of Deutsche Telekom AG has in the past few years been subjected to the first inroads⁵ and as part of the TA finally it is to crumble to dust. Nonetheless, the Federal Government assumes that Deutsche Telekom AG will persist in dominating the "market for telecommunications services for a longer time period even after the monopolies will fall."⁶ Consequently, the Federal Government defines the two main goals of the TA as to make possible a non-discriminatory competition for new participants which will join the market and to assure a functioning competition through interventions into the conduct of those enterprises which dominate the market.⁷

This article seeks to summarize the salient features of the TA and to outline the perspectives for potential foreign investors in the German telecommunications market as to the regulatory environment such investor will face. For this purpose, it will briefly describe the process which led to the TA (2.), the applicability of the TA (3.), the Regulator to be established under the TA (4.), the licenses available under the TA (5.), the duties of the licensee (6.) and finally the rights of the licensee (7.).

This article is not intended to and cannot provide a comprehensive summary of the TA. Instead it seeks to inform about and draw attention to only those issues which may be of primary interest to a potential investor and which are essential for understanding the regulatory framework for the telecommunications industry in Germany.

At this early stage of the practical implementation of the TA, no case law or administrative practice is available to assist in the

4. Hefekaeuser, *Die Deutsche Telekom AG—Von der öffentlich-rechtlichen zur privatrechtlichen Zielsetzung in Unternehmen der öffentlichen Hand*, *Zeitschrift fuer Gesellschaftsrecht* 1996, p. 385-395 at 385. The biggest company is AT&T followed by the Japanese NTT.

5. In addition to Deutsche Telekom AG, currently only Mannesmann D 2 Privat (a joint venture of Mannesmann and Airtouch as operative partners) and E-Plus (a joint venture primarily of Vebacom, Thyssen, Bell South and Vodafone) may offer mobile digital voice telephony services to the public.

6. Motives of the Federal Government on the TA Bill sent to the Bundesrat—dated February 9, 1996 (Bundsrats-Drucksache 80/96) p. 33 (hereinafter "Government Motives").

7. Government Motives, *supra* note 6, at 34.

interpretation of the TA. Accordingly, the motives of the legislature are of prime importance for its understanding and its interpretation.⁸

I. THE ROCKY ROAD TO THE TA

A. *The Deregulation Process in Germany*

The TA replaces a cluster of laws and regulations which in the past governed the provision of telecommunications services in Germany and which, in particular, secured the voice telephony monopoly for what until recently was the Deutsche Bundespost.⁹

However, the TA is not the first, but rather the third and—for the time being—final step in the liberalization of the German telecommunications market. The first phase was completed in 1989 and was characterized by three events: Originally, telephone services in Germany were provided exclusively by Deutsche Bundespost which was state owned and had a legal position akin to a governmental agency (*Sondervermögen des Bundes*). In addition to providing telecommunications services, Deutsche Bundespost was also in charge of the mail service in Germany and provided banking services. In preparation of a future competitive market, the Deutsche Bundespost was broken up in three separate public enterprises, one of which was Deutsche Telekom.¹⁰

Moreover, in 1990, the German Ministry of Post and Telecommunications (“BMPT”) issued the first cellular phone license to a private competitor (“D 2”) and thereby admitted for the first time private entities to provide voice telephony services in Germany to the public. The first license was followed by a second DCS 1800 license issued to E-

8. The most relevant documents are: Government Motives (*supra* note 6); Statement of the Bundesrat dated April 23, 1996 (Exhibit 2 to Bundestags-Drucksache 12/4438); Recommendations of the Committee on Post and Telecommunications dated June 12, 1996 (Bundestags-Drucksache 13/4864); Recommendations of the *Vermittlungsausschuss* (mediation committee between Bundestag and Bundesrat) dated June 26, 1996 (Bundestags-Drucksache 13/5066).

9. In particular, in Sec. 100 Subs. 3 TA, the Law on Telegraph Lines, a statute originally adopted during the last century (*Telegraphenweggesetz* of December 18, 1899 published in RGBl. 1899, p. 705 as amended from time to time, most recently and for the last time in the statute of September 14, 1994), has been repealed. Moreover, Sec. 99 Subs. 1 TA substantially amended the Law on Telecommunications Equipment (*Fernmeldeanlagen-gesetz*), in the version published of July 3, 1989 (BGBl. I 1989, p. 1455) as amended for the last time on October 25, 1994 (BGBl. I 1994, p. 3082); until January 1, 1998, the *Fernmeldeanlagen-gesetz* remains the source for Deutsche Telekom AG's right to offer fixed network-based voice telephony services. For more details on the history of the liberalization, see Scheerer, *Das neue Telekommunikationsgesetz*, NJW 1996, p. 2953-2962 at 2953, 2954.

10. So-called *Postreform I* implemented by the *Poststrukturgesetz* of August 6, 1989 (BGBl. I 1989, p. 1026). The other two entities were *Deutsche Post*, the mail service, and *Deutsche Postbank*, a bank which provides current- and savings account services.

Plus Mobilfunk GmbH in 1993. Lastly, the telecommunications equipment market was liberalized, a move which has had a fundamental impact on consumers who, previously, had to either buy or lease all telephony equipment from Deutsche Bundespost.¹¹

The second phase followed five years later with the privatization of Deutsche Telekom on January 1, 1995: Deutsche Telekom became a private joint stock company (*Aktiengesellschaft*) under German law whose shares until recently were held exclusively by the Federal Government.¹² As part of the transformation into a joint stock corporation, Deutsche Telekom AG obtained the full capacity to act in Germany and, for the first time, also abroad.¹³ As a further step in the privatization process, Deutsche Telekom AG has conducted an initial public offering in November 1996.

B. Groundwork for Deregulation by the European Union “EU”

The EU deserves the laurels for getting this deregulation off the ground and paving the way for the TA.¹⁴ Since 1987 the EU has striven to open the door to competition in the telecommunications sector. For this purpose a number of greenbooks, counsel directives and counsel resolutions were put in place.¹⁵ Apart from those measures, the European

11. See Sec. 2a of the *Fernmeldeanlagenengesetz* dated 3 June 1989—as amended—(BGBl. I 1994, p. 1455) pertaining to terminal installations. One of the consequences was that until the beginning of the nineties, telephone answering machines were a rarity in Germany, as these were expensive to buy or lease and, in addition, special fees were incurred for operating them.

12. *Postreform II*, implemented by the *Postneuordnungsgesetz* of September 14, 1994 (BGBl. I 1994, p. 2325) with the by-laws of Deutsche Telekom AG attached as Exhibit 3 to Sec. 11 Subs. 2 of the *Postumwandlungsgesetz* (BGBl. I 1994, p. 2339).

13. As a government agency, Deutsche Bundespost's ability to act abroad was extremely limited. However, Deutsche Telekom AG, once permitted to join the international parquet, rapidly did so and now seeks to become a global player. On July 17, 1996 the EU Commission consented to “Atlas” (a joint venture of France Télécom S.A. and Deutsche Telekom AG) and “Global One”, a joint venture of “Atlas” and Sprint Corp. of the U.S. See *Frankfurter Allgemeine Zeitung*, Die EU-Kommission genehmigt Telekom-Projekt Atlas, July 18, 1996, p. 1.

