



January 13, 2006

Gloria Blue
Executive Secretary Trade Policy Staff Committee
ATTN: Section 1377 Comments
Office of the United States Trade Representative
600 17th Street, N.W. Washington, D.C. 20508

**RE: GERMANY: WTO General Agreement on Trade in Services
REPLY COMMENTS**

Dear Ms. Blue:

Pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 3106 ("Section 1377"), COMPTEL hereby responds to the request of the Office of the United States Trade Representative (USTR) for reply comments regarding Germany's compliance with U.S. telecommunications trade agreements.

COMPTEL is submitting a paper entitled "Perspectives in the Regulation of Europe's Communications Markets" that the German Federal Ministry of Economic Affairs (BMWi) recently filed in a European Commission consultation on the review of the new telecom regulatory framework. This paper validates the concerns raised in COMPTEL's initial comment filing on December 16, in which COMPTEL argues that Germany is moving away from regulating the ex-monopolist. Easing regulatory checks and balances even for a limited time would devastate competition in the broadband and other emerging sectors and violate, in particular, Section 2.2 of the Reference Paper. If rules are lifted, as the BMWi appears to suggest, it will devalue investments that competitors already made on infrastructure and new services and discourage new foreign investment, and it will undermine efforts to harmonize European and worldwide telecommunications markets.

COMPTEL urges USTR to work aggressively with the German government on these issues and the other issues raised in COMPTEL's comments. Please do not hesitate to contact me if I can be of any assistance in this matter.

Respectfully submitted,

/s/ Jason Oxman

Jason Oxman
Senior Vice President,
Legal & International Affairs

Encl. BMWi Strategy Paper – English translation

Perspectives in the Regulation of Europe's Communications Markets

To date, the process of privatization and liberalization in the telecommunications market initiated by the EU is a success story. Market openings and pro-competitive regulation have helped to strengthen Germany and Europe as a place for doing business and have taken considerable financial strain off consumers and companies alike when it comes to using electronic communications services. The available range of communication services has grown both in terms of quantity and quality – due in no small part to an accelerated pace of innovation induced by competition.

This success story should be continued. In particular, Germany's Ministry of Economic Affairs (BMWi) gives priority to the strengthening of competition in the ICT sector, which is certainly favored by the European legal framework for electronic communications networks and services.

The overriding goal is a highly efficient telecommunications market that ensures an optimum range of telecommunications services for companies and consumers, thereby making the best possible contribution to growth, innovation and employment in the overall economy.

This goal can only be achieved with the kind of competition that does equal justice to static and dynamic aspects of competition, i.e. by safeguarding price and cost efficiency on the one hand and providing sufficient incentive for innovations and investments on the other.

To continue strengthening our competitiveness in such a way, the BMWi deems it necessary to regularly review the underlying policies regarding their effectiveness in the pursuit of key goals. Experiences with the existing legal framework need to be evaluated and necessary consequences derived.

Basically, the work already done at the European level (KOM, ERG etc.) is commendable. It forms a sound basis for upcoming discussions about the future evolution of the legal framework. At the same time, it is necessary to expand the basis for discussion to include experiences that various member states have had implementing the European legal framework. Public communication of the topic would ease the process, and a broad political debate is urgently needed.

To facilitate this political process, the BMWi has drawn up the following proposals for further developing the European legal framework for electronic telecommunications networks and services. The proposals are the result of an intensive dialog with the academic/scientific community initiated by the BMWi. The paper is backed by (the opinions of) noted regulation experts. Furthermore, the BMWi will submit a study on optimized regulation in dynamic markets in early 2006, and will host an international strategy conference probably in spring 2006.

The BMWi takes the view that the regulatory principle of "constancy of economic policy" must be upheld, and that changes should only be made if they serve to advance the existing legal

framework. When revising the regulatory framework, it is important to ensure continual evolution, and especially to ensure that companies are given the necessary security for longer-term investments.

Therefore, the discussion paper concentrates on proposals that are likely to

- limit regulation to the necessary minimum
- minimize bureaucracy
- further increase the transparency of regulation
- regularly review the results of regulation
- systematically facilitate a smooth transition into antitrust law

Our activities seek to support the goals of the Lisbon Strategy, i.e. of turning the EU into the world's most competitive and dynamic knowledge-driven economic region by the year 2010.

1. Principles of Regulation

- Experiences gained in recent years have shown that market opening processes can and should be effectively supported by regulation. However, it should be noted that regulation cannot create an ideal world of antitrust results and that regulation will always remain a second-best option – second, that is, to the processes of competition.
- The BMWi fundamentally welcomes limiting the areas that can and may be regulated to a necessary minimum as outlined in the 3-Criteria Test¹ described by the EU Commission. However, in view of its importance, this test procedure should be included in the framework directive.
- For regulatory practice to be consistent, it is essential to make decisions based on an inherently coherent concept of competition. The concept of effective competition could represent an appropriate basis for this.
- However, the BMWi finds it problematic that in the EU Directives, effective competition is equated with the absence of market power (*Gleichstellungsthese*)² and that this could lead to the conclusion that the primary goal of regulation is the removal of extensive market power.
This creates a danger of inefficient and excessive regulation, as natural monopolies and bottleneck positions are virtually characteristic for the Telco market, and temporary monopoly positions represent a key element in dynamic processes of competition.³
- Therefore, a clear regulatory and antitrust concept is required, one that is based not simply on the notion of extensive market power, but also takes into account production technology concerns and leaves room for antitrust processes as identified by Schumpeter (“processes of creative destruction”). The latter is incompatible with the goal of eliminating any kind of market power.

