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Via e-mail

European Regulators Group

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**Public Call for Input on Regulatory Remedies
Our Ref.: 051-2002-026/11**

Dear Sirs,

on behalf of our client, 01051 Telecom GmbH, we hereby would like to give some input to the document that has been published with respect to remedies in connection with the new SMP-concept ("ERG working paper on the SMP-concept for the new regulatory framework"). We would like to address some issues that have come across the discussion we have had in the German market with respect to the implementation of the new regulatory framework, especially in discussions addressing the revision of the Telecom Act (TKG). Thereby, a number of our comments are based on issues which we consider critical when comparing the framework developed by the EU commission and the ERG in the current paper and the draft text of the revised German Telecom Act. These especially critical points are as follows:

1.

The new framework puts the emphasis on the reduction of sector specific regulation and a larger role of general competition law. It has been emphasised in various presentations and documents from the EU commission and its representatives, that the market shall be analysed strictly according to the concept and criteria of competition law. Some commentators argue that it is not clear whether European competition law or national competition law shall be used in this analysis. As is well know, national competition law might deviate from

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Date: 01.07.2003

the EU competition law. One outcome of these differences is that the draft new German Telecom Act uses the wording of “marktbeherrschende Stellung” coming from national competition law instead of “beträchtliche Marktmacht” (significant market power) coming from the new Directives. Therefore, we would welcome a clarification on this matter in the document serving as a guideline for analysis of the NRAs. This could be stressed stronger in Article (1) of the ERG working paper.

2.

One specific regulatory / competition problem that has occurred refers to regulatory decisions affecting several markets due to an interrelationship between those markets. The most recent example is the decision of the German NRA on contributions to an access deficit of DTAG – which we heavily doubt is really existing - to be paid as a supplement on interconnection tariffs for origination of local calls via carrier selection (decision BK 4a-03-009). Thereby, the authority refuses to accept the current EU regulatory framework (especially Art. 7 Sec. 4 of the Directive 97/33), but also creates a new regulatory problem as the market for access and the market for voice telephony are mixed, so that a potential position of significant market power would relate to both markets.

We believe that the problem of such matters affecting two or more markets which both have been identified as candidate markets for ex-ante-regulation need to be addressed in the approach that shall be followed by NRAs. We believe that this is an issue to be dealt with under Article (16) of the working paper as it is an outcome of vertical integration of the incumbent operator and thus we suggest to emphasize this point stronger there.

3.

Another major problem for the future competition and regulatory process refers to bundled products. Especially incumbent operators enjoying significant market power in the access market tend to develop and promote bundled products of access plus e.g. voice traffic or plus internet access more and more extensively. Also here we can see a significant market power potentially on two (or more) markets respectively a leveraging of significant market power from the access market to different other markets. Thus, we believe that also this specific issue needs to be addressed and that it should not be overlooked especially with regard to regulation of end user services / end user tariffs. Due to the fact that an operator might be able to create unique selling proposition in the end user market such situations should not be exempted from regulatory intervention and also, NRAs should be open to define and assess such new “bundled markets” if necessary in order to maintain competition. Again, this addresses the issue of vertical integration (Article 16) but also the topic of barriers to expansion (Article 18) as bundled products of the incumbent firm may limit the further market entry and growth of new competitors especially when they are dependent on wholesale products which are not offered in a non-discriminatory way.

4.

We strongly support the approach that the market analysis should be based on the calculation of market shares on the one hand side, but also should take account of all the other factors mentioned in the working document on the other hand side. However, with respect to market shares it needs to be considered that it is not only relevant which market share the largest operator(s) respectively service provider has, but it is also important to analyse how the rest of market shares is distributed among the competitors. The evaluation of the competitive situation of the market will be very different whether there are only one or just a few large competitors to the (incumbent) operator or whether there are very many small competitors.

Therefore, we suggest that also the relationship between the enterprise with the largest market share and all other suppliers of services in this market needs to be looked at in order to assess the independence of the largest enterprise in comparison to his competitors. One way to this might be to rely on concentration ratios like CR3, CR5 or the Hirschman-Herfindahl index in the analysis.

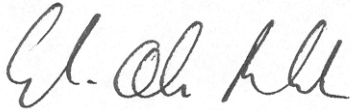
Regarding the assessment of market shares on the basis of sales, we would like to point to the fact that this might involve problems, e.g. when certain payments are “redeclared” for something else (e.g. revenue from monthly rental could be declared as revenue from usage or vice versa). Basing the assessment only on sales might generate problems in verification. Therefore, volume based assessments are at least a good additional way of assessment (Article 7).

5.

We would suggest to put more emphasis on potential abuses of significant market power in the end user market by executing price-cost-squeezes. The background for this is the ongoing rebalancing of many incumbent operators by increasing monthly rental fees and reducing fees for voice traffic. This makes it very difficult to compete against such operators when comparing the lowest retail tariffs of the incumbent operator to the interconnection (wholesale) fees (=costs of alternative operator) which are a necessary input for the competitor’s service. This price-cost-squeeze may arise for voice telephony services as well as for access especially to the unbundled local loop, as shown by the recent decision of the EU-commission to impose a fine of € 12.6 mio. on Deutsche Telekom. Therefore, we believe that the criterion of price-cost-squeeze needs more emphasis in the working paper and the concepts followed by the national regulatory authorities.

We hope to have the possibility to be included in the further discussion and would like to be informed about any hearing taking place on these issues.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Ernst-Olav Ruhle'. The signature is written in a cursive style with some loops and flourishes.

Dr. Ernst-Olav Ruhle
(Economist)