14. A statement also strongly supported by Scherer, *supra* note 9, at 2953, with more references in footnote 5.

15. The most important being: Greenbook “on the development of the Common Market for telecommunications services and telecommunications equipment”, June 6, 1987, COM (87) 290; Commission Directive of June 28, 1990 “on the establishment of the internal market for telecommunications services through the implementation of open network provision” (90/387/EEC), OJ 1990, No. L 192/1 (the “ONP-Directive”) as amended by Commission Directive of March 13, 1996 (96/19/EC), OJ 1996, No. L 74/13; Commission Directive of June 28, 1990 “on the competition in the markets for telecommunications services” (90/388/EEC), OJ 1990, No. L 192/10; Council Resolution of July 22, 1993 “on the review of the situation in the telecommunications sector and the need for further development in that market” (93/C/213/01), OJ 1993, No. C 213/1; Council Resolution of December 22,

Commission has addressed non-compliance issues in accordance with Art. 90 Sec. 3 of the EC-Treaty¹⁶ to several member states individually with the aim to open the telecommunications sector of those countries for competition.¹⁷ Most of the compliance-issues were resolved in cooperation with the national governments and no formal decisions of the Commission proved to be necessary.¹⁸

Probably the most important step was that the EU set the deadline for the provision of voice telephony services for January 1, 1998.¹⁹ The TA intends to transform the regulatory requirements imposed by the EU into national German law.²⁰ The deregulation on the EC-level is supposed to be completed in the near future.²¹

C. Legislative Process Leading to the TA

The legislative procedure in Germany was characterized by the legal framework imposed by the EU (in particular by the deadline "January 1, 1998") and a tug-of-war between the Federal Government and the German Federal States.

After several months of deliberations, the German Lower House (*Bundestag*) voted in favor of the bill on June 13, 1996.²² However, the German Upper House (*Bundesrat*), which represents the German States, voted against the bill on July 1, 1996: The main reason for the rejection by the *Bundesrat* was that the German local communities wanted their share in the revenues to be generated in the telecommunications field as well. In particular, they wanted to insert a provision which would have provided for a toll as remuneration for the network carrier's right to use

1994 "on the principles and timetable for the liberalization of telecommunications infrastructure" (94/C 379/03), OJ 1994, p. 443.

16. The clause reads: "The Commission shall ensure the application of the provision of this Article and shall, where necessary, address appropriate directives or decisions to Member States."

17. See the 1995 Report of the Commission on the competition policy within the EC (DG IV, Luxembourg 1996, p. 45 and 46) ("DG IV Report"): "Omnitel Pronto Italia", "Mobistar", "Vebacom SDH-network".

18. See DG IV Report, *supra* note 17, p. 46.

19. Article 1 Subs. 2 of the Commission Directive 96/19/96 of March 13, 1996 (OJ No. L 74/13) amending Directive 90/388/EEC with regard to the implementation of full competition in the telecommunications market.

20. This explains why the TA refers in several paragraphs directly to the Open-Network-Provision (ONP) Directive 90/387/EEC dated June 28, 1990. See e.g. Sec. 5 TA (duties to report to the Regulator).

21. Scherer, *supra* note 9, at 2954. In particular, the EC plans to amend the ONP-Directive—see proposal COM (95) 543 final, dated March 1, 1996, OJ 1996, No. C 62/3.

22. For a more elaborate discussion of the history of the TA see: Twickel, Die neue deutsche Telekommunikationsordnung, NJW-CoR 1996, p. 226–230 at 227.

the land of the states and the local communities for telecommunications networks.

In addition, the governments of the Federal States (*Bundesländer*) sought to expand the bill in respect to broadcasting rules, tried to secure greater influence over telecommunications regulation for the States and requested to improve the "universal services" required under the TA.²³ They feared that some geographic regions would benefit more from the deregulated market than others.

The *Bundesrat* sent the bill to the arbitration committee of the German parliament which forged a compromise to ensure that future competitors guarantee a universal service at a reasonable price in response to technical and social developments. The idea of a "toll" was finally dropped even though there remained an issue as to the right of the federal government to include in a federal bill rules transferring user rights relating to property of the States to private entities.²⁴ This issue may have to be dealt with by the Federal Constitutional Court.²⁵ In any event, on the basis of the compromise, the *Bundesrat* gave its green light and passed the bill on July 25, 1996. The removal of this final stumbling block opened the door for the Federal President to proclaim the law on July 31, 1996. The law became effective on August 1, 1996 even though some of its provisions will not become operative before January 1, 1998 which was the deadline set by the EU and which will be the date marking the opening of the German telecommunications market. Until then, Deutsche Telekom AG will remain the sole provider of fixed network-based voice telephony services.²⁶

II. THE APPLICABILITY OF THE TA

A. Activities Covered by the TA

The TA governs "telecommunications", which it defines as "the technical process of emitting, transferring, and receiving of messages of all kind in the form of codes, language, pictures or sounds by way of Telecommunications Equipment."²⁷ "Telecommunications Equipment"

23. See 6.2.1 (*infra*).

24. For more details see Twickel, *supra* note 22, at 229; Frankfurter Allgemeine Zeitung, Bötsch erwartet sinkende Telefongebühren, July 6, 1996, p. 12; Financial Times, Expectations mixed on new telecoms law, August 5, 1996, p. 4.

25. The cities of Gera and Dortmund have already passed a resolution to file a constitutional complaint (*Verfassungsbeschwerde*): Der Spiegel, Klage gegen Nulltarif, October 7, 1996, p. 124.

26. Sec. 97 Subs. 2 TA; Sec. 1 Subs. 4 *Fernmeldeanlagen-gesetz*.

27. Sec. 3 item 16 TA.

in turn is defined "as technical installations or systems which are capable of sending, transferring, connecting, receiving, channeling or controlling electromagnetic or optic signals which can be identified as information"²⁸ In other words, the TA governs the technical process of the transfer of information by electrical, electromagnetic or optical means.

The definition of "telecommunications" under the TA is much more complicated and broader than the traditional definition. Previously, telecommunications was merely understood as "communication by electrical or electromagnetic means over a distance."²⁹ The term "telecommunications" as used in the TA encompasses much more than the classic telephone services. The primary areas of application of the TA are (i) the provision of "voice transmission services" (*Sprachtelefondienste*), i.e. the classic voice telephone service, (ii) the provision of radio, TV and similar signals either in the old fashioned way of terrestrial waves or in the more modern ways via cable or satellite, and (iii) the provision of data lines for information transfer (such as faxes and data transfer).

On the other hand, the TA does not apply to a number of telecommunications related businesses such as, for example, the sale, lease, installation or maintenance of telecommunications equipment, and the provision of consulting, billing or other services for the telecommunications industry.³⁰

Moreover, the TA only governs the issue whether and how the telecommunications services may be rendered. It does not address the contents of the services.³¹ Contents requirements are contained in other federal and state statutes, in particular the German Penal Code which imposes limits as to the publication of pornographic materials³² and nazi propaganda.³³ In addition with regard to radio and television services, the media laws of the Federal States are applicable.

B. *Territorial Scope of the TA*

The TA fails to expressly address the issue as to its international jurisdiction, i.e. the question of its territorial scope (*räumlicher Geltungsbereich*). There is no hint in the TA that it only applies to electromagnetic or optic signals produced in Germany. Instead, it also

28. Sec. 3 item 17 TA.

29. Rowe, *Telecommunications for Managers* (3rd ed.), 1995, p. 4.

30. Government Motives, p. 37, *supra* note 6 (comments on Sec. 6).

31. Government Motives, p. 37 (comments on Sec. 3).

32. See Sec. 184 of the German Penal Code (governing pornographic material).

33. See Sec. 86 Subs. 1, No. 4 of the German Penal Code (governing nazi propaganda).

applies to any electromagnetic or optic signal which may be received in the Federal Republic of Germany, irrespective of where such signals are produced.

Correspondingly, also the provision of telecommunications services into Germany via satellite is governed by the TA.³⁴ If a conflict should arise between rules of an international treaty and the TA with regard to such services, the rules of the international treaty will prevail (Article 25 of the German Basic Law). The most recent example of such an international treaty is the recently revised Constitution and Convention on the International Union of Telecommunications dated December 22, 1992 which Germany has joined by virtue of a federal law dated August 20, 1996.³⁵

C. Persons Covered

The TA lacks any provision distinguishing between German and foreign entities and accordingly it applies to both foreign and domestic providers equally (national treatment).

