

# Official Journal

## of the European Union

ISSN 1725-2555

L 263

Volume 46

14 October 2003

English edition

## Legislation

Contents

I Acts whose publication is obligatory

.....

II Acts whose publication is not obligatory

### Commission

2003/706/EC:

- ★ **Commission Decision of 23 April 2003 on the aid scheme implemented by Germany entitled ‘Guarantee schemes of the Land of Brandenburg for 1991 and 1994’ — State aid C 45/98 (ex NN 45/97) <sup>(1)</sup> (notified under document number C(2003) 1217)** ..... 1

2003/707/EC:

- ★ **Commission Decision of 21 May 2003 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-1/37.451, 37.578, 37.579 — Deutsche Telekom AG) <sup>(1)</sup> (notified under document number C(2003) 1536)** ..... 9

2

<sup>(1)</sup> Text with EEA relevance.

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other Acts are printed in bold type and preceded by an asterisk.

## II

(Acts whose publication is not obligatory)

## COMMISSION

## COMMISSION DECISION

of 23 April 2003

on the aid scheme implemented by Germany entitled 'Guarantee schemes of the Land of Brandenburg for 1991 and 1994' State aid C 45/98 (ex NN 45/97)

(notified under document number C(2003) 1217)

(Only the German version is authentic)

(Text with EEA relevance)

(2003/706/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above,

Whereas:

1. PROCEDURE

- (1) During the period 1991-1994 the Land of Brandenburg operated a guarantee scheme for industry, the professions and agriculture/forestry dating from 5 September 1991 (Bürgschaftsrichtlinie des Landes Brandenburg für die Wirtschaft und die freien Berufe sowie die Land- und Forstwirtschaft vom 5. September 1991), hereinafter called the 1991 guarantee scheme. The scheme was never notified to the Commission pursuant to Article 88(3) of the EC Treaty.
- (2) The 1991 scheme was superseded on 17 May 1994 by an amended guarantee scheme (hereinafter called the 1994 guarantee scheme), which was not notified in time to the Commission either. The 1994 guarantee scheme applied in its original version until 20 March 1995. On that date the scheme, which had been notified belatedly, was suspended. The Commission approved a significantly modified version for application after 20 March 1995 (SG(96) D/7438) <sup>(1)</sup>.

- (3) By letter dated 14 July 1998 (SG(98) D/5743), the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of both the 1991 guarantee scheme and the 1994 guarantee scheme in the version applicable until 20 March 1995.
- (4) The application of both schemes to the production, processing and marketing of the agricultural products referred to in Annex I to the EC Treaty did not, however, form the subject-matter of the formal investigation procedure.
- (5) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* <sup>(2)</sup>. The Commission invited interested parties to submit their comments on the measure, but did not receive any such comments.
- (6) Germany submitted comments by letters dated 11 September 1998, 2 October 1998 and 25 May 1999 and at meetings on 11 and 12 May 1999.
- (7) On 28 January 2003 a meeting took place between the Commission and Germany in Berlin. In the course of that meeting the Commission requested additional information on the current situation with regard to the enterprises that had benefited under the 1991 and 1994 guarantee schemes.
- (8) Germany submitted final comments by letter dated 20 March 2003.

<sup>(1)</sup> OJ C 291, 4.10.1996.

<sup>(2)</sup> OJ C 369, 28.11.1998, p. 4.

## 2. DESCRIPTION OF THE 1991 GUARANTEE SCHEME

### 2.1. Aid recipients

- (9) The *Land* of Brandenburg provided guarantees to credit institutions granting loans to enterprises (both SMEs and large enterprises), to professional people and to managers willing to hold shares in an enterprise.

### 2.2. Assisted projects

- (10) Under the 1991 scheme, the following projects were eligible:

- initial investments (Neuinvestitionen),
- acquisition of operating funds (Beschaffung von Betriebsmitteln),
- *ex post* financing of investments (Nachfinanzierung von Investitionen),
- consolidation (Konsolidierung),
- reorganisation (Sanierung).

### 2.3. Conditions governing the provision of guarantees

- (11) The conditions for the provision of guarantees to cover loans include the requirements that the risk of default, under normal economic circumstances, be proportionate to the objective pursued, that the guarantee be an essential precondition for an enterprise obtaining a bank loan for a project in the absence of alternative forms of security, and that the borrower offer all additional forms of collateral as may reasonably be demanded.
- (12) The borrower must pay a one-time fee for the giving of the guarantee of 0,5 % of the guaranteed amount, and an annual administrative charge of 0,5 % of the amount outstanding.
- (13) The guarantee amount is fixed in each case by the Minister for Finance of the *Land* of Brandenburg. It is limited as a rule to a reasonable proportion of the loan or of the deficiency.
- (14) Guarantees securing loans for the purpose of reorganising a firm are granted solely on the basis of a restructuring plan aimed at restoring the firm's long-term viability.

## 3. THE 1994 GUARANTEE SCHEME

- (15) In its main characteristics, the 1994 scheme is largely identical to the 1991 scheme. Differences exist in so far as, compared with the 1991 scheme, it contains new provisions limiting the guarantee amount to 80 %, or in some cases to 90 %, of the loan.

## 4. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (16) As regards the application of the schemes to initial investment projects, the Commission raised serious doubts as to the compatibility of the schemes with the common market for the following reasons:

- (a) when it came to deciding whether such projects were covered, the schemes did not refer either to the Community definition of initial investment set out in point 5 of the Annex to the Commission's 1979 communication on regional aid systems <sup>(3)</sup> (the 1979 communication) or to eligible costs. Thus the schemes were not transparent within the meaning of the 1979 communication and the possibility could not be ruled out that they covered aid unrelated to initial investment projects within the meaning of the above definition (e.g. aid towards capital expenditure on replacements) which must be treated as operating aid;
- (b) if the assistance was to be considered regional aid, the schemes failed to provide a ceiling in cases of combination with other forms of aid; it was therefore impossible to verify the combination ceilings applicable to aid in the Brandenburg region;
- (c) the guarantees provided under the schemes could cover either the entire loan (the 1991 guarantee scheme) or up to 90 % of the loan (the 1994 guarantee scheme). According to the Commission's settled practice, in order to make sure that a project is economically viable, the recipient's contribution without State aid must form a sufficient part, normally accounting for at least 20 % of the loan;
- (d) the scope of the schemes does not preclude their application to sensitive industries for which there are specific rules on State aid.

- (17) With regard to the application of the schemes to projects to acquire operating funds, the Commission expressed serious doubts as the provision of guarantees for projects to acquire operating funds must be considered operating aid. However, the schemes are neither limited in time nor do they embody a sliding scale, which is contrary to the Commission's settled practice <sup>(4)</sup> on operating aid which can be provided on certain conditions in assisted regions under Article 92(3)(a) suffering from serious structural handicaps.

<sup>(3)</sup> OJ C 31, 3.2.1979, p. 9.

<sup>(4)</sup> See point 6 of the Commission communication on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ C 212, 12.8.1988, p. 2).

(18) As regards the application of the schemes to the *ex post* financing of investments, the schemes do not specify the cases in which guarantees can be provided for such financing. According to the Commission's settled practice, however, the granting of aid for investments that have already been effected when the application is made cannot be considered compatible with the common market if such aid is not necessary for the implementation of the investment project. Such assistance constitutes operating aid, which can be considered compatible with the common market only if the abovementioned criteria are met (see projects for the acquisition of operating funds).

(19) As to the application of the schemes to projects to restructure firms in difficulty, the aid is subject to compliance with the following specific conditions <sup>(5)</sup>:

(a) if there is overcapacity in the industry, a plan for reducing capacity in proportion to the amount of aid granted must be presented in the cases of both large firms and SMEs holding a dominant position on the relevant market;

(b) the recipient must bear an appropriate part of the restructuring costs;

(c) compliance with the principle that restructuring aid may only be granted once unless the new need for restructuring funding was neither foreseeable by the enterprise nor a result of its negligence;

(d) the aid is restricted to that necessary for the implementation of the restructuring plan;

(e) the presentation of a restructuring plan showing that the enterprise is economically viable and can make a real contribution to the development of the region without continually requiring aid;

(f) the exclusion from the schemes of sensitive industries subject to specific rules on State aid and the requirement of individual notification where guarantees are provided for large firms.

##### 5. COMMENTS FROM GERMANY

(20) Within the period covered by the present proceeding, the *Land* of Brandenburg awarded a total of 68 guarantees, six of which were granted for the production, processing and marketing of agricultural products listed

in Annex I to the EC Treaty. These six guarantees are not covered by this proceeding. Firms active in other sensitive sectors were not granted any aid.

(21) According to Germany, all cases of application involve guarantees securing loans for investment projects pursuant to the Community definition of initial investment laid down at point 5 of the 1979 communication. This would imply that the regional aid rules apply.

(22) As to the application of the schemes to projects involving operating aid, it is Germany's view that guarantees were only provided for compatible operating aid, in so far as all guarantees granted for operating funds were limited in time and embodied a sliding scale of 20 % per year.

(23) A detailed examination was also made of those cases of application in which the aid element of a guarantee was covered by the *de minimis* rule. In cases of guarantees awarded to sound enterprises, Germany takes the view that the provisions of the *de minimis* rule were met at the granting stage. Moreover, Germany holds, on the basis of an alleged aid value of a guarantee of 0,5 %, that the granting under the 1991 and 1994 schemes remained within the *de minimis* ceiling.

(24) Germany recognises that guarantees were provided for projects to restructure enterprises in three cases altogether, but points out that of these enterprises none is currently still active on the market.

(25) Germany admits furthermore that guarantees covering up to 90 % of the loan were provided, which, in Germany's view, was in compliance with the 23rd Framework Plan of the joint Federal Government/*Länder* programme for improving regional economic structures <sup>(6)</sup>.

(26) As to the legal aspects, Germany takes the view that the 1991 scheme, operating from 5 September 1991 until 16 May 1994, falls outside the scope of the 1994 Community guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(7)</sup>, which entered into force on 23 December 1994. Furthermore, the scheme is comparable to several schemes approved by the Commission between 1988 and 1992. Germany recalls that the Commission changed its policy on state guarantees only in mid-1994 by a series of appropriate measures. For these reasons, Germany concludes that the 1991 scheme has to be appraised on the same legal basis as the then existing schemes in several German *Länder*.

<sup>(5)</sup> See, for example, the Commission's Eighth Report on Competition Policy, points 227-229, Brussels, Luxembourg, 1979.

<sup>(6)</sup> In force from 1 January 1994 until 17 March 1995.

<sup>(7)</sup> OJ C 368, 23.12.1994, p. 12.

## 6. LEGAL ASSESSMENT

### 6.1. Existence of State aid

(27) By a letter dated 5 April 1989 concerning State guarantees <sup>(8)</sup>, as supplemented by a letter dated 12 October 1989 <sup>(9)</sup>, the Commission informed Member States that it considered that all State guarantees fell under Article 87(1) (then Article 92(1)) of the EC Treaty and accordingly had to be notified pursuant to Article 88(3) (then Article 93(3)) of the EC Treaty. Thus, at the latest as from 5 April 1989, Member States could no longer entertain any doubts that all State aid in the form of guarantees had to be notified.

(28) In order to provide Member States with a fuller explanation of the principles on which it relied when interpreting Articles 87 and 88 and when applying those articles to State guarantees, the Commission published its notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees <sup>(10)</sup> (hereinafter called the 2000 notice). The Commission thus further clarified its approach in this area in order to make its policy as transparent as possible, thereby ensuring that its decisions are predictable and that equal treatment is guaranteed. In particular, the Commission considered therein that only the fulfilment of the following conditions ensures that a state guarantee scheme does not constitute State aid under Article 87(1):

- (a) the scheme does not allow guarantees to be given to borrowers who are in financial difficulty;
- (b) the borrowers would in principle be able to obtain a loan on market conditions from the financial markets without any intervention by the State;
- (c) the guarantees are linked to a specific financial transaction, are for a fixed maximum amount, do not cover more than 80 % of each outstanding loan or other financial obligation and are not open-ended;
- (d) the terms of the scheme are based on a realistic assessment of the risk so that the premiums paid by the recipient enterprises make it, in all probability, self-financing;
- (e) the scheme provides for the terms on which future guarantees are given and the overall financing of the scheme to be reviewed at least once a year;
- (f) the premiums cover both the normal risks associated with providing the guarantee and the administrative

costs of the scheme, including, where the State provides the initial capital for the start-up of the scheme, a normal return on that capital.

Taking into account that the 1991 and 1994 schemes neither excluded borrowers facing liquidity difficulties who would, without the state guarantee, not obtain a loan on market conditions, nor required any risk assessment or a bank coverage of at least 20 % of the outstanding loan, it is considered that these conditions are not met by the Brandenburg schemes.

(29) In the 2000 notice the Commission indicates that the cash equivalent of a loan guarantee in a given year can be:

- (a) calculated in the same way as the grant equivalent of a soft loan, the interest subsidy representing the difference between the market rate and the rate obtained thanks to the state guarantee after any premiums paid have been deducted; or
- (b) taken to be the difference between the outstanding sum guaranteed, multiplied by the risk factor (the probability of default) and any premium paid, i.e. (guaranteed sum x risk) — premium; or
- (c) calculated by any other objectively justifiable and generally accepted method.

(30) The 2000 notice stipulates that the standard form of calculation for guarantee schemes should, in principle, be the second method.

(31) In this connection the Commission has examined whether the guarantee schemes constitute *de minimis* schemes, i.e. measures under which aid may not be granted which exceeds the *de minimis* limits of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid <sup>(11)</sup> and hence which does not fulfil all the requirements of Article 87(1) of the EC Treaty.

(32) Since Regulation (EC) No 69/2001 entered into force only on 2 February 2001, whereas the guarantee schemes applied from 5 September 1991 to 16 May 1994 and from 17 May 1994 to 20 March 1995, the question arises whether *de minimis* aid granted before Regulation (EC) No 69/2001 entered into force is governed by that Regulation or by the *de minimis* provisions of the Community's 1992 SME guidelines <sup>(12)</sup> and the Commission's 1996 *de minimis* notice <sup>(13)</sup>.

<sup>(8)</sup> SG(89) D/4328 of 5 April 1989.