¹ See Recital 9 in the Commission's Recommendation dated Feb 11, 2003

² See Recital 27 in the Framework Directive dated Mar 07, 2002

³ cf. Supreme Court Decision No. 02-682 dated Jan 13, 2004

- A feasible concept must be drawn up as to whether and how regulation should be applied in new markets, especially with a view to encouraging innovations and investments.
- In principle, the concept of technology-neutral regulation should be embraced to prevent distortion of competition – however, it must not serve to justify a quasi-automatic broadening of regulation.
- The goal embodied in the directives – of anchoring at least part of the regulation in general antitrust law – should be pursued systematically and in earnest. This, too, should be considered in the necessary revision of the regulatory and antitrust concept.

2. Instruments for Attaining Telco Policy Goals

- The principle contained in the directives, that any regulatory measures must be adapted to the underlying competitive constellation in each case, is to be commended. The greater the competitive intensity in a given market, the lower the intensity of regulation should be.
- Accordingly, one should differentiate between areas in which companies command a de facto unique position for a limited time – especially in cases where a natural monopoly is given – and areas where competitive structures have already emerged or can develop in the foreseeable future.
- Far-reaching regulatory interventions such as price sanctions and obligatory access should be limited to areas in which companies command de facto unique positions, as competitive developments would otherwise be impeded and this would run counter to the objectives of the package(of directives/guidelines).
- Dynamics and innovations should be facilitated by regulation that is adapted to the market conditions in a given case. In principle, incentive-based instruments (e.g. price cap, access holidays) should be given preference.
- In areas where sustained antitrust developments are discernible, sector-specific antitrust watchdogs, e.g. to prevent predatory tactics, should suffice. This would facilitate a later transition into general antitrust law as intended by the directives.
- To make regulation predictable for the overall market, the regulatory authorities must take care to be consistent in their application of regulatory instruments (in terms of both timing and content).
- To this end, the regulatory authorities should publish guidelines on all key questions and discuss them with market participants to ensure the transparency and predictability of regulation

3. Analyzing the Effectiveness of Regulation

- In view of the fact that it limits (market) freedom, governmental regulation should be an exception and should require explanation in the economic policy framework. Questions

of whether and how regulation should be practiced should thus be subjected to a regular review with a view to effectiveness.

- For this reason, mechanisms to monitor the effectiveness of regulation and the underlying legislation should be introduced both at the national and the European level (cost-benefit analyses, international benchmarks, etc.).
- The review should not be left to institutions that are indirectly or directly charged with the task (of regulation), but should be conducted by independent institutions.
- The review should extend to salient regulatory decisions, regulatory instruments, and the legislative framework.
- The details of the analysis should differ depending on the object of review and the level (national / European). The primary goal should be to point up functional chains and thereby make regulatory policies and their effects more transparent.
- A quantification of the costs and benefits of regulation is always commendable and should also be an aim of the reviews. However, this will not be possible in all cases.

4. Institutional Structuring of the Regulatory and Legal Framework

- Basically, the idea is to increase the transparency of decisions at the European level, avoiding bureaucratic procedures and any impermissible restriction of the member states' leeway (subsidiarity principle).
- Key requirements should be included in the Community (EC) Law instruments intended for that purpose (directives, regulations) and not determined at other levels (recommendations and guidelines).
- In selecting and fleshing out Common Law instruments, the principles of subsidiarity and absolute necessity should always be taken into account. Therefore, directives/guidelines should not be conceived or interpreted such that they become de facto "orders" or hard-and-fast regulations.
- To avoid bureaucratic structures and accommodate the fast pace of developments in the telecommunications markets, the procedure under Article 7 (Consolidation Procedure at the EU Level in Processes of Defining and Analyzing Markets) should be reviewed in its entirety.
- A clear separation/distribution of jurisdictions between the member states (governments) and their regulatory authorities must be ensured in comitology procedures in the Telco sector. This also means that important decisions are discussed in an open-minded way by the appropriate comitology committee, and not prejudiced by preliminary decisions made by the ERG. The members of the comitology committee are always the member states and not the regulation authorities.

- Given the dynamic nature of – and forecasting error zones in – the communications markets, and in view of the dissimilarity between the telecommunications markets in the various EU member states, there is much to recommend allowing “competitive discovery procedures” in the institutional sector, i.e. at the regulatory level itself.
- Competition between various regulation models, coupled with appropriate benchmarking, would offer the advantage that successful models would be discovered sooner, while less effective approaches would remain limited in their negative effects and could be eliminated sooner in the interest of the member states affected.
- The proposed competition between regulatory models does not call into question the harmonization already achieved to date –and largely necessary – at the European level, but does argue against any further centralization.