As a consequence, not only German but also foreign companies will be required to comply with the TA if their activities fall within the subject matter and the territorial scope of the TA. On the other hand, foreign companies have the same right to provide telecommunications services in Germany and may obtain a telecommunications license under the same prerequisites as any Eastern German company.³⁶ Unlike the telecommunications laws of other European countries, e.g. Poland and Russia,³⁷ the TA does not contain any provision which requires a majority ownership in any telecommunications provider to be held by German nationals.

34. Such transmission will in most instances require a "Class 2" telecommunications license. Sec. 6 Subs. 2 No. 1b TA. For further details see *infra* Chapter 5.2.

35. BGBl. II 1996, p. 1306. The task of this Union is mainly to harmonize the use of frequencies on the international level (Art. 12) and to elaborate standards for the international telecommunications sector (Art. 17).

36. See Hiltl/Grossmann, Grundfragen des neuen deutschen Telekommunikationsrechts, Betriebsberater 1995, p. 169–176 at 172.

37. Also some of the member states of the EU are considering to introduce limitations on foreign ownership. Due to EU laws, such limitations can apply only to nationals of outside of the EU.

III. THE REGULATOR

A. *Structure of the Regulator*

After an intense discussion, as part of the "deregulation" of the telecommunications industry, the TA provides for a new governmental agency to be established under the Federal Ministry of Economics. This new agency will be located in Bonn and will serve as the regulator for the German telecommunications industry. Its name will be the *Regulierungsbehörde für Telekommunikation und Post* (hereinafter the "Regulator").

As an alternative to creating a new governmental agency, it had been proposed to assign the responsibilities now bestowed on the Regulator to the Federal Cartel Office in Berlin.³⁸ After a show of strength between the Minister of Post and Telecommunications and the Minister of Economy, it was finally decided to form a new governmental institution.

The Regulator must be established by January 1, 1998, and will be headed by a president to be nominated by the Federal Government and to be appointed by the Federal President. The German Ministry of Post and Telecommunications will remain the regulatory authority until the new authority can take over the baton on January 1, 1998.

B. *Tasks of the Regulator*

The primary tasks of the Regulator are the following:

- (i) administration the telecommunications market,
- (ii) supervision of the telecommunications industry for the purpose of securing compliance with the TA, and
- (ii) protection of the consumers against excessive use of market power by market dominating suppliers.

1. Administration of the Telecommunications Market

The task which will probably be the most in the lime light of the public is the issue of the telecommunications new licenses which will be dealt with in the 5th chapter of this article. In addition, the administration of the market comprises the issuance and administration of radio

38. The Federal Cartel Office currently watches the antitrust implications of the development of the telecommunications market and is often regarded as the most efficient German Government authority with a track record of not bowing to political pressures.

frequencies,³⁹ the administration of telephone numbers, and the approval of terminal equipment.

There can be hardly any doubt that the administration of numbers is of outstanding practical importance for the users and is crucial for newcomers in the market: The issuance of complicated numbers and the inability of switching to another provider while keeping the old number would constitute an additional barrier to entering the market. From 1998 on the operators of telecommunications networks have to assure that any user who switches to another telecommunications provider will be able to keep its number unless it is justified to refrain from this obligations for technical reasons, e.g. if the user changes his/her residence.⁴⁰

The Regulator is responsible for setting up the framework for the issuance of numbers and is responsible for issuing the numbers to network operators, service providers and users. The numbers will be assigned upon an application by the aforementioned persons or legal entities. The Ministry of Post and Telecommunications is empowered to regulate the details (including the fees attached to the assignment of numbers) by an ordinance.⁴¹

Also in the future, only terminal equipment approved may be used by customers in Germany. The Regulator is responsible for the approval of such equipment in Germany but may delegate this task to other institutions. For this purpose it may accredit other institutions.⁴² The approval is to be granted if the equipment in question does meet the applicable technical specifications set by European Law.⁴³ Within the EU, terminal equipment approved for one country may be used in any EU country.⁴⁴ According to Sec. 3 item 3 TA terminal equipment are not only installations “which shall be directly connected to a terminal link of a telecommunications network” (e.g. faxes, telephone handiest, modems) but also those installations which cooperate with a telecommunications network and shall be directly or indirectly connected to a

39. Secs. 44 to 49 TA.

40. So-called *Netzbetreiberportabilität*. Sec. 43 Subs.5 TA. The Regulator may, however, grant exceptions due to technical reasons or in case that such an exceptions does not “infringe” with the competition in this market.

41. Sec. 43 Subs. 3 TA.

42. Sec. 62 Subs. 1 TA.

43. In particular: Council Directive of April 29, 1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment (91/263/EEC), OJ 1991, L 144/45, as amended.

44. Sec. 59 Subs. 4 TA. The telephone sets etc. which are used within the EU must be compatible, capable to interconnect with each other and provide a sufficient reliability. The transmitting installation must not pretend or be disguised in “an object of daily use” (Sec. 65 Sec. 1 TA). Thus, James Bond's famous cellular phone in his shoe is illegal in Germany unless it has been approved as equipment elsewhere in the EU.

terminal link of a telecommunications network (e.g. telecommunications control units or transmission control units).

2. Supervision of the Telecommunications Industry

The Regulator is also responsible for supervising the compliance with the TA as well as any licenses issued under the TA by all participants in the telecommunications market.⁴⁵

For this purpose, the TA grants far reaching rights to the Regulator with regard to the access to information. For example, the Regulator may request information free of charge from all enterprises doing business in the telecommunications sector including but not limited to their turnover.⁴⁶ Moreover, the Regulator has the right to verify the accuracy of such information by visits to the facilities of an operator during "normal business hours."⁴⁷ The Regulator may even enforce its requests by obtaining a search warrant from the local court in charge (*Amtsgericht*) and may seize the relevant documents.⁴⁸

3. Protection of Customers

To protect the consumers, the Regulator is responsible for (a) regulating the general conditions of telephony services as used by each licensee⁴⁹ and (b) approving the prices charged for telecommunications services.⁵⁰

According to Sec. 23 Subs. 1 of the TA, the Regulator has the right to object to the general conditions of business (*Allgemeine Geschäftsbedingungen*) of the offerees of telecommunications services if such conditions fail to comply with the relevant EU regulations or recommendations issued by the EU Parliament or the EU Council pursuant to Art. 6 of the ONP-Directive.⁵¹ Sec. 23 TA only transfers European into German law. It does not authorize the Regulator to object to the General Conditions on the basis that a provision violates other laws, in particular the German Statute governing General Conditions⁵² which sets certain limits for the type of provisions which the general conditions

45. Sec. 71 TA.

46. Sec. 72 Subs. 1 No.1 TA.

47. Sec. 72 Subs. 1 No. 2 TA.

48. Sec. 72 Subs. 5 TA.

49. Secs. 5, 8, 19, 43, 44, 59, 71 TA.

50. Secs. 24, 25, 27 TA.

51. See *supra* note 15.

52. Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen dated December 9, 1976, BGBl. I 1976, p. 3317, as amended from time to time, for the last time on September 2, 1994, BGBl. I 1991, p. 2325.

may legally contain and is intended to protect customers against particularly onerous as well as unexpected provisions.

The responsibility of the Regulator for the approval of prices is governed by Sec. 24 of the TA which applies only to entities with a market dominating position as defined in Sec. 22 of the Act against Restraints of Competition.⁵³ Correspondingly, for the time being, only the prices charged by Deutsche Telekom AG will be reviewed by the Regulator. However, in the future also new competitors in the market might have to obtain the go ahead of the Regulator on pricing issues first, if they succeed in obtaining a market dominating position in any market (be it with regard to any local market or be it in the market for a particular service). Each company which qualifies as such will be notified and the companies as well as the relevant markets will be published annually in the Regulator's Official Gazette.⁵⁴

In those cases in which a market dominating entity does require the approval of the Regulator for the prices charged, the Regulator is required to assure that the supplier (i) does not reap monopoly profits, (ii) does not charge predatory prices, and (iii) does not engage in price discrimination without a factually justified reason.⁵⁵

IV. TELECOMMUNICATIONS LICENSES

A. Levels of Governmental Supervision and Regulation

As to the telecommunications activities regulated by the TA, the TA distinguishes between three types of activities which are subject to different levels of governmental supervision and regulation:

- (i) activities which are not subject to the regulatory framework imposed by the TA,
- (ii) activities which are subject to a notification requirement and certain other rules and regulations,⁵⁶ and
- (iii) activities which require a license.⁵⁷

The telecommunications activities outside of the regulatory framework of the TA are those which are not covered by Sec. 4 TA.