<sup>(9)</sup> SG(89) D/12772 of 12 October 1989.

<sup>(10)</sup> OJ C 71, 11.3.2000, p. 14.

<sup>(11)</sup> OJ L 10, 13.1.2001, p. 30.

<sup>(12)</sup> OJ C 213, 19.8.1992, p. 2.

<sup>(13)</sup> OJ C 68, 6.3.1996, p. 9.

- (33) Regulation (EC) No 69/2001 is silent on this point. However, its wording does not rule out its application to previous cases, which in any event are subject to the control mechanism laid down in Article 3 of the Regulation. The Commission has reached the conclusion that, in the absence of any express provision to the contrary in Regulation (EC) No 69/2001, the Regulation should apply to *de minimis* aid granted before it entered into force. For one thing, the Regulation, in so far as it exempts a particular category of measure from the notification requirement, is a procedural regulation and should thus apply immediately to all pending proceedings. For another, the immediate application of the Regulation is in line with the underlying objectives of procedural simplification and decentralisation. Only in respect of aid not caught by the Regulation and thus not eligible for exemption on this basis will the Commission take account of the provisions that were in force when the aid was granted. Since the Regulation is, in principle, more generous than its *de minimis* predecessors and since the latter apply in any event to cases where the aid concerned is not exempt under the Regulation, due regard is paid to the general legal principles of legitimate expectation and legal certainty. From an economic standpoint, the Commission takes the view that measures which cannot be classed as aid within the meaning of Article 87(1) of the EC Treaty under Regulation (EC) No 69/2001, in force today in an integrated market, *a fortiori* cannot in the past have given rise to any aid in a less integrated market. It will therefore base its further assessment of the 1991 and 1994 guarantee schemes on Regulation (EC) No 69/2001, which does not rule out the possibility of the provisions in force at the time the measures were implemented being applied, provided that the measures concerned are not exempt under Regulation (EC) No 69/2001.
- (34) The proceedings initiated thus cover both the guarantee schemes and the cases of application which do not fall within the scope of Regulation (EC) No 69/2001 or the other relevant *de minimis* provisions and the cases which do fall within the scope of the Regulation or of the other relevant *de minimis* provisions but in which the *de minimis* ceiling is exceeded.
- (35) The Commission takes the view that the aid element in the guarantee depends on the risk factor, which in turn depends on all the circumstances of the guarantee and of the loan. It is not possible to conclude that the administrative charge of 0,5 % and the one-off payment of 0,5 % of the amount covered by the guarantee provided for under the Brandenburg schemes would in all cases correspond to the market premium for the guarantee. Germany has failed to prove that these charges were sufficient to compensate for the substantial default risk resulting from the guarantees. In fact, Germany admits that a substantial part of the firms that benefited from the guarantees have gone bankrupt in the meantime.
- (36) The Commission does not share Germany's view that the aid element contained in the guarantees can be set in principle at 0,5 %. Germany has provided no evidence that this percentage results from one of the methods for calculating the aid element in a guarantee scheme. In the Commission's view, the aid amount may even be as high as the amount actually secured by the guarantee if, at the time of the loan decision, there is clearly a strong probability of the borrower being unable to repay his debt.
- (37) The Commission accordingly concludes that the aid element in the guarantees under the two Brandenburg schemes may have exceeded the scope of Regulation (EC) No 69/2001 and hence that it may be possible that guarantees were provided which conferred an advantage on an enterprise compared with other enterprises and thereby distorted or at least threatened to distort competition.

## 6.2. Lawfulness of the aid

- (38) The Commission notes that in 1991, when the 1991 guarantee scheme entered into force, there was no provision on *de minimis* aid. The 1991 scheme was thus not exempted from the notification requirement under Article 88(3) of the EC Treaty. The Commission regrets that, in granting the aid, Germany acted in breach of Article 88(3) of the EC Treaty.

## 6.3. Compatibility of the aid with the common market in so far as the scope of Regulation (EC) No 69/2001 or of the other relevant *de minimis* provisions was exceeded

### 6.3.1. Compatibility with regional aid rules

- (39) The gist of the regional aid rules was laid down in the 1979 communication. These rules were refined by specific rules on the criteria for eligibility as assisted area, and concerning operating aid, contained in the 1988 communication. In 1998, the Commission proceeded to consolidate all the criteria applied to date

in the guidelines on national regional aid <sup>(14)</sup> (hereinafter called the 'regional aid guidelines'). According to their point 6, these guidelines are applied to aid notified or granted after their entry into force. Aid notified or granted before this date has to be examined on the basis of the earlier rules <sup>(15)</sup>. In view of the operational periods of the two guarantee schemes, the 1979 communication, as amended by the 1988 communication, applies. An assessment based on the 1998 regional aid guidelines would not in principle lead to a more favourable conclusion. For SME aid, which does not constitute operating aid, the Commission applies first and foremost Regulation (EC) No 70/2001, as amended.

(44) As regards investment aid, the Commission wrote to Germany in 1991 <sup>(17)</sup> confirming the extension of the regional maximum intensities applicable under the outline plan of common interest to the new German *Länder*. On this basis, initial investment could be assisted to the tune of 23 % gross, extension projects to the tune of 20 % gross, and rationalisation and reorganisation to the tune of 15 %. These ceilings could be raised to 35 % gross when the aid was combined with other public funding. In 1994, the Commission confirmed this assessment, authorising aid intensities up to 35 % gross for large enterprises and up to 50 % gross for SMEs <sup>(18)</sup>.

(40) Articles 87(3)(a) and (c) of the EC Treaty provide two distinct possibilities where the Commission may consider regional aid compatible with the common market. The schemes under examination apply in Brandenburg, an assisted region that was eligible for regional aid during the period in question pursuant to Article 87(3)(a) of the EC Treaty <sup>(16)</sup>.

(45) For the period in question, and notwithstanding specific rules applicable to investment aid to firms active in sensitive sectors, aid schemes for initial investment in the assisted region of Brandenburg are considered compatible with the common market, provided the scheme, in case of combination with any other regional aid, does not allow the above aid ceilings to be exceeded. This holds also for initial investment aid to firms in difficulty. In fact, it was established Commission policy until 1999 to allow for the provision of regional initial investment aid under regional investment schemes without excluding firms in difficulty, or requiring individual notification to the Commission <sup>(19)</sup>.

(41) The Commission distinguishes in the field of regional aid between aid to initial investment and operating aid.

(42) The scope of the guarantee schemes included both initial investment and replacement investment aid. Aid for replacement investment is excluded from the concept of initial investment of the 1979 communication and has to be considered operating aid. The scope of the schemes further covered operating funds as well as *ex post* financing of investment. As to the latter, according to the Commission's settled practice, the granting of aid for investments that have already been carried out when the application is made is also deemed to be operating aid. The same holds for aid for operating funds.

#### 6.3.1.2. Operating aid

(46) To the extent that guarantees were provided in favour of viable firms for purposes other than to finance initial investment, they can be considered to constitute operating aid. Given the severe disadvantages of less-favoured regions, operating aid may fall under the derogation in Article 87(3)(a) of the EC Treaty in so far as such aid is justified as contributing to the development of the region concerned. In addition, the whole economy of the *Land* of Brandenburg, an assisted region under Article 87(3)(a), had to face significant problems due to the weakness of the capital market at the time the schemes were being implemented. The granting of operating aid, therefore, is considered to have favoured development and to have alleviated the existing handicaps during the period 1991-1994. The Commission

#### 6.3.1.1. Initial investment aid

(43) The 1979 communication defined aid for initial investment as aid linked to investment in fixed assets in the creation of a new establishment, the extension of an existing establishment or in engaging in an activity involving fundamental change in the product or production process (by means of rationalisation, restructuring or modernisation).

<sup>(17)</sup> N 153/91 — SG(91) D/6968 of 11 April 1991.

<sup>(18)</sup> SG(94) D/1551 dated 4 February 1994, N 464/93/part new *Länder* — in relation to N 531/1995, OJ C 291, 4.10.1996, p. 4.

<sup>(19)</sup> The Commission changed its policy in this field in 1999 by adopting the 1999 guidelines and associated appropriate measures pursuant to Article 88(1) of the EC Treaty that require individual notification of initial investment aid to large firms in difficulty.

<sup>(14)</sup> OJ C 74, 10.3.1998, p. 9.

<sup>(15)</sup> OJ C 119, 22.5.2002, p. 22.

<sup>(16)</sup> See for the period 1991-94, N 153/91, and for the period 1994-96, N 464/93.

notes further that Germany has confirmed that no enterprise active in a sensitive sector (steel, shipbuilding, synthetic fibres, textiles) forms the subject-matter of this proceeding. The Commission accordingly finds that, in so far as they provided for operating aid for viable firms, the guarantee schemes are compatible with the common market.

#### 6.3.2. Compatibility with restructuring aid rules

- (47) Aid granted in favour of firms in difficulty, which cannot be regarded as regional aid for initial investment is to be considered restructuring aid. The Commission will not, however, carry out an examination of the compatibility of the guarantees with the restructuring aid rules as the three firms in difficulty which received aid on the basis of the two guarantee schemes are no longer active on the market; an examination of the aid has thus become devoid of purpose.

#### 6.3.3. Compatibility on the basis of other derogations

- (48) Article 87(2) of the EC Treaty, and in particular Article 87(2)(c), does not apply to both schemes. The schemes address general regional economic weaknesses of enterprises in the *Land* of Brandenburg and do not particularly address specific disadvantages caused by the division of Germany. Nor does Germany take the view that the derogation laid down in this article applies. In addition, the Commission considers that the State aid in question is not destined to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State within the meaning of Article 87(3)(b) of the EC Treaty, or to promote culture and heritage conservation within the meaning of Article 87(3)(d).

### 7. CONCLUSIONS

- (49) The 1991 and 1994 guarantee schemes were not notified and therefore constitute unlawful aid within the meaning of Article 88(3) of the EC Treaty. Aid which was granted outside the scope of Regulation (EC) No 69/2001 was granted unlawfully.
- (50) Germany has confirmed that firms active in sensitive sectors do not form the subject-matter of this proceeding.
- (51) Aid for initial investment granted on the basis of the schemes is compatible with the common market in so

far as, when combined with other public funding, it does not exceed the relevant regional aid ceilings.

- (52) Operating aid granted on the basis of the schemes to viable firms is compatible with the common market.
- (53) It is the Commission's long-established practice, in accordance with Article 87 of the EC Treaty, to require recovery from the aid recipient of State aid within the meaning of Article 87(1) of the EC Treaty, which has been unlawfully granted and is incompatible with the common market. This practice is confirmed by Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty<sup>(20)</sup>. Pursuant to that article, the Member State concerned must take all necessary measures to recover the aid from the recipient. In order to determine in which cases recovery has to be effected, Germany should be required to draw up a list of aid measures which neither satisfy the conditions of Regulation (EC) No 69/2001 nor comply with the *de minimis* provisions in force when a given measure was implemented,

HAS ADOPTED THIS DECISION:

#### Article 1

1. Subject to paragraphs 2 and 3, the guarantee scheme of the *Land* of Brandenburg for industry, the professions and agriculture/forestry for the period from 5 September 1991 to 16 May 1994 (hereinafter called the 1991 guarantee scheme) and the guarantee scheme of the *Land* of Brandenburg for the period from 17 May 1994 to 20 March 1995 (hereinafter called the 1994 guarantee scheme) constitute State aid within the meaning of Article 87(1) of the EC Treaty.

2. The guarantee schemes do not constitute State aid within the meaning of Article 87(1) of the EC Treaty in so far as the advantages they conferred satisfy the requirements of Regulation (EC) No 69/2001 or of the *de minimis* provisions in force at the time a particular measure was implemented and, in combination with other *de minimis* aid, do not exceed the *de minimis* ceilings of Regulation (EC) No 69/2001 or of the applicable *de minimis* provisions.

3. The guarantee schemes do not constitute State aid within the meaning of Article 87(1) of the EC Treaty in so far as they benefited enterprises involved in producing goods or providing services, which are not the subject of trade between Member States.

4. To the extent that they fall within the scope of Article 87(1) of the EC Treaty, the guarantee schemes constitute unlawful aid.

<sup>(20)</sup> OJ L 83, 27.3.1999, p. 1.

*Article 2*

Aid within the meaning of Article 87(1) of the EC Treaty for enterprises' initial investment projects is compatible with the common market provided Germany has limited the combined aid amount for such projects to 35 % gross for large enterprises and 50 % gross for SMEs. Any aid exceeding the ceiling set is incompatible with the common market.

*Article 3*

Operating aid within the meaning of Article 87(1) of the EC Treaty in favour of viable enterprises is compatible with the common market.

*Article 4*

This Decision does not apply to those cases covered by the guarantee schemes that have already been the subject of another formal investigation procedure or of a formal Commission decision.

For the purposes of implementing this Decision, Germany shall draw up a list of the enterprises concerned.

*Article 5*

Germany shall take all necessary measures to recover from the recipients the aid referred to in Article 2 and unlawfully made available to them.

Recovery shall be effected in accordance with the procedures of national law. The aid to be recovered shall include interest from the date on which it was at the disposal of the recipients until the date of its recovery. Interest shall be calculated on the

basis of the reference rate used for calculating the grant equivalent of regional aid.

*Article 6*

Germany shall, in implementing this Decision, draw up a list of the firms concerned in cases which fall outside the scope of Regulation (EC) No 69/2001 or which, if the aid element contained in the guarantee and other *de minimis* aid granted during the relevant period are included, exceed the ceiling laid down in that Regulation.

In this connection, Germany shall devise a method of identifying the aid element in the guarantee based on the Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees.

*Article 7*

Germany shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

*Article 8*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, on 23 April 2003.