53. Gesetz gegen Wettbewerbsbeschränkungen—as amended from time to time, for the last time on October 10, 1994, BGBl I 1994, p. 3210.

54. Sec. 26 TA.

55. Sec. 24 Subs. 2 TA.

56. Sec. 4 TA.

57. Sec. 6 Subs. 1 TA.

Section 4 TA requires any provider of “telecommunications services” to notify the Regulator of the commencement, change or termination of the operation of such service. The purpose of this notification requirement is primarily to enable the Regulator to observe the market efficiently.⁵⁸ “Provider” in this context is everybody who exerts the legal and factual control over the operations necessary for the transfer of information via transmission lines (Sec. 3 item 1 TA). Consequently, the TA grants some leeway in order to shift the status as a provider to a third party, e.g. by way of outsourcing such activities from the owner of the transmission lines.

“Telecommunications services” in turn are defined in Sec. 3 item 18 TA as the *commercial* offering of telecommunications. While neither the TA nor the legislative motives define the term “commercial” (*gewerblich*), it should be interpreted in line with the constitutional definition of “commerce” as an activity which seeks to generate a profit.⁵⁹

One of the examples for telecommunications activities which are therefore not subject to notification is the operation of a company’s internal computer network since such network does not provide commercial telecommunications services. Similarly, the interconnection within a group of companies (“closed user group”) does not constitute offering commercial telecommunications services and will not fall within the legal framework of the TA.

However, in such case, the exact structure of the interconnection arrangement will determine whether a service is offered commercially and accordingly, whether the notification requirement of Sec. 4 TA applies. In particular for tax reasons it may be necessary to charge other group companies for the telecommunications services provided by one member of the group (in particular in the case of “outsourcing”) which the Regulator may interpret as rendering the services “commercially”. Until an administrative practice will have been developed, there will be some uncertainty as to when the offering of telecommunications services can be qualified as “commercial” and, accordingly, when they are subject to the notification requirement.

The TA does not contain a *de minimis* rule which would impose the notification requirement only on those providers whose activities are in any way relevant for the market. While Sec. 96 Subs. 1 No. 1 TA

58. Government Motives, *supra* note 6, p. 37 (comments on Sec. 3).

59. The motives expressly refer to the constitutionally guaranteed freedom of commerce in the telecommunications sector (Secs. 12, 14 German Basic Law). See Government Motives, *supra* note 6. For a more elaborate discussion of the term “commercial” see Jarrass/Pieroth, *Grundgesetzkommentar*, 3rd. ed. (1995) Art. 12, note 4, Art. 14 note 8.

imposes a penalty for non-compliance with the TA, it has been suggested that the requirement will in practice fail to meet its target.⁶⁰

Whether telecommunications services offered commercially must only be notified to the Regulator or whether providing these services requires a license will primarily depend on whether the services are to be offered to “the public” which will be discussed in the next paragraph.

B. Licensing Requirement

According to Sec. 6 Subs. 1 Nos. 1 and 2 TA, any provider of telecommunications services requires a license:

- (1) who operates Telecommunications Lines which reach over the border of a plot of land and which are used for Telecommunications Services for the public or
- (2) who offers Voice Telephony Services on the basis of self-operated Telecommunications Networks.

Practically, Sec. 6 covers all of those business activities which were hitherto reserved for the Deutsche Telekom AG.⁶¹ The buzz words in this context are “Telecommunications Services for the public” (*Telekommunikationsdienstleistungen für die Öffentlichkeit*), “Voice Transmission Services” (*Sprachtelefondienste*),⁶² “Telecommunications Networks” (*Telekommunikationsnetze*)⁶³ and “Telecommunications Lines” (*Übertragungswege*).⁶⁴ Each of these terms is defined in Sec. 3 TA.

As Sec. 6 Subs. 1 Nos. 1 and 2 TA both apply only to services offered to the public, the term “public” is of quintessential relevance for distinguishing between those services which do and those which do not require a license. In this respect it is important to consider Sec. 6 Subs. 3 TA which establishes the presumption that the operation of telecommunications lines which are available to third parties does constitute

60. Scherer, *supra* note 9, at 2955.

61. Government Motives, *supra* note 6, p. 37 (comments on Sec. 6 Sec. 1).

62. In accordance with Art. 2 of the ONP-Directive of the EU, Art. 3 item 15 TA now defines “voice telephony” as “the commercial provision for the public or direct transport of real-time speech to and from the termination points of a public switches network whereas every user can use the equipment connected to a network termination point to communicate with another network termination point.”

63. Sec. 3 item 21 TA. It is defined as “the technical equipment as a whole (transmission lines, telephone exchange facilities and other equipment indispensable for a proper functioning of the telecommunications network) which serves to render telecommunications services or non-commercial telecommunications services.

64. Sec. 3 Item 20 TA: “telecommunications cable facilities above and under ground including the attached switches and branches, masts and supports, cable shafts and cable pipes”.

offering a telecommunications service to the public. It is therefore the responsibility of the offeree of such services to produce sufficient evidence to show that the services are not open for the "public".

On the other hand, the Government Motives to the TA state explicitly that a company which provides telecommunications services to fulfill only its own needs (*Eigenversorgung*) is not subject to any license.⁶⁵ The same is true for a company which plans to operate a network on its own "plot of land" (*Grundstück*), e.g. on the premises of its factory; it does not matter whether this plot of land consists in reality of several registered pieces of land next to each other. It is sufficient that they form a unit by their "appearance" or by their "economic use" (Sec. 6 Subs. 1, 3 item 6 TA).

Taking into account the uncertainty arising from the lack of any established administrative practice, it is advisable to contact the Regulator before setting up a network which does not simply serve to interconnect terminal equipment within the same legal entity, even if it is run as a corporate network. The Regulator may verify whether such corporate network is really restricted to a closed user group or whether it is open for any "outsider" to become a member of the club.⁶⁶ For the distinction between public and non-public telecommunications services, it is irrelevant whether the telecommunications lines are operated by the licensee itself or are leased from a third party.⁶⁷

Summarizing this section one may state that the licensing requirement is rather broad and considering the presumption in favor of an offer to the public, most commercial telecommunications activities governed by the TA will also qualify under the licensing requirement of Sec. 6 TA. Accordingly, the licensing requirement will in practice be the ground rule for commercially relevant telecommunications services in Germany.

C. *Classes of Licenses Available*

Section 6 Subs. 2 TA is a focal point of the TA. It provides for the following four classes of licenses:

Class 1: cellular license (*Mobilfunklizenz*)

Class 2: satellite radio license (*Satellitenfunklizenz*)

Class 3: telecommunications services for the public which are not covered by class 1 or class 2

65. Government Motives, *supra* note 6, p. 37 (comments on Sec. 6 Sec. 1).

66. Hiltl/Grossmann, *supra* note 37, p. 171; Scherer, *supra* note 9, at 2955.

67. Government Motives, *supra* note 6, p. 37 (comments on Sec. 6 Sec. 1).

Class 4: license for Voice Transmission Services on the basis of self-operated telecommunications networks.

The division into these four classes has more a technical than a legal background: Class 1 and Class 2 activities require radio waves as their means of transmission. Since there is not a unlimited number of frequencies available, those licenses require a sophisticated distribution system. Services under Classes 3 and 4 can at least in theory be offered by a huge range of service providers. The tariffs for services under the Classes 3 or 4 are subject to the approval of the Regulator (see Sec. 25 Subs. 1 TA). In addition, it is important to understand that Class 4 does not include the right to operate transmission lines as it is stated explicitly in Sec. 6 Subs. 2 No. 2 TA. Instead, it covers those cases in which transmission lines are leased from other carriers or in which the connection is not based on cables (the definition of “transmission lines” only covers “cable facilities”). However, the Regulator may grant the right to operate “transmission lines” under Class 1, 2 to 3 together with a Class 4 license (see Sec. 6 Subs. 4).⁶⁸ For example, the offeree of a voice telephony service to the public over its own transmission lines would require a Class 3 and a Class 4 license. If such offeree intends to offer only data transmission for the public via its own network, such offeree would require a Class 3 license only.

D. Prerequisites for Obtaining a License

The number of licenses is generally not limited and the Regulator is required to issue a license to the applicant unless any of the reasons outlined in the TA apply as grounds for denying the license.⁶⁹

Section 8 Subs. 3 TA lists the grounds for denial of a license as follows:

- (a) the Regulator has no frequencies available for the operation envisaged by the applicant (Sec. 8 Subs. 3 No. 1 TA);
- (b) facts justify the assumption that the applicant does not have the reliability, operating capacity or expertise for exploiting the license and it can be expected that the applicant will not exploit the license permanently (Sec. 8 Subs. 3 No. 2a TA);⁷⁰

68. Government Motives, p. 37 (comments on Sec. 6 Sec. 2).

69. Scherer, *supra* note 9, at 2956.

70. “Reliability” in this context means that the applicant will ensure that it will fully comply with the law when exploiting its license; “operating capacity” means that the applicant will always have at its disposal sufficient “means of production” (capital, staff etc.) for the establishment and the operation of the business covered by the license, in other words,

- (c) facts justify the assumption that the grant of the license would endanger the public security (Sec. 8 Subs. 3 No. 2b TA).

E. Procedure for the Award of the License

The applicable procedure for the award of a license depends on whether the telecommunications services are to be provided via a limited number of available cable or radio waves and those which are not. This is because the transmission via cable or radio waves may be subject to the availability of frequencies.

Licenses requiring a frequency are granted on the basis of a frequency exploitation plan (*Frequenznutzungsplan*) which will be established and updated by the Regulator (Sec. 45 TA). The Regulator may restrict the number of frequencies for any particular sector of the telecommunications market, if, according to the frequency-exploitation-plan, frequencies are not sufficiently available to provide all potential providers of services with the frequencies required (Sec. 10 TA). Before restricting the number of licenses, the Regulator has to conduct hearings involving the interested parties. If the Regulator after such hearings decides to limit the number of licenses available, such decision has to be published in the official gazette of the Regulator (Sec. 11 TA).

F. Application for Licenses not Subject to Frequency Restrictions

The grant of a license requires a written application to the Regulator. In the documents to be submitted, the applicant has to define the contents and the class of the license which it seeks to obtain. In particular, the applicant needs to specify the geographical area in which it seeks to operate. The applicant is free in choosing the scope of the license and may choose at its own discretion whether to go for a wide area network (WAN), local area network (LAN) or metropolitan area network (MAN).⁷¹ The TA does not differentiate between these networks. A new operator could, for example, limit the application for the license to any region—northern Munich for instance—and offer telecommunications services in it. This will offer new competitors a lot of flexibility in challenging the market position of Deutsche Telekom AG.

the licensee has to be able to make sure that the system will operate trouble-free; "expertise" is given if the applicant will ensure that the persons who are involved in the business covered by the license possess the necessary knowledge, experience and skills. See Sec. 6 Subs. 3 TA.

71. Rowe, *supra* note 29, at 418.

In addition to said information, the applicant has to submit an excerpt of the company register in charge and to name the planned date of operation as well as a contact person for the Regulator.

The Regulator “should” decide about the application within six weeks (Sec. 8 Subs. 1 TA). This does not mean that the Regulator is required to grant the license within this six-week period but it shall use its best efforts to do so. To speed up the procedure, it will most likely prove helpful to discuss the specific requirements of a particular license application beforehand with the Regulator.

G. Grant of Licenses if the Number of Licenses for a Particular Market Are Limited

If the number of licenses available for a particular type of service has been restricted, the TA contemplates two different procedures for the grant of the license. Either the Regulator conducts an *auction* in which it defines the parameters of the license to be granted or it asks for *tenders* in which it is again for the prospective licensee to define the scope of the license to be obtained. Even though Sec. 11 Subs. 1 TA could be read to grant the Regulator complete discretion as to whether to opt for an auction or for a tender, Sec. 11 Subs. 5 TA indicates that a tender may only be chosen if the auction is “not suitable for the grant of the license” (e.g. a license has already been granted for the particular market by way of a tender).⁷²

An *auction* means that the license goes to the highest bidder. Before the Regulator may schedule an action, it has to determine the technical and other minimum requirements pertaining to the admittance of the prospective licensee(s). The requirements imposed will in most cases include the following:

- a minimum offer,
- the scope of the license (applicable technical standards, architecture, relevant geographic area) which has to comply with the frequency-exploitation-plan,
- a time schedule for the project,
- the extent of the territorial support (in particular, the percentage of territorial coverage to be reached within the time schedule) by the future licensee,

72. This has been the case for the cellular phone networks in Germany. Still, the broad discretion of the Regulator in this matter is problematic (cf. Scherer, *supra* note 9, at 2958).

- the minimum number of frequencies to be purchased at the auction (Sec. 11 Subs. 4 TA).

If the Regulator decides to impose additional requirements, these must be non-discriminatory, objective and transparent. In any event, in setting additional requirements, the Regulator shall “take into consideration the interests of small and medium-sized enterprises”. This last requirement has been implemented during the course of the legislation to appease lobbyists; its practical value may be questioned.

The purpose of the *tender* is to determine which prospective licensee is most capable of satisfying the need of the customers (users) for the telecommunications services for which the license will be granted (Sec. 11 Subs. 6 TA). Therefore, in the tender process the decision to whom the license is awarded is not based solely on the amount of the bid.

The legal conditions for the tender which the Regulator has to comply with are very similar to those which apply to the auction (definition of the technical requirements, the architecture of the system, the geographic area and the percentage of the population to be covered). However, as distinguished from the auction process, the applicants have the opportunity to define the scope of the license it seeks to obtain within the parameters given in the tender condition.

The Regulator awards the licenses on the basis of the following criteria:

- expertise of the applicant,
- efficiency and suitability of the proposed solutions to render the services and
- the promotion of a functioning competition in the relevant market.

In particular, the Regulator may consider the degree of the territorial coverage in the relevant geographic area (*Versorgungsgrad*) which may be reached with the telecommunications service offered by the applicant in the tender. In any event, all criteria for the selection of the successful candidate must be “objective, non-discriminatory, proportionate and transparent”.⁷³ In the improbable case that, after the Regulator has evaluated all offers several candidates are equally qualified, the award of the license will be decided by drawing lots.

73. Art. 2 Sec. 3 ONP-Directive, as amended by Commission Directive 96/19/EC of March 13, 1996 (OJ 1996, No. L 74/13). If the Regulator does not comply with these rules, any competitor of the licensee may challenge the procedure by a law suit: Scherer, *supra* note 9, at 2957.

Last but not least, it should be noted that the Regulator has the right to exclude a bidder if its successful bid would endanger the fair competition on the relevant telecommunications market (see Sec. 11 Subs. 3 TA). The idea behind this is to grant to new companies the opportunity of a fair market access.⁷⁴

H. *Licenses Predating the TA*

As a general rule all licenses which were granted before the TA entered into force will sustain under the new regulatory framework. Sec. 97 Subs. 5 rules that the “awards” (*Verleihungen*), i.e. privileges according to Sec. 2 Subs. 1 of the Telecommunications Installations Act which were issued before the TA came into force, remain in force,⁷⁵ but can be amended and revoked according to the rules of the TA (for instance if the licensee does not follow the conditions of the license).