*For the Commission*

Mario MONTI

*Member of the Commission*

**COMMISSION DECISION**  
**of 21 May 2003**  
**relating to a proceeding under Article 82 of the EC Treaty**  
**(Case COMP/C-1/37.451, 37.578, 37.579 — Deutsche Telekom AG)**  
(notified under document number C(2003) 1536)  
(Only the German text is authentic)  
(Text with EEA relevance)  
(2003/707/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, the first Regulation implementing Articles 85 and 86 of the Treaty <sup>(1)</sup>, as last amended by Regulation (EC) No 1216/1999 <sup>(2)</sup>, and in particular Articles 3 and 15(2) thereof,

Having regard to the complaints lodged on 18 March 1999, 19 July 1999 and 20 July 1999 by Mannesmann Arcor AG & Co. and 14 German regional fixed-network operators, alleging infringement of Article 82 of the EC Treaty by Deutsche Telekom AG and asking the Commission to put an end to that infringement,

Having regard to the Commission decision of 2 May 2002 to initiate proceedings in this case,

Having heard the undertakings concerned in accordance with Article 19(1) of Council Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 81 and 82 of the EC Treaty <sup>(3)</sup>,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the report by the Hearing Officer,

Whereas:

**I. THE FACTS**

(1) This decision concerns unfair pricing contrary to Article 82(a) of the EC Treaty. The prices in question are charged to competitors and end-users by Deutsche Telekom AG ('DT') for access to its local networks. DT's local networks each consist of a number of local loops.

In accordance with Article 2(e) of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) <sup>(4)</sup>, the local loop is the physical circuit connecting the network termination point at a subscriber's premises to the main distribution frame or equivalent facility in the fixed public telephone network.

(2) On 18 March 1999, Mannesmann Arcor AG & Co. lodged a complaint against DT under Article 82 of the EC Treaty and against Germany under Article 86 of the EC Treaty.

(3) The Commission received two further complaints in respect of the same facts, one on 19 July 1999, from TeleBeL GmbH and seven other companies (see recital 9) (Case COMP/C-1/37.37.58) and one on 20 July 1999, from EWE TEL GmbH and five other companies (see recital 10) (Case COMP/C-1/37.579). All of these additional 14 complainants are German local and regional telecommunications operators active in different German towns or cities.

(4) The main contention in all three complaints is that the margin between the prices DT charges its competitors for unbundled access to local loops in Germany and the prices it charges end-users for access to its fixed network is not sufficient to enable its competitors to compete with it to provide end-user access over local networks. The main accusation made against Germany is that the German regulatory authority for telecommunications and posts (*Regulierungsbehörde für Telekommunikation und Post*, abbreviated to RegTP and hereinafter referred to as 'the regulatory authority') has fixed the wholesale charges at a level exceeding the retail charges.

(5) Charges for access to local networks are partly regulated by the regulatory authority, but this decision is concerned with unfair prices which have been set by DT itself in the exercise of its own commercial freedom, and for which it is directly responsible.

<sup>(1)</sup> OJ L 13, 21.2.1962, p. 204/62.

<sup>(2)</sup> OJ L 148, 15.6.1999, p. 5.

<sup>(3)</sup> OJ L 354, 30.12.1998, p. 18.

<sup>(4)</sup> OJ L 108, 24.4.2002, p. 7.

## II. THE UNDERTAKINGS

### A. THE PARTY AGAINST WHOM THE COMPLAINTS ARE MADE

- (6) DT is the incumbent telecommunications operator in Germany. It operates the fixed telephone network originally built using public resources. DT was at one time wholly owned by the German State. On 18 November 1996, 25 % of the equity was sold on the open market to private investors: this package amounted to 714 million shares known as 'T' shares, and was sold for DEM 20,1 billion. Following a capital increase in June 1999, the percentage of shares owned by private investors rose to 33 %. At that time a 65 % stake was still held by the German State (43 % direct and 22 % through the German recovery bank Kreditanstalt für Wiederaufbau, or 'KfW'), while 2 % was held by France Télécom. When DT took over the United States mobile operator VoiceStream/Powertel in 2000, the State and KfW gave up part of their holdings. France Télécom sold its shares back to DT. Currently, 30,92 % of the shares are held by the State, 12,13 % by KfW, and 56,95 % by institutional and private investors.

- (7) Before the full liberalisation of telecommunications markets, DT enjoyed a legal monopoly in the retail provision of fixed-line telecommunications services. Since 1 August 1996, when the Telecommunications Act ('the Act')<sup>(5)</sup> entered into force, the German markets in the provision of infrastructure and in the provision of telephone services have been liberalised. DT now faces varying degrees of competition from alternative operators on the two markets.

### B. THE COMPLAINANTS

- (8) The complainant in Case COMP/C-1/37.451 is Mannesmann Arcor AG & Co., one of Germany's largest fixed-network operators, which offers end-users a wide range of telephone services. In 2000 Mannesmann AG was taken over by Vodafone Airtouch plc<sup>(6)</sup>. Since April 2001 the complainant has traded under the name Arcor AG & Co. (hereinafter 'Arcor'). On 30 September 1998 Arcor concluded an outline agreement with DT for local loop unbundling, in which charges were agreed only provisionally, pending authorisation by the regulatory authority, as required by the German rules on price regulation.

- (9) The complainants in Case COMP/C-1/37.578 are TeleBeL GmbH (Wuppertal), CNB GmbH (Bremen), Citykom

GmbH (Münster), HTN GmbH (Hanover), Hamcom GmbH (Hamm), KomTel GmbH (Flensburg), DOKOM GmbH (Dortmund) and KielNet GmbH (Kiel).

- (10) The complainants in Case COMP/C-1/37.579 are EWE TEL GmbH (Oldenburg), HanseNet GmbH (Hamburg), ISIS Multimedia Net GmbH (Düsseldorf), NetCologne GmbH (Cologne), tesion Kommunikationsnetze Südwest GmbH & Co. KG (Stuttgart) and VEW TELNET GmbH (Dortmund).

- (11) All 14 complainants in Cases COMP/C-1/37.578 and COMP/C-1/37.579 are local and regional fixed-network operators with geographically restricted licences, who connect end-users to their own networks within their licensed territory, in so far as their networks are within reach and operational. To connect customers that they cannot reach with their own networks these complainants need unbundled access to DT's local loops (see recital 64 et seq.). All 14 have concluded agreements with DT concerning local loop unbundling.

## III. FACTS AND FIGURES

- (12) In order to compete with DT, competitors secure network access either by using their own infrastructure (optical fibre, cable television, power lines, etc.), or by using DT's local network on the basis of unbundled access to local loops. The latter option is less cost-intensive, and gives even financially weaker competitors, who are unable to build complete infrastructures of their own, direct access to the German retail market. Countrywide providers of telecommunications services also depend on shared use of existing infrastructure. But in the case of telephone calls, as a result of network interconnection, alternative operators wishing to provide countrywide services in Germany no longer face any comparable bottleneck.

- (13) New entrants do not have network infrastructures of their own that are as extensive as those of DT, and with traditional technologies they are unable to match the economies of scale and the coverage of the incumbent operator, which rolled out its local network over a long period under the protection of exclusive rights, and funded its investment out of monopoly rents<sup>(7)</sup>.

- (14) DT offers access to its local networks to other telecommunications operators and to end-users. The rules governing telecommunications in Germany regulate the two types of access in different ways.

<sup>(5)</sup> Telekommunikationsgesetz (TKG), 25 July 1996, publication reference BGBl. I, p. 1120.

<sup>(6)</sup> Case COMP/M.1795 — Vodafone Airtouch/Mannesmann (OJ L 141, 19.5.2000, p. 19).

<sup>(7)</sup> Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ L 336, 30.12.2000, p. 4, recital 3).

## A. WHOLESALE ACCESS: FULL UNBUNDLING

do not confer anticompetitive advantages on some operators only <sup>(16)</sup>.

(15) At local level a distinction can be made between two different forms of access to incumbents' fixed telephone networks: one is full local loop unbundling, and the other is line sharing, or shared use of local loops. The charges for the two forms of access are different. This decision relates only to fully unbundled access to DT's local loops.

(16) With effect from June 1997 DT was required to offer its competitors fully unbundled access to the local loop <sup>(8)</sup>. The requirement was imposed by decision of the Federal Ministry of Posts and Telecommunications in May 1997 <sup>(9)</sup>; at that time no such obligation yet existed under Community law <sup>(10)</sup>. DT challenged the decision before the administrative courts <sup>(11)</sup>; DT's application was finally dismissed by the Federal Administrative Court in 2001. On 30 August 1998, on the basis of this unbundling requirement, an outline agreement on unbundled access to DT's local loops was reached between DT and Mannesmann Arcor.

(17) Under German telecommunications law, charges for access to the local network must be cost-oriented <sup>(12)</sup> and must be authorised in advance by the regulatory authority <sup>(13)</sup>. When deciding whether to authorise the wholesale prices that DT charges other operators, the regulatory authority has to satisfy itself that they correspond to the cost of efficient service provision <sup>(14)</sup>, contain no special extra charges or discounts <sup>(15)</sup>, and

(18) In March 1998, acting under these provisions in response to an application made by DT on 23 December 1997, the regulatory authority for the first time authorised monthly net charges for unbundled access to DT's local loop (all charges specified in this decision are net charges) <sup>(17)</sup>. DT had requested authorisation for a monthly charge of EUR 14,73 for the rental of a basic analogue local loop <sup>(18)</sup>. DT had also applied for one-off charges of EUR 309,84 for opening a new connection, no additional work being needed <sup>(19)</sup>, and EUR 135,49 for taking over an existing serviceable connection <sup>(20)</sup>. On 9 March 1998 the regulatory authority rejected part of the costing submitted by DT, and authorised a monthly charge of EUR 10,56 for the rental of a local loop. It authorised the one-off charges requested for the time being. DT did not at that time charge its competitors separately for discontinuing access to local loop; the cost of discontinuance was included in the charges for access provision.

(19) While granting this partial authorisation, the regulatory authority also ordered DT to submit a more detailed cost calculation, by the middle of 1998, using the cost accounting system DT had recently introduced (INTRA). It told DT that the corrections ought to bring the charges finally sought for unbundled access for competitors to well below EUR 10.

<sup>(16)</sup> Section 28(1) and (2) of the Act.

<sup>(17)</sup> Regulatory authority division (*Beschlusskammer*) 4, file reference BK 4a 1130/E23.12.97; in DT's application, costs were calculated using DT's traditional cost accounting system.

<sup>(18)</sup> 'CuDa 2Dr', a copper pair circuit. Many higher-performance local loops also exist.

<sup>(19)</sup> There is a 'new connection' where a local loop access product is ordered without discontinuing a DT product at the same time, or where the technical set-up or use of the local loop is changed, or where there is no longer any serviceable connection to the end-user for the desired product variant (DT local loop contract, version current at 18 November 2002, Annex 1, definitions). The basic charge is due where no additional work is needed on DT's cable distribution frame or at the customer's premises (such a connection is hereinafter referred to as a 'straightforward' new connection); otherwise higher one-off charges are payable.

<sup>(20)</sup> There is a 'takeover' of an existing connection where a local loop access product is ordered and an existing DT product is discontinued at the same time, and there is no change in the technical set-up or use of the local loop (DT local loop contract, version current at 18 November 2002, Annex 1, definitions). The basic charge is due where no additional work is needed on DT's cable distribution frame or at the customer's premises (such a connection is hereinafter referred to as a 'straightforward' takeover); otherwise higher one-off charges are payable.

<sup>(8)</sup> Following a complaint lodged by Mannesmann Arcor under section 33(2)(2) of the Act, which came after unsuccessful negotiations with DT between November 1996 and March 1997.

<sup>(9)</sup> Ministry Decision 223a of 28 May 1997.

<sup>(10)</sup> Since 1 January 2001, when Regulation (EC) No 2887/2000 entered into force, local loop unbundling has also been mandatory under Community law.

<sup>(11)</sup> An application for an interim injunction was dismissed on 18 August 1997 by the Administrative Court of Cologne, and that dismissal was upheld on 29 September 1997 by the Higher Administrative Court of Münster.

<sup>(12)</sup> Section 24(1) of the Act.

<sup>(13)</sup> Sections 25(1) and 24 of the Act.

<sup>(14)</sup> Section 24 of the Act.

<sup>(15)</sup> Section 29(1) of the Act.