One noteworthy exemption exists for the privileges which were or will be granted to the Deutsche Telekom AG until January 1, 1998 in the field of voice telephony or tariffs: Those privileges may only continue until December 31, 2002 “at the latest” (Sec. 97 Subs. 3 TA). After this deadline Deutsche Telekom AG will be treated as every other market participant.

V. DUTIES OF THE LICENSEE

After the Regulator will issue the license, any licensee is subject to two sets of obligations, the once imposed in the license itself and the once imposed by the TA for the provision of telecommunications in general.

A. *Duties Imposed in the License*

1. Licensing Fee

Again, with regard to licensing fees, it is necessary to distinguish between licenses which are available without restrictions and those which will be awarded after a tender or auction proceeding.

If the license is awarded without tender or auction, the licensee is to pay only an administrative fee for the work involved in the grant of the license and the other administrative costs associated therewith. These

74. Government Motives, *supra* note 6, p. 39 (comments on Sec. 11 Subs. 3).

75. With regard to license already issued, Secs. 6 to 11 which govern the grant of a telecommunications license do not apply. No new application for a license is necessary.

fees are not intended to generate an additional source of revenue for the government but are instead only intended to cover the costs of the Regulator. They are to be fixed by regulation of the Ministry of Post and Telecommunications (BMPT) as it is set forth by Sec. 16 TA. Insiders estimate that a nation-wide license will cost up to DM40 million.⁷⁶

In those instances in which the license is awarded in a competitive process, the licensee will be required to pay the fee offered in the tender or auction.

2. Miscellaneous Other Obligations Imposed in the License

The Regulator has the right to attach *Nebenbestimmungen* to the license. *Nebenbestimmungen* is a term defined by the administrative law.⁷⁷ It means that the Regulator may put the license under conditions (e.g. to cover a geographic area within a certain period of time) which the applicant has to fulfill under or in connection with the license. Such license conditions are only permitted if they serve to ensure the purposes aimed at by the TA, in particular to

- “safeguard the interests of the users”,
- “ensure fair and effective competition on the relevant market”,
- “safeguard an overall basic supply of telecommunications services,” and
- “maintain the interests of public security”

All *Nebenbestimmungen* have to be proportional with regard to the scope of the license to the issued.⁷⁸ One important license condition could be that the Regulator forbids a company which dominates a market sector to merge with another company doing business in this market (Sec. 33 TA). The license may also be granted for a certain period of time if only a limited number of frequencies are available (Sec. 8, Subs. 4 TA). The intention behind this rule is that this time limitation enables other competitors to offer their services on the relevant market.⁷⁹ Any restriction imposed by a *Nebenbestimmung* needs to be balanced against the freedom of trade and commerce (*Gewerbefreiheit*) which is guaranteed by the Articles 12 and 14 of the Basic Law and has to be revoked if it is no longer necessary to safeguard the aforementioned purposes.

76. Rheinische Post, *Telekom-Lizenzen teurer*, October 26, 1996.

77. Sec. 36 *Verwaltungsverfahrensgesetz* (Law on Administrative Procedures).

78. Government Motives, *supra* note 6, p. 38 (comments on Sec. 8 Sec. 2).

79. Government Motives, p. 38 (comments on Sec. 8 Sec. 4).

B. Obligations Imposed by the TA

In addition to specific requirements imposed in the license itself, the licensees will be required to comply with the obligations deriving from the TA itself, in particular including obligations relating to “universal services”, “interconnect” and “data protection”.

1. Obligation to Provide “Universal Services” (Universaldienstleistungen)

The most onerous obligation which the TA imposes is the requirement to provide a so called “universal service”. Fortunately for new competitors in the market, not every company offering telecommunications services will be required to provide a “universal service”. Instead, the requirement will be imposed on new companies in the market by the Regulator only if otherwise it is not sufficiently secured that the public has “universal services” available.

2. Definition

The notion of “universal service” is not a German invention. In the opening paragraph of the US-Communications Act of 1934 it was already stated that the Act was created “to make available, so far as possible, to all people of the United States rapid, efficient nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges”.⁸⁰ Nowadays, this notion has been shifted from the creation of a telephone service for everyone to ensure that everyone will receive a minimum amount of key telecommunications services in a more and more competitive environment.

Under Art. 87f of the Basic Law,⁸¹ the Federal Republic of Germany is required to assure the availability of “full territorial coverage of adequate and sufficient telecommunications services.” “Adequate” in this context refers to the quality and kind of those services, whereas “sufficient” means a sufficient quantity of the services.⁸² While the Basic Law does not expressly mention “universal services”, the law is regarded as requiring the Federal Government to ascertain universal services without being required to provide either the service nor the necessary infrastructure itself.⁸³

80. This notion can be traced back to the “Kingsbury Commitment” of AT&T in 1913—cf. Rowe, *supra* note 29, p. 46, 47.

81. Inserted 1994 by Constitutional Amendment, BGBl. I 1994, p. 2245.

82. BT-Drucksache. 12/7269, p. 5; BT-Drucksache. 12/8108, p. 6.

83. Jarass/Pieroth, *supra* note 59, Art. 87 f, note 3.

The Federal Government translated the requirements of the Basic Law in Sec. 17 Subs.1 of the TA. In the TA “universal services” are defined as “minimum offer of telecommunications services to the public for which a certain quality is fixed and which have to be accessible for all users irrespective of the location of their home or their residence.” The “minimum offer of telecommunications services” cover those services which are indispensable for the public as key services or, as the TA names it, as “basic supply” (*Grundversorgung*). The TA fails to specifically list the services covered but leaves the details to be dealt with in governmental regulations. This is to permit more flexibility in amending the services regarded as “universal services” in light of the moves of the market. The German lawmaker hopes that “a multitude of citizens will take new additional services for granted and hence indispensable”. Such services can then be determined as “universal services” without requiring a revision of the TA itself.⁸⁴

3. Implementation by the Federal Government

On the basis of the TA, the Federal Government in the meantime acted: On September 2, 1996 the cabinet adopted the Regulation on Universal Services (*Telekommunikations-Universalienleistungsvorordnung*).⁸⁵ According to its paragraph 1 such universal service comprises voice telephony on the basis of the ISDN standard, the provision of the necessary transmission lines, assistance of an operator with regard to numbers of the subscribers, and the publication of a directory which contains the data of the subscribers which have not objected to the entry of their data.

4. Provision of “Universal Services” by Deutsche Telekom AG

As currently Deutsche Telekom AG, the monopolist for voice telephony, is required to and does provide a “universal service”, for the time being other market participants will not be responsible to comply with the obligation to provide “universal services”. Furthermore, Deutsche Telekom AG is required to notify the Regulator one year in advance if it discontinues providing universal services. Only then the Regulator may impose the duty on other companies, and only those which have obtained a “market dominating position” in the relevant area. In this sense, being required to provide the “universal service” can almost be regarded as an “honor”, if not at least a marketing tool.

84. Government Motives, *supra* note 6, p. 41 (comments on Sec. 16).

85. Handelsblatt, Netzzugang zu fairen Bedingungen, September 3, 1996.

5. Costs of Providing "Universal Services"

If the company responsible for rendering the universal services produces sufficient evidence that the long-term costs for these services within the relevant geographic area exceed the gains, it is entitled to a compensation (Sec. 20 Subs. 1 TA). This compensation will be financed by a levy which will be imposed on every licensee who operates on the relevant product market and holds a share of at least 4% of the total turnover in such product market within Germany. The amount of the levy which such licensee has to pay via a fund (*Universaldienstfonds*) will be calculated on the basis of its turnover in proportion to the total turnover of the other licensee(s) which operate in the relevant market (Sec. 21 Subs. 1 TA). The Regulator will determine the levy at the end of each calendar year in which the compensation will be granted (Sec. 21 Subs. 2 TA). So far it is not clear whether Deutsche Telekom AG, initially responsible for the services will be in a position to obtain any compensation for its provision of universal services.

6. Obligation to Permit Interconnection

The most important rules for new entrants into the German telecommunications market may be those relating to the interconnection between networks. It would stop most new operators to come into the German market if such operator were unable to connect its customers with the network of the dominant market players at a reasonable cost. It should not cause astonishment that the issue of interconnection became (and still is) a bone of contention between the Deutsche Telekom AG which currently still controls the vast majority of telephone lines in Germany and the prospective private carriers.⁸⁶

The solution of the TA mirrors the political compromise achieved which aims to transfer European law on the national level.⁸⁷ The concept, even though far from being stringent, differentiates between those carriers dominating the market within the territory they cover ("Market Dominating Carrier") and all other carriers:

7. Obligations for the Market Dominating Carrier

A market dominating carrier⁸⁸ of a telecommunications network is required to grant access to the other user to such network or to any part

86. Handelsblatt, Private sehen Gefahr fuer den Wettbewerb, May 9, 1996; Twickel, *supra* note 22, at 229.

87. In particular, the ONP-Directive (*supra* note 15).

88. One should note that the rule also applies to all companies which form a group with the carrier (Sec. 35 Subs. 4 TA).

of it.⁸⁹ The market dominating carrier may do so by providing either a link for all users ("general network access") or "special links" ("special network access").

The market dominating carrier may refuse access only for the following reasons:

- security of network operations,
- maintenance of network integrity,
- interoperability of services, in justified cases or
- data protection, as appropriate.⁹⁰

The access shall be granted on the basis of an interconnection agreement which will, inter alia, govern the compensation to be paid. Such agreement has to be based on objective criteria and must be non-discriminatory and transparent. Moreover, it should guarantee an equal access to the networks of the Market Dominating Carrier.⁹¹ Again, the details for the interconnection are not provided for in the TA itself. Instead the TA authorizes governmental regulations to provide for the details of the interconnection and the TA requires that the interconnected changes are approved by the Regulator.

Together with the *Universaldienstverordnung* on September 2, 1996 the cabinet also adopted the Regulation on Network Access (*Netzzugangsverordnung*) which covers the issue of interconnection more specifically. This Regulation found the consent of the German Bundesrat on September 27, 1996. Close observers consider the *Netzzugangsverordnung* a can of worms: It states that the Market Dominating Carrier has to enable the use of the services rendered via its interface. The conditions for the use must be non-discriminatory and identical with those conditions which the Market Dominating Carrier "concedes to itself for the use of such a service". Unfortunately, the *Netzzugangsverordnung*, as it currently stands, does not contain more details on the tariffs the Market Dominating Carrier is allowed to charge.⁹²

Section 2 *Netzzugangsverordnung* is of particular interest in this context. It defines the access to be granted more closely and generally requires the Market Dominating Carrier to unbundle its networks ac-

89. Sec. 35 Subs. 1 TA.

90. Art. 3.2 ONP-Directive.

91. See Art. 3.1 ONP-Directive.

92. Annex II 3 on the ONP-Directive ("Harmonized tariff principles") provides some guidelines: "There may be different tariffs, in particular to take account of excess traffic during peak periods and lack of traffic during off-periods, provided that the tariff differentials are commercially justifiable and do not conflict with the above principles."

cess, i.e. it has to offer interfaces in such a way, that no services will be passed to the other carrier which such carrier does not demand (e.g. an access for voice telephony for a data service provider). This 'unbundling' also includes the direct access to those network links which connect the Market Dominating Carrier directly with its clients (i.e. without intermediate switches). However, and this is the other side of the coin, the market dominating carrier may refuse to unbundle if it can show that the unbundling is not justified in the individual case. This restriction has been criticized as a loophole for Deutsche Telekom AG to evade its obligation to provide interconnect to each carrier by arguing that it is too complicated or too expensive to provide an interface which is designed to comply with each of their specific needs. Consequently, those carriers might be required to pay for the music which they have not ordered and which they have not even listened to. This may hamper or even undermine the competition which the TA intends to spur.⁹³

From a practical point of view, the list which is attached to Sec. 5 Subs. 2 *Netzzugangsverordnung* may be the most relevant passage of this regulation: It contains those stipulations which have to be implemented into the interconnect agreement, in particular: location of the points of presence, technical norms, network management, safeguard of quality, payment.

In any event, considering the economical relevance of the *Netzzugangsverordnung* and the critic it has already drawn, much will depend on how strictly the Regulator will apply this regulation against Deutsche Telekom AG.

8. Interconnection Obligations of Other Carriers

While Market Dominating Carriers are required to grant access, with regard to interconnections other operators of public telecommunications networks are only under a duty to negotiate (Sec. 36 TA). It is not yet clear how the legal terms "interconnections" and "network access" relate to each other. By the mere sense of the word, "interconnections" are less than the full "network access" provided for by the *Netzzugangsverordnung*.

"Duty to negotiate" means the following: If one carrier demands interconnection from another carrier, it is upon such other carrier to make an offer. Both sides have to negotiate thereafter in good faith in order "to make possible and to improve the communication between the users of the different public telecommunications networks". Only in

93. Handelsblatt May 9, 1996 (*supra* note 86). Deutsche Telekom AG counters this argument stating that it is not a "supermarket" and with increased costs for such as special access 'made-to-order' of each individual carrier.

case that those carriers do not reach an interconnect agreement, the Regulator may interfere to secure an open access (Sec. 37 TA).

9. Data Protection, Emergency Calls

The TA and other regulations impose a number of requirements on the operator of a public telephony network relating to the issue of security in the widest sense.

Germany imposes rather stringent rules on the privacy of telecommunications and data protection. The basic rule is that whoever offers telecommunications installations has to protect its back-up system against illegal access and interferences from outsiders.

On the other hand, Government agencies which prosecute criminal acts may demand the transfer of personal data of a suspect from the operator if this is necessary to fulfill their tasks and may even, if authorized by a court ruling, eavesdrop into the conversations of a suspect.⁹⁴ Correspondingly, the operator is required to build the network in a manner which permits it to grant the access to the security forces. Sec. 90 Subs. 2 TA states that all companies which offer telecommunications services have to hold disposable their updated client files for on-line retrieval by the appropriate public agencies.

This rule has been severely criticized as a violation of data protection and as an open door for computer hackers.⁹⁵

The providers of the telecommunications services are allowed to publish the names, addresses, professions, area of business, and the kind of telecommunications connection of their customers in printed or electronic directories if the customer consents.

With regard to the security of the individual using telephone equipment, the operators are under an obligation to permit emergency calls free of charge and without requiring any access code.

C. Consequences of the Failure of the Licensee to Comply with its Obligations under the License or the TA

The basic remedies available for failing to comply with the obligations imposed by the TA are the revocation of the license, indemnification and, in limited circumstances criminal penalties (Sec. 96 TA).

94. Sec. 90 TA lists the authorities which may raise this request (e.g. the courts, the prosecutors, the customs police, the office responsible for the defense of the constitution and the German Intelligence Agency).

95. NJW—Wochenspiegel 1996, p. XXXI.

Section 15 TA states that the Regulator may revoke the license if (i) the licensee does not fulfill the conditions of the license, (ii) the licensee does not comply with the TA or violates criminal law, or (iii) the licensee does no longer have the ability to perform as required under Sec. 6, 8 TA. If the licensee assigns the license to a third person, the license may be revoked if this third person does not meet the personal criteria of Sec. 8 Subs. 3 No. 2 TA. The revocation of a license is subject to the regular procedural law for the revocation of governmental acts and may therefore be challenged in the administrative courts.

In addition, the violation of obligations by the licensee may give rise to damage claims of the customers either under the TA or under the general conditions which are applicable to the particular relationship between the user and the operator. Sec. 40 Subs. 1 TA provides the users with a claim against any provider of telecommunications services for the public in case that the provider infringes intentionally or negligently with the TA, any regulation issued thereunder, any telecommunications licenses or any directive by the Regulator, provided that the rule violated is aimed at protecting the customer. The TA does not provide for stipulated damages, but the claimant will be responsible to show specific damages. However, it is at least conceivable that stipulated damages clauses or even contractual penalty clauses will find their way into the general terms and conditions for telecommunications services. Sec. 41 TA empowers the Federal Government to issue ordinances which aim to protect the user (e.g. references to and inclusion of the general terms and conditions of business). So far, no ordinance which covers this sector has been issued.