- (20) On 5 June 1998, contrary to these guidelines, DT submitted a fresh application to the regulatory authority seeking authorisation for a monthly charge of EUR 24,16. It also applied for one-off charges of EUR 384,58 for a straightforward new connection and EUR 323,67 for a straightforward takeover. Under the terms of the Act, the regulatory authority was required to decide on the application within 10 weeks, which meant that the deadline was 30 November<sup>(21)</sup>. But on 27 November 1998, DT, having learnt that the regulatory authority intended to increase the monthly charge to EUR 11,86, withdrew its application, on the recommendation of the Federal Minister for Economic Affairs. The same day the regulatory authority decided to suspend the proceedings and to extend the validity of its provisional authorisation of 9 March 1998, which was now to continue until 30 April 1999<sup>(22)</sup>.
- (21) On 20 January 1999 the Administrative Court of Cologne, on an application for interim measures brought by Mannesmann Arcor, held that the regulatory authority was entitled to reach a decision on the level of charges of its own motion, and that in this particular case it was bound to do so<sup>(23)</sup>. However, DT immediately lodged a new application with the regulatory authority, seeking authorisation for a monthly charge of EUR 19,07 and one-off charges of EUR 224,26 for a straightforward new connection and EUR 186,44 for a straightforward takeover.
- (22) On 10 February 1999 the regulatory authority authorised a monthly local loop access charge of EUR 12,99 for a basic line<sup>(24)</sup>. It authorised one-off charges of EUR 100,50 for a straightforward new connection and EUR 97,99 for a straightforward takeover. It also authorised a one-off discontinuance charge of EUR 55,07, which DT now showed separately from the charges for access provision. In so far as the charges applied for were higher than these, the regulatory authority rejected DT's application. The authorisation was valid until 31 December 2001.
- (23) On 19 January 2001, DT lodged a new tariff application with the regulatory authority seeking a monthly charge of EUR 17,40 for a basic line and one-off charges of EUR 119,51 for a straightforward new connection, EUR 127,04 for a straightforward takeover, and EUR 104,41 for discontinuance of access to the local loop<sup>(25)</sup> in the case of a basic line. Along with the application DT submitted calculations of the costs of these services based on its own internal cost accounting system; it expressly stated that under the relevant rules of German law these were the only calculations that could be considered for purposes of the authorisation of charges<sup>(26)</sup>.
- (24) The regulatory authority decided on the application on 30 March 2001,<sup>(27)</sup> with effect from 1 April 2001 it authorised a monthly charge of EUR 12,48 for the rental of a basic line<sup>(28)</sup>, and one-off charges of EUR 92,59 for a straightforward takeover and EUR 86,51 for a straightforward new connection<sup>(29)</sup>. The same decision authorised discontinuance charges of EUR 38,06 for a straightforward takeover and EUR 59,24 for a new connection requiring work on DT's cable distribution frame. In so far as the charges applied for were higher than these, the regulatory authority rejected DT's application. The regulatory authority based this partial authorisation essentially on the system of analytical cost accounting developed by the consultant WIK<sup>(30)</sup>, which set out to identify the long-run incremental costs of unbundling in a more theoretically rigorous way<sup>(31)</sup>, as DT's own cost calculations did not meet the legal requirements in every respect.
- (25) On 11 April 2002<sup>(32)</sup>, the regulatory authority approved DT's application to reduce one-off charges with effect from 1 April 2002, bringing the charge for a straightforward new basic connection to EUR 81,12, for a straightforward takeover to EUR 70,56, and for discontinuance to EUR 34,94 (with simultaneous transfer of the customer) or EUR 50,71 (without simultaneous transfer)<sup>(33)</sup>. By decision of 30 April 2003, the regulatory authority<sup>(34)</sup> reduced the monthly charge to EUR 11,80 with effect from 1 May 2003.
- 
- (25) There is a description of this service in Annex 4 to the local loop charges application of 19 January 2001, p. 6 (Annex ZZ to DT's reply of 24 September 2001 to the request for information of 29 August 2001).
- (26) Grounds of application set out in Annex 2 to the local loop charges application of 19 January 2001, p. 3 (see footnote 25).
- (27) Division 4, file reference BK 4a-01/001/E 19.1.2001.
- (28) It authorised monthly charges for 13 different types of line, the highest being EUR 65,70.
- (29) It authorised one-off charges for more than 80 different types of case, the highest being over EUR 400.
- (30) Wissenschaftliches Institut für Kommunikationsdienste, Bad Honnef, Germany.
- (31) Using the LRIC (long-run incremental cost) method.
- (32) Division 4, file reference BK 4a-02/004/E 31.1.2002.
- (33) It authorised access provision charges for more than 70 different types of case, and discontinuance charges for more than 30; some of these were substantially higher than the amounts cited here.
- (34) Division 4, file reference BK 4a-03-010/E, 19.2.2003.
- (21) DT withdrew its application on 17 July 1998, and submitted it afresh on 21 September 1998, seeking the same charges, but providing more detailed cost accounting.
- (22) Ministry press release of 27 November 1998 (Annex 7 to complaint in Case COMP/C-1/37.451); regulatory authority press release of 27 November 1998 (Annex 7A to complaint in Case COMP/C-1/37.451).
- (23) File reference L 3890/98.
- (24) Division 4, file reference BK 4e-98-024/E 21.09.98.

## B. RETAIL ACCESS

- (26) DT offers its end-users two basic variants of access to the fixed network. These are the traditional analogue connection (marketed under the brand name 'T-Net') and the digital narrowband connection (integrated services digital network, or ISDN, brand name 'T-ISDN'). Both these variants of end-user access can be provided over DT's existing copper pair network. DT also offers end-users a broadband connection allowing broadband services such as faster Internet access (asymmetrical digital subscriber line, or ADSL, brand name 'T-DSL'), which it provides by upgrading an existing T-Net or T-ISDN line.
- (27) According to information provided by DT<sup>(35)</sup>, the number of DT's analogue (T-Net) and digital (T-ISDN) retail lines, including all lines with an ADSL upgrade, developed as follows between 1998 and 2002:

Table 1

|            | T-Net     | T-ISDN | Total |
|------------|-----------|--------|-------|
| 31.12.1998 | [...] (*) | [...]  | [...] |
| 31.12.1999 | [...]     | [...]  | [...] |
| 31.12.2000 | [...]     | [...]  | [...] |
| 31.12.2001 | [...]     | [...]  | [...] |
| 31.12.2002 | [...]     | [...]  | [...] |

- (28) Of the total number of local loops, an increasing proportion is being equipped with ADSL technology, allowing faster transmission of larger volumes of data. According to information provided by DT, the roll-out of ADSL (T-DSL) end-user connections developed as follows between 1998 and 2002<sup>(36)</sup>:

(\*) [...] = business secret.

(35) DT's reply of 23 July 2001 to the request for information of 22 June 2001 and DT's reply of 4 February 2002 to the request for information of 17 January 2002 in Case COMP/C-1/37.451; DT's letters of 17 January 2003 and 22 January 2003: primary rate access connections are not included, and nor are 'other' connections, because they are numerically insignificant, or because their prices cannot be apportioned with sufficient accuracy.

(36) DT's reply of 23 July 2001 to the request for information of 22 June 2001 and DT's reply of 4 February 2002 to the request for information of 17 January 2002 in Case COMP/C-1/37.451; DT's letters of 17 January 2003 and 22 January 2003.

Table 2

|            | T-DSL/T-Net | T-DSL/T-ISDN | Total     |
|------------|-------------|--------------|-----------|
| 31.12.1998 | [...]       | [...]        | 0         |
| 31.12.1999 | [...]       | [...]        | 3 000     |
| 31.12.2000 | [...]       | [...]        | 149 000   |
| 31.12.2001 | [...]       | [...]        | 2 000 000 |
| 31.12.2002 | [...]       | [...]        | 3 100 000 |

- (29) DT's retail tariffs are made up of two components: a basic monthly charge, which depends on the quality of the line and services supplied, and a one-off charge for a new connection or takeover of a line, depending on the work needed at the two ends of the line<sup>(37)</sup>.
- (30) DT's retail prices for analogue and ISDN lines are regulated under the German price cap system, in which a price adjustment guideline is set for a basket of services, whereas retail tariffs for T-DSL are not subject to any advance regulation.

## (a) CHARGES FOR ANALOGUE AND ISDN LINES (T-NET AND T-ISDN)

- (31) Unlike the prices that DT charges its competitors for access to the local network (see recital 15 et seq.), its retail tariffs for analogue and ISDN lines are not regulated individually in line with cost-orientation principles, but instead fall under what is known as the price cap system. Prices for retail subscription to DT's fixed telephone network and for telephone calls made are not regulated for each service separately, depending on the individual cost of that service: they are regulated for a block of services at a time, with different services being grouped together in what is called a 'basket'<sup>(38)</sup>.

(37) DT's current retail tariffs are published on the Internet at [www.telekom.de](http://www.telekom.de). See also regulatory authority, 'Anhang 2 zur Mitteilung 68/1999', publication reference *Amtsblatt (RegTP)* No 3/1999, p. 540.

(38) Sections 27(1)2 and 25(1) of the Act; Sections 4 and 5 of the telecommunications charges order (*Telekommunikations-Entgeltregulierungsverordnung* (TEntgV, hereinafter 'the order'), 1 October 1996, publication reference BGBl. I, p. 1492).

(32) Under the German telecommunications charges order, the price cap method is the preferred tariff regulation tool: strict cost orientation is applied to an individual retail service only if that service cannot be allocated to one of the predetermined baskets<sup>(39)</sup>. This means that the firm whose charges are regulated has some discretion to fix its prices on a commercial basis. The price cap system is made up of one price cap decision, laying down the division of services into baskets, the price adjustment guideline and other general terms for a specified period, and other decisions reached on individual applications for adjustments to charges during that price cap period.

(33) A basket is to be composed of services which are in a comparable situation with respect to competition<sup>(40)</sup>. A starting charge level is first determined for all the services grouped in a basket<sup>(41)</sup>, and a target, known as the price cap index, is set for the movement of the basket price over a specified period<sup>(42)</sup>. Price adjustment guidelines have to be arrived at taking account of the general rate of price increases, the anticipated productivity gains of DT, and the relationship between the starting charge level and the long run incremental cost of efficient service provision<sup>(43)</sup>.

(aa) **Price cap periods 1998/1999 and 2000/2001**

(34) The price cap mechanism for retail fixed-network charges was introduced by decision of the Federal Ministry of Posts and Telecommunications in December 1997<sup>(44)</sup>, and was taken over by the regulatory authority from 1 January 1998. Two baskets were established, one for services to residential customers and the other for services to business customers. Each basket contained access services (standard analogue and ISDN subscriptions), the full range of telephone products offered by DT, such as local, regional, long-distance and international calls, and also satellite calls and optional tariffs.

(35) Under the Ministry's original decision, dated 17 December 1997, DT was to reduce the aggregate

price for each basket by 4,3 % in the first price cap period, that is to say the two years running from 1 January 1998 to 31 December 1999. When the first price cap period ended, on 31 December 1999, the regulatory authority decided essentially to maintain the composition of the baskets and to lower the basket prices by a further 5,6 % in the second price cap period, which ran from 1 January 2000 to 31 December 2001<sup>(45)</sup>. In each price cap period the average price index<sup>(46)</sup> was to be smaller or no bigger than the price cap index<sup>(47)</sup>. These index figures are intended to reflect productivity and efficiency gains on DT's part and the rate of price increases in the economy as a whole, as a result of inflation for example, during the particular price cap period.

(36) Within this framework of binding price reductions, DT could modify the charges for individual components of the basket as it wished. In formal terms, though, any adjustment of the charges needed authorisation by the regulatory authority. DT was entitled to take the initiative and to apply for authorisation at any time; there was no restriction on the number of adjustments that could be made in any one price cap period. In the price cap system, planned adjustments to charges can as a rule be authorised if the average price of a basket does not exceed the imposed price cap index<sup>(48)</sup>, and there are clearly no discounts or discriminatory terms<sup>(49)</sup>. Thus DT was free to increase the charges for one or more components of the basket provided that the overall ceiling for the basket was not exceeded. This meant that an increase that exceeded the price ceiling for a basket was possible only if at the same time the prices of other components of the same basket were reduced. But the price cap system made no provision for mandatory minimum basket prices, and there was nothing to prevent DT from reducing all of the charges grouped in a basket beyond the rates of reduction imposed.

(37) In the first two price cap periods, DT reduced the retail prices in both baskets substantially, going far beyond

<sup>(45)</sup> Regulatory authority decision of 23 December 1999, Division 2, file reference BK 2c 99/050.

<sup>(46)</sup> The average price index incorporates the imposed aggregate price movement in each basket from one price cap period to the next. In 1997 it was set at a reference value of 100, and then adjusted for each of the two price cap periods, taking account of general price changes and the share of turnover accounted for by each service in the basket in each price cap period.

<sup>(47)</sup> The price cap index shows the required aggregate price reduction per price cap period, taking account of the level of prices after the reductions required in the preceding price cap period.

<sup>(48)</sup> Section 27(2), second sentence, of the act, and section 5(3) of the order.

<sup>(49)</sup> Section 27(3) of the act.

<sup>(39)</sup> Section 1(1) of the order.

<sup>(40)</sup> Section 1(2) of the order.

<sup>(41)</sup> Section 4(1) of the order.

<sup>(42)</sup> Section 4(2) of the order.

<sup>(43)</sup> Section 4(2) and (3) of the order.

<sup>(44)</sup> Ministry decision of 17 December 1997, 'Mitteilung 202/1997', publication reference *Amtsblatt (BMPT)* 34/97, p. 1891.

the mandatory reductions<sup>(50)</sup>. In terms of volume of turnover, in the first price cap period, running from January 1998 to December 1999, the reductions amounted to EUR [...] for the residential basket and EUR [...] for the business basket. Taking out the mandatory reduction of 4,3 %, the additional, unimposed reductions for the two baskets together amounted to EUR [...] <sup>(51)</sup>. In the second price cap period, running from January 2000 to December 2001, the additional, unimposed reductions, after the mandatory reduction of 5,6 % is taken out, amounted to a further EUR [...] in the residential customers basket, and EUR [...] in the business customers basket <sup>(52)</sup>. This means that over a period of four years, DT undertook voluntary price reductions that went beyond what was required by a total of EUR [...] <sup>(53)</sup>.

- (38) The reductions applied to call charges only: the monthly and one-off access charges for standard analogue telephone connections remained unchanged throughout the entire time from 1998 to the end of 2001.

- (39) In that period DT's basic monthly charge for retail access to a standard analogue telephone line ('T-Net standard') was always EUR 10,93. DT claims that this charge does not cover the cost to DT of providing end-users with analogue access to the telephone network. DT contends that it has not yet fully eliminated the revenue shortfall on retail access to the fixed network <sup>(54)</sup>. DT's predecessor, Deutsche Bundespost, had permitted this shortfall essentially on social grounds: Deutsche Bundespost offered users access to the telephone network below cost, and made up its losses on access out of above-average revenue from calls, and especially its charges for international calls.

- (40) Until 31 March 2000 the basic monthly charge for an ISDN connection was EUR 19,56 for T-ISDN multi-device mode (*Mehrgeräteanschluss*), simple; EUR 20,45 for T-ISDN multi-device mode, standard; EUR 22,67 for T-ISDN, multi-device mode, comfort; EUR 26,23 for T-ISDN point-to-point mode (*Anlagenanschluss*), simple;

EUR 28,45 for T-ISDN point-to-point mode, standard; and EUR 30,68 for T-ISDN point-to-point mode, comfort <sup>(55)</sup>. On 17 December 1999, DT applied for authorisation to reduce these prices to EUR 19,78 for T-ISDN multi-device mode, standard, EUR 21,99 for T-ISDN multi-device mode, comfort, EUR 25,56 for T-ISDN point-to-point mode, simple and standard, and EUR 28,12 for T-ISDN point-to-point mode, comfort, and on 16 February 2000 the regulatory authority granted the authorisation applied for with effect from 1 April 2000 <sup>(56)</sup>. These are therefore the prices that applied until the end of the original price cap scheme.

- (41) Throughout the whole price cap period 1998 to 2001 DT's one-off retail charges for analogue and ISDN lines of all kinds amounted to EUR 22,22 for a takeover of a serviceable connection and to EUR 44,45 for the provision of a new serviceable connection with no special work required. There were no discontinuance charges for DT customers.

#### (bb) *Price cap period 2002*

- (42) A new price cap system was approved by the regulatory authority on 21 December 2001 and has been in force since 1 January 2002 <sup>(57)</sup>. On 23 May 2001, the regulatory authority published preliminary guidelines for new price cap arrangements to apply from 2002 <sup>(58)</sup>, and in October 2001 it announced its intention of adjusting the composition of the baskets and the imposed reductions in the basket prices, known as 'X factors' <sup>(59)</sup>. The decision of 21 December 2001 was in line with what had been proposed. In place of the two baskets for residential and business customers, the new system uses four baskets, for end-user lines (basket A), local calls (basket B), domestic long-distance calls (basket C), and international calls (basket D) <sup>(60)</sup>.

- (43) End-user lines are now in a separate basket with a negative X factor; this obliges DT to increase charges, restructuring its tariffs further in order to put an end to

<sup>(50)</sup> Since the beginning of 1998 the regulatory authority has authorised seven price reductions within the price cap system: on 30 January 1998, on 11 December 1998, on 16 March 1999, on 16 April 1999, on 21 January, on 16 February 2000, and on 13 March 2002.

<sup>(51)</sup> Regulatory authority's reply of 3 April 2002 to the request for information of 23 March 2002.

<sup>(52)</sup> Regulatory authority's reply of 3 April 2002 to the request for information of 23 March 2002.

<sup>(53)</sup> Regulatory authority's reply of 3 April 2002 to the request for information of 23 March 2002.

<sup>(54)</sup> DT's observations on the complaint in Case COMP/C-1/37.451, 14 May 1999, p. 17; DT's reply of 24 September 2001 to the request for information of 28 August 2001 in Case COMP/C-1/37.451, p. 5.

<sup>(55)</sup> For precise descriptions of these ISDN variants see DT's letter of 17 January 2003 and Annex DT St 29.

<sup>(56)</sup> A regulatory authority decision of 28 February 2001 extended that authorisation to 31 March 2002.

<sup>(57)</sup> Decision of 21 December 2001, file reference BK2c 01/009, publication reference *Amtsblatt (RegTP)* 2/2002, 6.2.2002, p. 75.

<sup>(58)</sup> [http://www.regtp.de/reg\\_tele/start/fs\\_05.html](http://www.regtp.de/reg_tele/start/fs_05.html).

<sup>(59)</sup> 'Mitteilung 580/2001', publication reference *Amtsblatt (RegTP)* 20/2001, 17.10.2001, p. 3087.

<sup>(60)</sup> X factors: basket A, - 1 %; basket B, 5 %; basket C, 2 %; and basket D, 1 %. The reference values for these price adjustment guidelines are the average price index and the price cap index at the end of the second price cap period.

the existing shortfall on subscriber lines<sup>(61)</sup>. With the imposed X factor of - 1, and an inflation rate of 3,1 %<sup>(62)</sup>, DT is entitled under the new price cap system to increase charges for end-user lines by 4,1 % a year, or 12,3 % over the three-year period covered by the new price cap procedure<sup>(63)</sup>.

(b) CHARGES FOR ADSL LINES ('T-DSL')

(44) On 15 January 2002, DT informed the regulatory authority that it proposed to increase its monthly charges for analogue and ISDN lines by an initial EUR 0,56 each<sup>(64)</sup>. By a decision of 13 March 2002, the regulatory authority made a finding that DT had complied with all the values laid down for increases in the various end-user line charges in basket A, as the average level of charges for all the services in basket A had risen by 4,04 %<sup>(65)</sup>. From 1 May 2002 the monthly charge for an analogue line (T-Net) became EUR 11,49, and the monthly charge for T-ISDN became EUR 20,34 for multi-device mode, standard, and EUR 22,55 for multi-device mode, comfort. The prices of the other T-ISDN variants remained unchanged.

(45) Lastly, on 31 October 2002 DT submitted an application to the regulatory authority for authorisation to increase the monthly rental charge for a T-Net analogue telephone line by EUR 0,99 to EUR 12,48, and to increase the one-off takeover charge for T-Net and T-ISDN lines by EUR 13,40 to EUR 35,62, with effect from 1 February 2003. But in its decision, adopted on 19 December 2002, the regulatory authority authorised only an increase of EUR 0,33 in the monthly charges, bringing them to EUR 11,82, and otherwise refused the application. Thus it did not authorise the increase in the one-off takeover charge that DT had applied for<sup>(66)</sup>. In support of its decision, RegTP specifies that these increases would not have been consistent with the current price cap index figures anymore. DT's one-off charges for all variants of T-Net and T-ISDN continue to stand at EUR 22,22 for a takeover and EUR 44,46 for a new connection. DT still collects no discontinuance charges from its own end-users.

(46) Unlike the tariffs for analogue and ISDN lines, T-DSL tariffs are not subject to advance regulation under the price cap system. The prices of T-DSL services are set by DT at its own discretion, but may be reviewed ex post<sup>(67)</sup>.

(47) From July 1999 to July 2000, DT offered T-DSL only over T-ISDN lines, at a price of EUR 22,74 monthly and a one-off EUR 100,93 for installation. Between August and December 2000, it offered T-DSL over T-Net lines at EUR 13,17 a month, and over T-ISDN lines at EUR 6,56 a month. From January 2001 to February 2002, the monthly charge for a T-DSL upgrade on a T-Net line was EUR 17,59, and on any variant of T-ISDN line EUR 8,77<sup>(68)</sup>. This meant that until 31 July 2000 the total price for T-DSL/T-ISDN multi-device mode, standard, was EUR 43,19, and for T-DSL/T-ISDN multi-device mode, comfort, EUR 45,41. From 1 August 2000 to 31 December 2000, the total price for T-DSL/T-Net was EUR 24,10, for T-DSL/T-ISDN multi-device mode, standard, EUR 26,34, and for T-DSL/T-ISDN multi-device mode, comfort, EUR 28,55. From 1 January 2001 to 24 February 2002, the total price of T-DSL/T-Net was EUR 28,52, for T-DSL/T-ISDN multi-device mode, standard, EUR 28,55, and for T-DSL/T-ISDN multi-device mode, comfort, EUR 30,76.

(48) On 2 February 2001, following a number of complaints from competitors, the regulatory authority initiated an ex post investigation of DT's ADSL prices, on the ground that there might be anticompetitive below-cost selling. The regulatory authority came to the conclusion that DT's monthly charge for T-DSL services over a T-ISDN standard line covered only [...] % of costs. In the same decision the regulatory authority also found that DT's one-off installation charge for T-DSL services covered only [...] % of costs<sup>(69)</sup>.

<sup>(61)</sup> Decision of 21 December 2001 (see footnote 57), pp. 17 and 19.

<sup>(62)</sup> German Statistical Office (Statistisches Bundesamt), price index for cost of living for a private household on 30 June 2001.

<sup>(63)</sup> On the assumption that the inflation rate remains unchanged in 2002 to 2004. In its decision of 21 December 2001 (see footnote 57), the regulatory authority forecasts that over the three years DT will have scope to increase charges for all lines by an average of 10 %, and for analogue lines by 14 %.

<sup>(64)</sup> DT press release, 15 January 2002.

<sup>(65)</sup> Division 2, file reference BK2a 02/001.

<sup>(66)</sup> Division 2, file reference BK2a 02/028; regulatory authority press release, 20 December 2002.

<sup>(67)</sup> Under section 30 of the Act.

<sup>(68)</sup> Written information from DT, 5 March 2002; all prices are for the T-DSL upgrade only, and come on top of the T-Net or T-ISDN charges, see recitals 40 and 41.

<sup>(69)</sup> Division 3, file reference BK3b-00/032, decision of 30 March 2001, p. 31. (The decision found that only the monthly charge for T-DSL/T-Net covered its cost.)

- (49) The regulatory authority nevertheless decided to take no action against these prices, and to close its investigation, because in two further decisions taken on 30 March 2001, it ordered DT to make it possible for its competitors to sell on to other customers local network wholesale services for connections and local and urban calls ('resale'), and to make joint use of the local loop ('line-sharing')<sup>(70)</sup>. But DT did not comply with these orders as expected, and on 18 December 2001 the regulatory authority decided to reopen the abuse proceedings and to investigate the T-DSL tariffs once again.
- (50) On 15 January 2002, DT announced that it would be reducing the monthly charge for T-DSL/T-Net from EUR 17,59 to EUR 17,23, and increasing the monthly charge for T-DSL/T-ISDN from EUR 8,78 to EUR 11,20<sup>(71)</sup>. DT has been applying these charges since 25 February 2002. On this basis the current total monthly retail prices are EUR 28,72 for T-DSL/T-Net, EUR 31,54 for T-DSL/T-ISDN multi-device mode, standard, and EUR 33,75 for T-DSL/T-ISDN multi-device mode, comfort<sup>(72)</sup>. As a result of an increase in the T-Net price on 1 February 2003, T-DSL/T-Net now costs EUR 29,05.
- (51) From 1 August 2000, DT customers had to pay a one-off charge of EUR 44,46 for the provision of a T-DSL upgrade on a T-Net line or any variant of T-ISDN line. On 15 January 2002, DT announced that it would be increasing this one-off charge to EUR 64,61 with effect from 1 July 2002, and to EUR 86,16 with effect from 1 January 2003. On 22 January 2002, the regulatory authority terminated its abuse proceedings on the ground that the price situation did not now give any cause to suspect that there might be 'price dumping' within the meaning of the Act<sup>(73)</sup>.

#### IV. ASSESSMENT

##### A. APPLICABILITY OF ARTICLE 82 OF THE EC TREATY

- (52) Operators of fixed telecommunications networks and telecommunications services are subject to Articles 81 and 82 of the EC Treaty, because by providing access to fixed networks and services over such networks on a

commercial basis they are carrying out an economic activity<sup>(74)</sup>. DT is a registered business undertaking that operates a fixed telecommunications network accessible to the public and provides related services. It therefore constitutes an 'undertaking' within the meaning of Articles 81 and 82 of the EC Treaty.

- (53) For the provision of network access and related services, DT is subject to sector-specific regulation under Community legislation and the national laws and regulations that implement the Community legislation. DT contends that the Commission is not entitled to proceed against charges which have previously been the subject of regulatory decisions at national level, owing to the division of responsibility between the Commission and the German regulatory authority<sup>(75)</sup>. DT argues that all of the charges at issue were imposed by the regulatory authority, so that DT was left no scope for independent commercial decisions against which competition proceedings might be brought at Community level<sup>(76)</sup>. If there is any infringement of Community law, the Commission should not be acting against an undertaking whose charges are regulated; its proper course is rather to bring infringement proceedings against Germany under Article 226 of the EC Treaty<sup>(77)</sup>.
- (54) Contrary to DT's view, however, the Court of Justice of the European Communities and the Court of First Instance of the European Communities have consistently held that the competition rules may apply where the sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition<sup>(78)</sup>. This is particularly so in the case of complaints submitted to the Commission regarding possible violations of the EU competition rules. In such cases the Commission has a duty to investigate, and if necessary to order appropriate remedies.

- (55) Accordingly the Commission stated in the notice on the application of the competition rules to access agreements in the telecommunications sector: framework, relevant markets and principles (access notice), that cases might be subject both to the competition rules and to national or European sector-specific measures,

<sup>(70)</sup> 'Resale' was ordered by Division 3, file reference BK 3a-00/025; 'line-sharing' was likewise ordered by Division 3, file reference BK 3c-00/029.

<sup>(71)</sup> DT press release, 15 January 2002 (the prices quoted are for T-DSL only, not including the T-Net or T-ISDN line).

<sup>(72)</sup> T-DSL is also offered via the other T-ISDN variants, but this happens so rarely that the prices can be ignored in this proceeding; see DT's letter of 31 January 2003.

<sup>(73)</sup> Division 3, file reference BK3b-01/039, regulatory authority press release, 22 January 2002.

<sup>(74)</sup> Court of Justice in Case 41/83 *Italy v Commission* [1985] ECR 873, paragraphs 17 to 20.

<sup>(75)</sup> DT's observations on the Statement of Objections, 29 July 2002, pp. 18 ff.; DT's letter of 25 October 2002, pp. 2 ff.

<sup>(76)</sup> DT's observations on the Statement of Objections, 29 July 2002, pp. 20 ff.

<sup>(77)</sup> DT's observations on the Statement of Objections, 29 July 2002, pp. 32 ff.

<sup>(78)</sup> Court of Justice in Joined Cases C-359/95 and C-379/95 *P Commission and France v Ladbroke Racing* [1997] ECR I-6225, paragraph 34, with further references; Court of First Instance in Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-296, paragraph 130; Court of First Instance in Case T-513/93 *Consiglio Nazionale degli Spedizionieri Doganali* [2000] II-1807, paragraphs 59 et seq.

most notably internal market measures. The Commission had this to say: 'In the telecommunications sector, the ONP Directives aim at establishing a regulatory regime for access agreements. Given the detailed nature of ONP rules and the fact that they may go beyond the requirements of Article 86 (now Article 82), undertakings operating in the telecommunications sector should be aware that compliance with the Community competition rules does not absolve them of their duty to abide by obligations imposed in the ONP context, and vice versa' <sup>(79)</sup>.

on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services <sup>(81)</sup>, Markets in access are to be distinguished from markets in the services provided to end-users over the networks, such as telephone call services for example.

(56) The notice goes on: 'Articles 85 and 86 of the Treaty (now Articles 81 and 82) apply in the normal manner to agreements or practices which have been approved or authorised by a national authority, or where the national authority has required the inclusion of terms in an agreement at the request of one or more of the parties involved' <sup>(80)</sup>.

(57) This decision concerns abuse by DT in the form of a margin squeeze generated by a disproportion between wholesale charges and retail charges for access to the local network. The charges in both cases are subject to sector-specific regulation (see recitals 17 et seq. and 31 et seq.), but DT has a commercial discretion which would allow it to restructure its tariffs further so as to reduce or indeed to put an end to the margin squeeze (see recital 163 et seq.). The margin squeeze therefore constitutes the imposition of unfair selling prices within the meaning Article 82(a) of the Treaty.