Lastly, the licensee may become criminally liable for certain violations of the TA. Sec. 94 TA states that persons who possess, produce or operate a transmission facility and infringe with Sec. 65 TA (devices suitable for illegal eavesdropping) are subject to confinement of up to two years or a monetary penalty. The same rule applies to illegal eavesdropping (Sec. 95 TA). Needless to say, if the licensee uses the telecommunications lines for distributing illegal information or other illegal purposes, this may also give rise to criminal punishment.

Operating a telecommunications network or providing telecommunications services without the necessary license itself is not a criminal offense. However, it is still illegal and subject to a fine of up to 1 million German marks (Sec. 96 Subs. 1 No. 3, Subs. 2 TA).

VI. RIGHTS OF THE LICENSEE

A. *Interconnection*

As discussed above, not only are their obligations imposed upon the operators of telecommunications networks to permit interconnection, but correspondingly the operators are also entitled to interconnect with other operators as well.

B. *Rights of Way („Fernmeldeleitungsrecht“)*

Considering that Germany is a rather densely populated country, no operator would be in a position to build or maintain a telecommunications network unless such construction or maintenance is facilitated by special rights. Practically, telecommunications lines are for most parts built over or under public ways which in turn are in most cases either owned by one of the Federal States or a local community. As there was no issue that the public roads also in the future would be used for telecommunications lines, the issue became whether and if so how the Federal States and the local communities would be compensated for the use of their land. Considering the financial stakes involved it is hardly surprising that the issue of remuneration for the use of public lands became one of the biggest bone of contention in the legislative process.

The solution which was finally agreed upon in the mediation committee (*Vermittlungsausschuß*) of the two Chambers of the German Parliament is as follows: The Federal Republic (*Bund*) has the right to use all public ways (highways, water ways, etc.) free of charge provided that the use does not continuously infringe upon the purpose for which the way is dedicated (Sec. 50 Subs. 1 TA). According to Sec. 49 Subs. 2 TA, the *Bund* transfers this right to the licensees as part of any telecommunications license issued by the Regulator. Thereby, the licensees obtain the right to use the public ways for their lines.

Any operator using public ways for telecommunications lines must maintain its lines and must ensure that any temporary or continuous restriction on the public way is kept to a minimum. To the extent that the lines or their maintenance result in a temporary or permanent restriction of the public use, the operator is required to compensate the owner of the public way for such restriction (e.g. warning signs, detours). Similarly, to the extent that the operator does undertake any construction work, it is responsible for fully repairing the public way and the TA contains a number of provisions to preserve the rights of other users of the public ways such as utility companies. There even exists an entire

provision in the TA that the licensee has to preserve the surrounding trees when laying its telecommunications lines (Sec. 54 TA).

Finally, in addition to the use of public ways, the TA imposes the obligation upon private owners of land to permit the use of his/her land for telecommunications lines if

1. the right to use the land is already granted in an easement and does not additionally impose restrictions on the land owner or
2. the land is not impaired or only marginally impaired by such line.

The latter case is very vague and is almost certain to give rise to a number of law suits.

In case that the exercise of this right requires a disproportional expenditure of money or work, one licensee may claim from another licensee that it admits the joint use of facilities which are intended to receive telecommunications lines. However, this claim only exists if the joint use is reasonable from an economic point of view and does not require extensive construction work. In exchange, the licensee which has to tolerate the joint use will receive an adequate compensation from the beneficiary party (Sec. 51 TA).

The rules relating to the use of public and private ways for telecommunications lines are very advantageous for those companies which already operate extensive networks in Germany. While the construction of a totally new set of telecommunications lines will be prohibitively expensive, the rights granted to licensees under the TA do suffice to maintain, expand and improve existing telecommunications networks. While so far the use of such networks was rather limited, a number of utility companies (such as RWE, VEBA, VIAG) as well as the German railways (*Deutsche Bundesbahn*) did already in the past as part of the utility or railroad lines install their own telecommunications lines which now prove to be a very valuable and sought after asset.⁹⁶ One may assume that the biggest German utility companies will whoop their resources in order to compete with the Deutsche Telekom AG.⁹⁷

The German local communities still threaten to invoke the German Federal Constitutional Court (*Bundesverfassungsgericht*) in order to

96. This is why the announcement of a 49.8% participation of the German Mannesmann Group in DB Kom, the telecommunications subsidiary of Deutsche Bahn AG, on July 17, 1996 met a huge repercussion in the German media.

97. Most recently, RWE linked-up with the rival team VEBA/Cable & Wireless for this purpose, while VIAG is still standing aside. See for instance Financial Times, Big contenders regroup for telecoms battle, October 10, 1996.

challenge the provisions on the use of public ways.⁹⁸ This should not give rise to concern: The chances that the justices will render the TA null and void are not very high since Art. 87f Basic Law contains an authorization for the Federal Parliament to create the regulatory environment for the telecommunications sector—which includes rules on the use of public ways.

CONCLUSION

The TA needs to be evaluated in light of the economic circumstances in which it was adopted and in which it will be applied.

The telecommunications market will be of growing importance in the next years and for Germany's position in the global market the world is turning into having a competitive telecommunications industry is of significant importance. On the other hand, the telecommunications industry is so important and moving so fast that Germany can hardly take the risk of leaving the development of the industry solely to market forces. This holds particularly true in light of the fact that for the foreseeable future Deutsche Telekom AG is expected to remain the dominating force in the market with a market share of app. 90%. Deutsche Telekom AG may therefore have the power to steer the market in a direction which would not be in the best interest of the Federal Republic of Germany as a whole.⁹⁹

Considering this background, it is hardly surprising that the TA is not a daring piece of legislation which simply opened up the market and left it to determine the future development. The reliance on market forces might have been futile anyhow. For these reasons, the TA is to be looked at more as an attempt to set forth an outline of the regulatory framework in which the German telecommunications market will develop rather than setting forth the regulatory environment itself.

Critics of the law are skeptical and fear that rather than creating a competitive environment which would tackle Deutsche Telekom AG's preeminent position in the market, the TA will turn out to be a Trojan horse to protect Deutsche Telekom AG against fledging newcomers. In particular the TA was attacked for opening the market too late, thereby giving Deutsche Telekom AG too much time to prepare for the new competitive pressures which it will face. Representatives of the industry

98. Scherer, *supra* note 9, at 2961/2962. There are strong arguments that the described provisions of the TA are constitutional as listed by Schuetz, *Wegerechte fuer Telekommunikationsnetze*, NVwZ 1996, p.1053-1061.

99. E.g. Lindemann, *supra* note 3.

also worry whether the new Regulator will be aggressive enough to impose its rules on Deutsche Telekom AG.¹⁰⁰

Whether these critics will turn out to be right depends less on the TA itself but much more on the regulatory environment to be set by the governmental regulations provided for in the TA (such as the interconnect regulation) and the application of the TA and the governmental regulations to be issued thereunder by the Regulator.¹⁰¹ With regard to many critical issues the TA is simply too vague to stand in the way of a particular development but on the other hand fails to give enough guidance to steer the ship in a particular direction. In any event, if the deregulation fails to provide the results hoped for, it will most likely be the TA which will be looked at as the source for such failure. In this respect, any forecast of the success or failure of the TA is highly speculative.

The ado about the future of telecommunications in Germany has not fully abated even though the very ambitious goals of the TA—more competition and technical innovation on the one hand, consumer protection on the other hand—has up to now received a broad support in Germany. The TA has certainly not put the discussion to rest.

100. Lindemann, *supra* note 3.

101. This view is shared by Scherer, *supra* note 9, at 2962.