#### B. DOMINANT POSITION

(58) DT enjoys a dominant position on the German markets in access to local fixed networks, both wholesale and retail; in the case of retail access, the market has to be further divided into narrowband and broadband access. DT does not dispute this definition of the markets, nor the fact that it has a dominant position on the markets thus defined.

##### (a) RELEVANT PRODUCT OR SERVICE MARKETS

(59) The relevant product or service markets are markets in the provision of local access to fixed telecommunications networks. According to the Commission guidelines

(60) As a result of the liberalisation of voice telephony services in Germany, a number of competitors have entered the market in recent years and now offer telephone services to end-users. The service offerings of new entrants have developed quickly, particularly for international calls, and to a lesser extent also for domestic long-distance and local calls. Given the high cost of building an alternative local access infrastructure, and the resulting dependence of the new entrants on the service offerings of the incumbent, competitors provide a far smaller proportion of access services to end-users in Germany. Whilst DT's share of the market in international and domestic long-distance call markets has fallen substantially, DT still delivers the bulk of local calls and of access services to end-users. Thus competition between new entrants and the incumbent operator continues to be concentrated on business customers and urban areas.

(61) Two separate markets in access to the local network have to be distinguished: the wholesale market, which is the upstream market in local network access offered by infrastructure owners to their competitors, and the retail market, which is the downstream market in access services offered by telecommunications operators to their own end-users <sup>(82)</sup>.

(62) The two markets, in wholesale and retail access, are closely linked to each other. Infrastructure owners provide access services both to their end-users, either directly or through an associated undertaking, and to other operators who have no networks of their own or whose networks are geographically restricted. These competing operators need network access as an input to their business, in order to be able to offer access and services to their own end-users.

<sup>(81)</sup> OJ C 165, 11.7.2002, p. 6, paragraph 65.

<sup>(82)</sup> Commission decision in *Telia/Telenor*, OJ L 40, 9.2.2001, p. 1, recital 79 et seq.; Commission decision in *Cégétel + 4*, OJ L 218, 18.8.1999, p. 14, recital 22; Commission guidelines (see footnote 81), paragraph 64.

<sup>(79)</sup> OJ C 265, 22.8.1998, p. 2, paragraph 22.

<sup>(80)</sup> *Ibid.*, paragraph 60, which refers to the Commission decision of 15 December 1982, AROW/BNIC (OJ L 379, 31.12.1982, p. 19).

- (63) According to the guidelines mentioned in recital 59, on the retail access market a further segmentation has to be made between narrowband access over analogue copper lines and ISDN lines, on the one hand (see recital 74 et seq.), and broadband access to local loops for high-speed data transfer, such as ADSL, on the other (recital 78 et seq.)<sup>(83)</sup>. This additional segmentation does not apply to wholesale markets, because so far it is only to a very limited extent that DT offers its competitors narrowband and broadband wholesale access separately (recital 64 et seq.).

(aa) **Upstream market in wholesale access**

- (64) The local loop can be rented to competitors as an input to their business. In Germany local loop unbundling now requires the incumbent operator to allow access to its network, and since the beginning of 1998, a new market in wholesale local network access has developed, upstream from the retail access market. So far DT has concluded about 100 local loop transfer contracts with other providers. The competitor pays DT a charge for this wholesale service.
- (65) None of the other owners of local telecommunications access infrastructure, such as local authorities and regional carriers, some of which are among the complainants in the present proceedings, has yet been able to build up local networks equivalent to those of DT. They have established local access networks only in geographically restricted areas, mainly in and around individual towns and cities. From the point of view of competitors seeking entry to the German market, the density of DT's fixed network, together with the technological facilities it offers, make wholesale access to that network the only commercially viable option.

- (66) According to the provisions of Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard ensuring universal service and interoperability through application of the principles of open network provision (ONP) and Directive 98/61/EC of the European Parliament and of the Council of 24 September 1998 amending Directive 97/33/EC with regard to

operator number portability and carrier pre-selection, telephone users must have the possibility, while maintaining their basic subscription with the original operator, to switch to another operator either with each individual telephone call (carrier selection) or for all calls (carrier preselection)<sup>(84)</sup>. Carrier selection and carrier preselection do not give competitors access to comparable infrastructure, because they enable them only to provide narrowband services. Furthermore, carrier selection and preselection were so far possible in Germany only for long-distance calls, for which there is now some degree of competition, but not for local calls, contrary to the obligations laid down in the Community directives on open network provision<sup>(85)</sup>. Economically, carrier selection and preselection differ from local network access in that selection and preselection charges are based on the duration of calls, whereas for local network access there are one-off and monthly charges.

- (67) The wholesale local access market cannot at present be further subdivided into narrowband and broadband services. Until recently DT granted local network access only for the entire bandwidth spectrum, so that competitors at the wholesale level had to rent all bandwidths in the local loop; they then freely decided whether they wanted to offer end-users narrowband or broadband services or both. A division between bandwidths has been possible only since DT at the end of 2001 concluded an agreement with a competitor, QSC AG, providing for line sharing, and the regulatory authority determined the charges for line sharing on 15 March 2002. So far only three line-sharing agreements have been concluded<sup>(86)</sup>. Thus in practice line sharing is not yet used to an extent sufficient to make it a separate wholesale access market in Germany.

(bb) **Downstream markets in retail access**

- (68) Local loops are primarily a form of infrastructure that allows access to and the delivery of retail telecommunications services. In Germany, interconnection and carrier selection and preselection have produced an opening to competition only on the long-distance and international

<sup>(83)</sup> Commission Guidelines (see footnote 81), paragraph 65.

<sup>(84)</sup> OJ L 199, 26.7.1997, p. 32 and OJ L 268 3.10.1998, p. 37.

<sup>(85)</sup> These new services were only introduced on 25 April 2003 (press release by RegTP of 21 February 2003) after infringement proceedings brought by the Commission against Germany.

<sup>(86)</sup> Eighth report from the Commission on the implementation of the telecommunications regulatory package (COM(2002) 695 final, 3.12.2001), Annex 1, p. 55.

calls markets; indeed despite an amendment to the Act on 1 December 2002 carrier selection and preselection until recently did not allow alternative operators to deliver local call services (call origination).

(69) Local networks are therefore the key infrastructure for providing local access services to end-users, that is to say the initial connection and long-term rental of local loops, and for local telephone calls. Local networks remain largely within the control of the respective network owner.

(70) The provision of access for end-users to the local loop and the provision of services delivered to end-users over the local loop form two separate relevant markets, in services which are not substitutable. On the demand side, customers are not in a position to switch from one market to the other, either because of an increase in price or for any other reason: they cannot replace retail network access by retail services, because the two products do not perform the same functions. The price structures of access and services are also very different. Access prices have remained relatively stable since local loop unbundling was made mandatory in Germany, but the prices of telephone services have fallen substantially. Access and services markets are different on the supply side too, because given the different functions the mere fact that new entrants provide telecommunications services will not under any foreseeable circumstances put them in a position to compete with DT in the provision of local access.

(71) The finding that a separate access market exists is in accordance with the practice followed by the Commission in its decisions<sup>(87)</sup> and with Commission Directive 96/19/EC<sup>(88)</sup> amending Directive 90/388/EEC of 28 June 1990 with regard to the implementation of full competition in telecommunications markets<sup>(89)</sup>, in which the Commission distinguishes the following fixed telephony retail services: the initial connection of a local loop, the monthly line rental, local calls, regional calls and long-distance calls.

(72) In the same vein, in its communication, 'Unbundled access to the local loop: enabling the competitive provision of a full range of electronic communication services, including broadband multimedia and high-speed Internet'<sup>(90)</sup> the Commission stated that network access and individual services delivered over the network were not currently substitutable for one another, and would therefore be considered as forming different relevant markets.

(73) The further segmentation of the retail access market into one market for narrowband services and another for broadband services is based on the finding that those are the two main categories of retail services offered over the local loop, with different features from the point of view both of demand and of supply.

### 1. Narrowband access services

(74) Narrowband access services to end-users form a market separate from the market in broadband access services. In Germany, the market in narrowband access services is already extensively developed and mature, with a number of alternative operators in place offering similar services over their own networks. Most of the new entrants in Germany offer local or regional access services, and have already secured a substantial number of end-users in the areas in which they operate; as well as the traditional analogue connections, most of them offer their customers ISDN connections too.

(75) Narrowband access services include access to analogue lines as well as to traditional digital lines (ISDN) offering bi-directional transmission capacities up to 64 kilobits per second (kbit/s). Such capacities are sufficient for transmitting voice communications, but too limited for the large volumes of data in video files for example. Internet access is possible over narrowband lines, but only in the form of dial-up access with metered tariffs, no flat-rate offer for narrowband Internet access being currently available.

(76) Narrowband access services are usually offered to residential customers who make no demands or only limited demands on Internet access in terms of transmission quality, quantity, and speed. These services are less suitable for business customers, and are not offered to them to any appreciable extent. Their prices are therefore significantly lower than those for broadband access services.

(77) A growing number of end-users are having their connections upgraded from analogue or ISDN lines to broadband ADSL lines in order to improve the speed and quality of transfer. But the contrary form of consumer behaviour, a downgrading from broadband to narrowband connections, does not occur to any appreciable extent, so that substitutability between the two categories of service can be said to be one-way.

<sup>(87)</sup> Commission guidelines (see footnote 81), with further references.

<sup>(88)</sup> OJ L 192, 24.7.1990, p. 10.

<sup>(89)</sup> OJ L 74, 22.3.1996, p. 13, recital 20.

<sup>(90)</sup> OJ C 272, 23.9.2000, p. 55,

## 2. Broadband access services

- (78) Broadband retail access services, delivered in the form of ADSL connections over the local network or via other access technologies, allow high-speed communication to be provided, and form a market separate from the market in narrowband retail access services. ADSL services are network access services provided over an asymmetrical digital subscriber line, with transmission capacities of 128 kbit/s upstream (from the user to the outside world) and of 512 kbit/s downstream (from outside to the user). Some services, such as video on demand, can be provided to a satisfactory quality only over broadband connections <sup>(91)</sup>.
- (79) Intensive Internet users with high demands in terms of transmission capacity, quality, security, and speed, and who also attach importance to permanent connectivity, for the most part make use of ADSL services. The special demand structure for broadband connections, as compared with narrowband, also derives from flat-rate pricing, which for intensive Internet users of this kind is cheaper than the traditional charges for metered connections. The only comparable alternative access technology available to residential customers in Germany is cable, but cable is available only in very restricted geographic areas.
- (80) Business customers likewise for the most part want ADSL broadband services. But for these customers, fibre-optic networks, leased lines, wireless local loops and satellite connections are also attractive options, because although their costs are higher they are better adapted in certain cases to business customers' particular requirements.
- (81) This end-user access market is therefore confined to ADSL broadband access services provided to residential customers. In contrast to the market in narrowband access services, this market has grown very unevenly in Germany. In particular, it has developed later <sup>(92)</sup>.
- (82) Narrowband and broadband markets need to be clearly distinguished on the supply side too. An operator wishing to convert from narrowband to broadband access services must be prepared to incur substantial additional costs. Along with heavy investment in plant,

most notably for special terminal equipment such as digital subscriber line access multiplexers or DSLAMs, substantial spending on marketing and advertising will be needed in order to secure customers for these new services.

### (b) LACK OF ALTERNATIVE INFRASTRUCTURE

- (83) DT's local networks are not the only technical infrastructure allowing access services to be provided to other operators or to end-users. The main conceivable alternatives to the local networks on all three of the relevant markets described above are fibre-optic networks, wireless local loops, satellites and upgraded cable TV networks. However, none of these alternatives can yet be considered equivalent to the local network in Germany, because they are not sufficiently developed in order to be substitutable. DT currently has about 19 000 broadband Internet connections to end-users working on the basis of alternative technologies, and its competitors about 86 000 <sup>(93)</sup>.
- (84) Fibre-optic networks are currently competitive only on upstream interfaces, and in the retail distribution network in special niches, such as networks connecting office buildings or in narrowly defined geographical areas.
- (85) Local network access via wireless local loops will in the short and medium term most probably be useful to professional clients and small firms, or meet the particular requirements of individual residential customers; for the great majority of residential customers wireless local loops are likely to remain uneconomical.
- (86) Satellites are an alternative mainly for commercial users. At present there are few offers of bi-directional services (send and receive by satellite), which would make satellites completely independent of the local networks. The necessary reservation of bandwidth on satellite transponders and the need to build additional plant in bi-directional ground stations make satellite communication very expensive, and practically out of the question for residential use. For this reason satellite operators have not yet succeeded in penetrating the market in public telecommunications services.

<sup>(91)</sup> The regulatory authority has accepted that DSL broadband access services form a separate market: decision of 30 March 2001, division 3, file reference BK 3b-00/032, p. 26.

<sup>(92)</sup> The market in retail access to broadband services does not include high-speed Internet-access services, which are provided not by DT itself but by its subsidiary T-Online.

<sup>(93)</sup> Eighth report from the Commission (see footnote 86), Annex 1, fig. 63, and report on Germany, p. 30.

(87) Cable networks were designed for one-way television transmission, and require costly and time-consuming upgrades for the provision of two-way telecommunication services. This has so far been done in only two of the nine German 'cable regions', namely in Hessen (where the provider is named 'iesy') and in North Rhine-Westphalia (where the provider, named 'ish', has since been declared insolvent), with a total of 30 000 households connected<sup>(94)</sup>. In the remaining seven regions, the television cable so far remains entirely unused for telecommunication services<sup>(95)</sup>.

(88) On the supply side, broadband cable services are not a substitute for ADSL access services, because the cable distribution network is still extremely fragmented. The network is divided into four hierarchical levels. The lowest level, level-4, comprises the connection between the last relay point in the network and the private household. There are over 100 commercial level-4 operators active in Germany at present, so that an Internet service provider would have to conclude a great number of distribution agreements with these operators in order to achieve a coverage comparable to that of DT's network.

(89) Other innovative technologies, such as the use of electric power networks, are not yet technically or economically mature or reliable enough to be an alternative to DT's local network. The provision of telephone services over existing power lines is still being tested, and is not yet ready to be offered to the public on a commercial basis. Currently only 2 000 households in Germany have broadband Internet access over power lines, provided by three different providers<sup>(96)</sup>.

(90) While the situation may change over time, these alternative networks, alone or in combination, cannot at present be regarded as alternatives to DT's copper pair network for the provision of narrowband and broadband telecommunications services to end-users in Germany.

<sup>(94)</sup> Regulatory authority annual report for 2001, p. 15.

<sup>(95)</sup> DT proposed selling all of its cable network in six German cable regions to Liberty Media, but that transaction was prohibited by the Federal Cartels Office (Bundeskartellamt) on 25 February 2002. On 29 January 2003 DT announced the sale of the remainder of the cable network to a consortium grouped around the investment bank Goldman Sachs; but this does not fundamentally change the situation, as it is still impossible to see when and in what way the cable network may be put to use in interactive communications services.

<sup>(96)</sup> Regulatory authority annual report for 2001, p. 16.

(91) The relevant product or service markets for purposes of this decision, therefore, are the market in local network access for competitors at the wholesale level, and the markets in access to narrowband and broadband connections at the retail level.

#### (c) RELEVANT GEOGRAPHIC MARKET

(92) The relevant geographic market is the German market, because the local network to which access is sought at wholesale and at retail level extends only over the territory of Germany.

(93) DT's local networks were developed countrywide. Competitors have been given licences by the national authorities, and can be expected to compete on national markets. In those cases where their licences to operate their own networks are restricted to specified parts of Germany, access to DT's local networks is indispensable in order to provide communication with the whole of the country. Access to the local networks is also important to those operators who have not got a network of their own and depend entirely on the incumbent's network.

(94) The bottlenecks in access, local calls and high-speed services do not prevent new competitors from developing local networks in more restricted areas, in densely populated urban areas for example. But as a rule these networks do not enable them to compete on an equal footing across the country with DT.

(95) The geographic market in which competition would take place if there were no bottlenecks is the whole of Germany.

#### (d) DT'S DOMINANT POSITION

(96) DT holds a dominant position on all the relevant markets, namely the wholesale market in access services for competitors and the retail markets in narrowband and broadband access services for residential and business customers.

(aa) **Wholesale access**

while its competitors had 86 000 customers with cable connections <sup>(100)</sup>.

- (97) As regards the provision of wholesale access services, DT is the only German telephone network operator having local networks with countrywide retail coverage. DT grants access to this network to its competitors on a wholesale basis. At present there is no economic alternative to DT's local networks, and it can therefore be accepted that since unbundling began in 1998 DT has had a 100 % share of the market in wholesale access for narrowband and broadband services.

(bb) **Narrowband retail access**

- (98) At the end of 2002 there were about 53,72 million telephone channels in Germany. Of these DT possessed 51,37 million analogue and ISDN channels, while DT's 64 competitors possessed a total of 2,35 million such channels, either in their own networks or on the basis of contracts for unbundled access to the local loop. DT's share of the market in narrowband retail access was therefore 95,6 %. In 2001 its share of this market was 97 %; in 2000 98,3 %; in 1999 99,2 %; and in 1998 99,7 % <sup>(97)</sup>.

(cc) **Broadband retail access**

- (99) The situation on the German market in broadband access services is comparable with that on the narrowband access market. DT has been offering ADSL services (T-DSL) as a mass product only since August 2000, and in October 2002 already had 2 580 000 customers, whereas its 34 competitors together, including Arcor, QSC and Freenet, had no more than 161 000 DSL connections <sup>(98)</sup>. This gives DT a market share of about 94 % of DSL connections <sup>(99)</sup>.

- (100) Even if the alternative broadband access technologies are included, DT still has a market share of 90 %. In October 2002, DT had 19 000 customers connected by optical fibre, wireless local loop, satellite or leased line,

(dd) **Potential competition**

- (101) Given the size of the investment required, the cost to a competitor of building a network reaching as large a proportion of the population as DT's existing local networks is a barrier to entry. The building of a comparable infrastructure is uneconomic using existing technologies, and to extend one over the whole country will remain difficult for the foreseeable future. This prevents competitors from competing with DT on an equal footing, and confines them to building networks of their own covering regional or local markets only. It is highly improbable that the alternative networks taken together will be able to match DT's countrywide local networks and reach a comparable clientele within the foreseeable future.

## C. THE ABUSE

## (a) MARGIN SQUEEZE

- (102) A margin squeeze exists if the charges to be paid to DT for wholesale access, taking monthly charges and one-off charges together, are so expensive that competitors are forced to charge their end-users prices higher than the prices DT charges its own end-users for similar services. If wholesale charges are higher than retail charges, DT's competitors, even if they are at least as efficient as DT, can never make a profit, because on top of the wholesale charges they pay to DT they also have other costs such as marketing, billing, debt collection, etc.
- (103) If DT charges its competitors prices for wholesale access to the local loop that are higher than its own prices for retail local network access, it prevents its competitors from offering access via the local loop in addition to call services. If a competitor might be interested in ordering unbundled local loops in order to offer access services to its customers, DT forces it to offset its losses on access services out of higher revenue on telephone calls, as DT itself does. But in recent years call charges have fallen substantially in Germany <sup>(101)</sup>, so that competitors often have no realistic possibility of offsetting one price against another.

<sup>(97)</sup> Regulatory authority annual report for 2002, p. 18; see also eighth report (footnote 86), p. 28; of DT's total 39 million local loops, only 855 000 lines were unbundled until the end of 2002.

<sup>(98)</sup> Eighth report (see footnote 86), p. 32.

<sup>(99)</sup> This also explains the [...] % share of the market in Internet access services to end-users in Germany held by T-Online, a wholly owned subsidiary of DT.

<sup>(100)</sup> Eighth report (footnote 86), p. 32.

<sup>(101)</sup> Regulatory authority annual report for 2001, p. 18.

(104) DT takes the view that there cannot be abusive pricing in the form of a margin squeeze in the present case, because wholesale charges are imposed by the regulatory authority<sup>(102)</sup>. A margin squeeze, DT contends, must be the result of excessive wholesale prices or insufficient retail prices, or a combination of the two, and it must be legally possible to end the situation by varying either of them. But the wholesale price is fixed by the regulatory authority, so that DT controls only the retail charges, and those are subject to review only for compatibility with the principles of abusive below-cost selling or predation<sup>(103)</sup>.

(105) Contrary to DT's view, however, the margin squeeze is a form of abuse that is relevant to this case. On related markets on which competitors buy wholesale services from the established operator, and depend on the established operator in order to compete on a downstream product or service market, there can very well be a margin squeeze between regulated wholesale and retail prices. To show that there is a margin squeeze it is sufficient that there should be a disproportion between the two charges such that competition is restricted. Of course it has also to be shown that the undertaking subject to price regulation has the commercial discretion to avoid or end the margin squeeze on its own initiative. If it has that discretion, as it has in the present case (see recital 163 et seq.), the question which prices the undertaking can change without the intervention of the State is relevant only for purposes of the choice of remedies to bring the margin squeeze to an end.

#### (b) METHODOLOGY OF THE MARGIN SQUEEZE TEST

(106) The Commission's practice in previous decisions has been to hold that there is an abuse of a dominant position where the wholesale prices that an integrated dominant undertaking charges for services provided to its competitors on an upstream market and the prices it

itself charges end-users on a downstream market are in a proportion such that competition on the wholesale or retail market is restricted<sup>(104)</sup>.

(107) In the case of the local network access at issue here, there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market.

(108) In such a situation, anticompetitive pressure is exerted on competitors' trading margins, which are non-existent or too narrow to enable them to compete with the established operator on retail access markets. An insufficient spread between a vertically integrated dominant operator's wholesale and retail charges constitutes anticompetitive conduct especially where other providers are excluded from competition on the downstream market even if they are at least as efficient as the established operator<sup>(105)</sup>.

(109) In order to establish the existence of a margin squeeze it is essential that the wholesale and retail access services be comparable. The established operator and its competitors as a rule provide retail services of all kinds. It has therefore to be considered whether the established operator's retail and wholesale services are comparable, in the sense that their technical features are the same or at least similar and that they allow the same or at least similar services to be provided<sup>(106)</sup>.

(110) The wholesale charges for unbundled access to local loops can indeed be compared with retail access charges. Wholesale access enables competitors to offer their end-users a range of retail access services (ISDN and ADSL) which goes beyond the basic analogue access.

<sup>(102)</sup> DT's observations on the Statement of Objections, 29 July 2002, p. 82.

<sup>(103)</sup> Annex DT St 5 (Lexecon opinion), point 33 et seq.

<sup>(104)</sup> Decision 88/518/EEC (Napier Brown — British Sugar) (OJ L 284, 19.10.1988, p. 41), recital 66.

<sup>(105)</sup> Access notice (see footnote 79), paragraphs 118 and 119.

<sup>(106)</sup> ONP Committee document ONPCOM 01-17, 25.6.2001.

(111) In order to compare wholesale and retail services, this decision uses a weighted approach to prices and costs. All forms of retail access (analogue, ISDN and ADSL) are aggregated on the basis of the number of each variant that the established operator has marketed to its own end-users (see recitals 112 to 137). The comparable wholesale and retail services are found to be fully unbundled local loop access and retail access in all its variants, i.e. analogue, ISDN and ADSL. If the average retail prices are below the level of the wholesale charges, it can be concluded that there is a margin squeeze. The established operator's product-specific costs for providing its own retail services (see recitals 138 and 139) need to be considered only if the average retail prices are above the level of the wholesale charges. In that case there is a margin squeeze if the product-specific costs exceed the positive spread between the retail prices and the wholesale prices.

(aa) **Weighting of retail prices**

(112) With full access to DT's local loops, competitors are enabled to offer their end-users on the downstream market a range of different retail services, namely analogue narrowband access, digital narrowband access (ISDN), and broadband access in the form of ADSL services.

(113) In the present case, a single wholesale service (local loop access) has to be compared to a plurality of different retail services (access to analogue, ISDN and ADSL connections). The easiest way to ensure comparability between the different access services at wholesale and retail level is to set a different wholesale charge for each retail service, determining the wholesale charge by subtracting a reasonable margin from the comparable retail charge (the retail-minus approach) <sup>(107)</sup>. Such differentiated wholesale tariffs do not exist in Germany: in setting the monthly charge for local loop rental, the regulatory authority has applied a single wholesale tariff, irrespective of the downstream service the competitor provides over the line.

(114) In the case of fully unbundled local loops, DT rents copper pairs to its competitors for their exclusive use.

The competitors have unrestricted control of the customer relationship for the provision of a full range of telecommunications access services over the local loop, including the establishment of ADSL digital connections for high-speed data applications. In such a situation, DT must be considered as imposing an abusive margin squeeze upon its competitors if the charge for full unbundling, allocated as an input cost between the various retail access services which wholesale access makes possible, together with the specific downstream costs, does not allow competitors to offer their own retail access services without suffering a loss.

(115) The tariffs to be taken into account for the comparison of wholesale and retail access services therefore must cover the full range of retail access services which competitors can offer. These tariffs are on the one hand the tariffs for full unbundling of an analogue copper pair (wholesale access service) and on the other the tariffs for a straightforward telephone line, ISDN, and ADSL (retail access service). Extending the comparison of tariffs beyond the straightforward analogue line takes due account of the fact that wholesale access to the local loop allows competitors to offer their customers a range of retail access services wider than the simple analogue subscription.

(116) In order to determine DT's total revenue from retail access services, the individual services have to be weighted. An average price has to be calculated for all retail access services, taking account of the number of each variant of retail access service actually marketed by DT and the respective prices of those lines.

(117) DT contends that it is not right to compare wholesale access charges and retail access charges by this method. The decisive consideration, according to DT, is the point of view of the end-user, and seen from that point of view access to the local network and the calls carried on that network form a single bundle of products. For competitors, access to the local loop is only a necessary prerequisite for the provision of further telecommunications services, and so revenue from those telecommunications services, and especially from telephone calls,

<sup>(107)</sup> This is currently done in Belgium, Italy, Luxembourg, the Netherlands, Portugal, Finland (two different monthly wholesale fees, for analogue+ISDN and ADSL), and in Sweden and Norway (three different monthly wholesale fees, for analogue, ISDN and ADSL); see ONP Committee working paper ONPCOM 01-27 REV2, 18.2.2002.

must be included in the calculation of DT's revenue on the retail side. DT argues that it takes account of this aspect by offsetting revenues to arrive at its retail charges. In DT's view the wholesale costs for the local loop are overheads both for the provision of retail access and for telephone calls, so that any attempt to allocate costs to individual services in order to investigate the possibility of below-cost selling makes no economic sense and is consequently arbitrary <sup>(108)</sup>.

(118) DT further contends that the comparison between the two charges is incomplete, because the calculation of the average retail price takes no account of the optional tariffs and DT's various ISDN tariff variants <sup>(109)</sup>. Lastly, the margin squeeze test applied by the Commission groups all regions and categories of customer together, which renders it unsuitable for assessing the overall scope for market entry by competitors <sup>(110)</sup>.

(119) Contrary to the view taken by DT, however, revenue from telephone calls should not be included in the calculation of the margin squeeze. This is clear both from the requirements imposed by the Community directives and from economic considerations.

(120) Separate consideration of access charges and call charges is in fact required by the Community-law principle of tariff rebalancing. For purposes of cost-oriented pricing, access to local network lines and the offer of different categories of call are clearly separate services.

(121) Article 4c(3) of Directive 90/388/EEC on competition in the markets for telecommunications services, as amended by Directive 96/19/EC (see recital 71) with regard to the implementation of full competition in telecommunications markets, states that: 'Member States shall allow their telecommunications organisations to rebalance tariffs taking account of specific market conditions and of the need to ensure the affordability of a universal service, and, in particular, Member States shall allow them to adapt current rates which are not in line with costs and which increase the burden of universal service provision, in order to achieve tariffs based on real costs.'

(122) The reasoning behind this provision is explained in recital 20 to Directive 96/19/EC. It says: 'As regards the cost structure of voice telephony, a distinction must be

made between the initial connection, the monthly rental, local calls, regional calls and long distance calls. The tariff structure of voice telephony provided by the telecommunications organisations in certain Member States is currently still out of line with cost. Certain categories of calls are provided at a loss and are cross-subsidised out of the profits from other categories. Artificially low prices, however, impede competition since potential competitors have no incentive to enter into the relevant segment of the voice telephony market ... Member States should phase out as rapidly as possible all unjustified restrictions on tariff rebalancing by the telecommunications organisations.'

(123) The concept of tariff rebalancing was clarified by the Commission in its Decisions on requests by Ireland <sup>(111)</sup>, Portugal <sup>(112)</sup>, Luxembourg <sup>(113)</sup>, Spain <sup>(114)</sup> and Greece <sup>(115)</sup> for additional time to implement the Directives. The Commission said therein: 'cost orientation of tariffs means as a general rule that prices are adjusted such that revenues are rebalanced with costs, i.e.:

— connection and rental revenues cover fixed costs (plus a standard margin),

— local call revenues cover local call costs (plus a standard margin),

— trunk call revenues cover trunk calls (plus a standard margin),

— international call revenues cover international call costs (plus a standard margin).

Consequently telecommunications organisations must raise bi-monthly rental and local calls (or at least not decrease these charges) and reduce tariffs for long distance calls.'

(124) Article 17(2) of Directive 98/10/EC of the European Parliament and the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment <sup>(116)</sup> states: 'Tariffs for use of the fixed public telephone network and fixed public telephone services shall follow the basic principles of cost orientation set out in Annex II to Directive 90/387/EEC.'

<sup>(108)</sup> DT's observations on the Statement of Objections, 29 July 2002, p. 74 et seq., and especially Annex DT St 5 (Lexecon opinion), points 19 et seq.

<sup>(109)</sup> DT's observations on the Statement of Objections, 29 July 2002, p. 78 et seq.

<sup>(110)</sup> DT's observations on the Statement of Objections, 29 July 2002, p. 80 et seq.

<sup>(111)</sup> OJ L 41, 12.2.1997, p. 8, point 24.

<sup>(112)</sup> OJ L 133, 24.5.1997, p. 19, point 30.

<sup>(113)</sup> OJ L 234, 26.8.1997, p. 7, point 16.

<sup>(114)</sup> OJ L 243, 5.9.1997, p. 48, point 13.

<sup>(115)</sup> OJ L 245, 9.9.1997, p. 6, point 41.

<sup>(116)</sup> OJ L 101, 1.4.1998, p. 24.

(125) Annex II to Directive 90/387/EEC of the Council of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision<sup>(117)</sup>, as amended by Directive 97/51/EC<sup>(118)</sup>, states: 'tariffs must be based on objective criteria and, until such time as competition becomes effective in keeping down prices for users, must in principle be cost oriented, on the understanding that the fixing of the actual tariff level will continue to be the province of national legislation and is not the subject of open network provision conditions ... in order to leave users a choice between the individual service elements and where technology so permits, tariffs must be sufficiently unbundled in accordance with the competition rules of the Treaty. In particular, additional features introduced to provide certain specific extra services must, as a general rule, be charged independently of the inclusive features and transportation as such ... tariffs must be non-discriminatory and guarantee equality of treatment, except for restrictions which are compatible with Community law. Any charge for access to network resources or services must comply with the principles set out above and with the competition rules of the Treaty and must also take into account the principle of fair-sharing in the global cost of the resources used, the need for a reasonable level of return on investment and, where appropriate, the financing of universal service in accordance with the interconnection Directive.'

(126) But on economic grounds too it is reasonable and legitimate to apply the margin squeeze test by looking at DT's revenue from access charges in isolation, and to exclude revenue from call traffic. When the margin squeeze test is applied to the case, the question is not how costs should be allocated in order to establish whether or not the costs of an individual service are being covered; if that were the objective, the revenue from call charges might indeed be relevant. The margin squeeze test seeks to compare charges for two particular services at different commercial levels. The comparison would be distorted if revenue from call traffic were to be included, because call services, which are additional to access services, cannot also be included in the calculation on the wholesale side. The question of cost allocation and cost cover will become relevant only at a second stage, if it is found that there is a positive margin between retail prices and wholesale prices. But there too a comparison between the two levels can be made without including telephone calls, provided both the spread between charges and the product-specific costs are treated the same way.

(127) The method used to determine whether there is a margin squeeze in this case is based on the principle that the established operator's tariff structure must

enable competitors to compete with that operator effectively, and at least to replicate the established operator's customer pattern. It must not be assumed that the competitors' customer structure and range of services will necessarily be more profitable than those of the incumbent. The primary consideration here is the effect on market entry by competitors, and not the question whether the end-user regards access services and calls as a single bundle of products

(128) Thus DT cannot invoke a calculation offsetting access and call charges against one another in order to challenge the admissibility of the comparison method. It cannot be assumed that all competitors have the same revenue structure as the established operator, and thus the same scope for offsetting one source of revenue against another. Nor should revenue from interconnection (for call termination, for example) be included in the calculation of the margin squeeze, because in accordance with Directive 97/33/EC on interconnection<sup>(119)</sup> it is required to be cost-oriented, so that with the exception of the permissible return on capital it has only an insignificant impact on the net revenue of the local access network operator.

(129) There is still a revenue shortfall on connections in Germany, and the use of call charges to finance that shortfall has been facilitated by the fact that competition in the local network continues to be very limited. For that reason the regulatory authority takes the view that more cost-oriented pricing is needed at the local level, and can be expected to result from the introduction of carrier selection and carrier preselection for local calls<sup>(120)</sup>. Similarly, DT itself, applying for authorisation of charges on 31 October 2002, invoked the organisational necessity of further rebalancing of access and call charges in order to justify the increase in the basic charge it was applying for<sup>(121)</sup>.

(130) Contrary to the view taken by DT, the higher monthly retail charges applying under the optional tariffs should not be included in the calculation of the margin squeeze

<sup>(119)</sup> See footnote 84.

<sup>(120)</sup> Decision of 21 December 2001, file reference BK2c 01/009; publication reference *Amtsblatt (RegTP)* 2/2002, 6.2.2002, p. 14.

<sup>(121)</sup> DT's letter of 13 November 2002.

<sup>(117)</sup> OJ L 192, 24.7.1990, p. 1.

<sup>(118)</sup> OJ L 295, 29.10.1997, p. 23.

either, even if the optional tariffs are increasingly being requested by DT's private customers too<sup>(122)</sup>. An increase of this kind in the monthly charges does not reflect any increased value of the line connected, which might be the case if there were technical improvements, for example, or if more sophisticated services were made available. The options tariffs are merely a method by which DT offers its end-users the possibility of paying a higher monthly charge in order to enjoy lower call charges<sup>(123)</sup>.

- (131) The optional tariffs represent a bundled offer of access and call services. But for competitors wishing to enter the market in retail access, the decisive consideration is the margin left them between the wholesale and retail charges applied under DT's standard tariffs. The increased access charges in DT's optional tariffs are a component in a contractual formula that offsets access charges and call charges; they cannot be calculated separately. Given their more limited financial resources, competitors are not usually able to do the same thing. This also makes it impossible to allocate costs to the individual components in the service offered, which is why the regulatory authority decided with effect from 1 January 2002 to take the optional tariffs out of the price cap mechanism and in future to regulate them by individual authorisation<sup>(124)</sup>.

- (132) DT also argues that the margin squeeze test is incorrect because it includes all regions and categories of customer alike, without further differentiation<sup>(125)</sup>; this argument too must be rejected. The approach taken is in line with the principle that there should be equal and effective competition throughout the country<sup>(126)</sup>. It cannot be supposed that all of DT's competitors compete with the established operator only in a defined region, and want to deal only with customers in the most attractive market segment, in big cities or urban areas for example. Some competitors, such as Arcor, do intend to compete with DT on a countrywide basis, but have so far been considerably hindered in their efforts to do so by the pricing policy applied by DT. And no

distinction is made here between residential and business customers, either at wholesale or retail level, because no sufficiently precise demarcation between them is possible.

- (133) DT argues that its competitors are not interested in connecting and serving analogue customers, but instead target only ISDN and ADSL users<sup>(127)</sup>; this argument too must be rejected, especially if it can be shown that there would be a margin squeeze even on the supposition that the competitors were using every unbundled customer line for the highest-value services, such as ADSL services provided over ISDN lines. On that assumption there was in fact always a margin squeeze under DT's local network access tariff structure from the entry into force of the unbundling obligation in Germany at the beginning of 1998 at least until the tariff changes on 1 May 2002<sup>(128)</sup>.

- (134) Competitors have aimed to win over subscribers on the basis of their specific needs, and to offer them services of all kinds. Digital broadband may indeed be the most profitable, or at least the most promising, of the markets to which access is being offered via the local loop, but it is not the only market competitors would like to enter. Apart from a few operators who have specialised from the outset in DSL services to frequent users and business customers, most competitors have tried to gain customers not only for digital broadband connections, but for analogue and ISDN connections too<sup>(129)</sup>.

- (135) In adopting this business strategy, since 1998, when unbundling was made mandatory, the competitors' main objective has been to enter the mass market of telephone customers with analogue lines. In 1998, the great majority of subscribers in Germany were still connected by analogue lines. Digital ISDN lines accounted for only a small percentage, and ADSL-upgraded lines started to be offered commercially only in July 1999. In April 2001 analogue lines still accounted for 75 % of all lines in Germany, and the competitors had a share of only 0,5 % of that market<sup>(130)</sup>.

<sup>(122)</sup> DT's observations on the Statement of Objections, 29 July 2002, p. 78.

<sup>(123)</sup> Even if we were to follow the modelling in Annex 10 to DT's observations of 29 July 2002 on the Statement of Objections, which according to DT increases the average retail price by EUR 1 per connection, there would currently still be a margin squeeze; see recital 160, Table 12.

<sup>(124)</sup> Decision of 21 December 2001, file reference BK2c 01/009, publication reference *Amtsblatt (RegTP)* 2/2001, 6.2.2002, p. 15.

<sup>(125)</sup> DT's observations on the Statement of Objections, 29 July 2002, p. 80.

<sup>(126)</sup> Section 2(2) (2) and (3) of the Act.

<sup>(127)</sup> DT's observations on the complaint in Case COMP/C-1/37.451, 14 May 1999, p. 20; DT's observations on the complaint in Case COMP/C-1/37.579, 10 September 1999, p. 12.

<sup>(128)</sup> See footnote 148.

<sup>(129)</sup> Complaint in Case COMP/C-1/37.451, p. 15; complaint in Case COMP/C-1/37.578, p. 45; complaint in Case COMP/C-1/37.579, p. 14.

<sup>(130)</sup> Special opinion (*Sondergutachten*) of the German Monopolies Commission, 2001, pp. 40 and 41.

(136) The reason competitors did not enter the market in greater numbers is that many were deterred by the high wholesale access charges. Even when digital services started to be rolled out more broadly, competitors continued to be interested in analogue lines: they were attracted by the prospect of being able to equip their own customers, over time, with higher-value lines and services<sup>(131)</sup>. In addition, until the European requirements with regard to carrier selection and carrier preselection have finally been implemented in practice in the local network in Germany, operators continue to offer local calls to their own subscribers only.

(137) DT's wholesale tariffs are the same for all varieties of subscriber line, so that it is not necessary to calculate a weighted average wholesale price. For the calculation of the spread by reference to retail prices, these wholesale prices constitute DT's revenues.

**(bb) Product-specific costs**

(138) The spread between the historic operator's retail and wholesale tariffs can be negative, positive or zero. If the wholesale charges are higher than the retail charges there is a negative spread; in that case there is a margin squeeze in any event, irrespective of the product-specific costs. If the wholesale charges are lower than the retail charges there is a positive spread; in that case there is a price squeeze if the spread is not sufficient to enable the historic operator to cover the product-specific costs of providing its services to end-users.

(139) The point of departure for determining DT's product-specific costs is the total cost of providing end-user access. But the total cost includes a network cost component, for such things as the copper cable, which is not to be taken into account in the calculation. The product-specific costs comprise only the costs of providing those additional services which are needed to give DT's end-users access to T-Net and T-ISDN connections (with or without T-DSL), including billing, customer care, etc.

**(c) EXTEND OF THE MARGIN SQUEEZE**

(140) Where wholesale and retail services are comparable, as described above, a margin squeeze occurs if the spread between DT's retail and wholesale prices is either negative or at least insufficient to cover DT's own downstream costs. This would mean that DT would have been unable to offer its own retail services without incurring a loss if, during the period under investigation, i.e. since 1998, it had had to pay the wholesale access price as an internal transfer price for its own retail operations.

(141) As a consequence the profit margins of competitors are squeezed, even if they are just as efficient as DT. This means that they cannot offer retail access services at a competitive price unless they find additional efficiency gains. A margin squeeze imposes on competitors additional efficiency constraints which the incumbent does not have to support in providing its own retail services.

**(aa) Calculation of the average retail price for local network access**

(142) DT's average retail price at the end of each year since the unbundling of local loops began must be calculated on the basis of the number of lines marketed by DT to its end-users in that year (see recitals 27 and 28) and the corresponding retail prices (see recital 31 et seq.). These average prices are composed of two items, the monthly subscription charge and the one-off charge for a new connection, a takeover or a discontinuance.

(143) On 31 December 2002, DT had a total of [...] end-user lines, of which [...] were analogue lines (T-Net) provided at a monthly charge of EUR 11,49 and [...] were ISDN lines provided at a monthly charge of between EUR 19,56 and EUR 28,12. These figures include 3 100 000 DT lines equipped with ADSL, of which [...] were provided over T-Net at a monthly charge of EUR 28,72 and [...] were provided over T-ISDN multi-device mode (standard and comfort) at a monthly charge of EUR 31,54 or EUR 33,75<sup>(132)</sup>.

<sup>(131)</sup> Letters from Arcor, 4 July 2001, p. 5, and 4 March 2002, p. 2, in Case COMP/C-1/37.451; letter from the other 14 complainants, 12 September 2002, p. 23; letter from COLT Telecom GmbH, 15 October 2002.

<sup>(132)</sup> See also footnote 72; the resulting average value for T-DSL/T-ISDN was EUR 32,65 at 31 December 2002; using the same method of calculation, the average value came to EUR 29,66 at 31 December 2001, EUR 27,45 at 31 December 2000 and EUR 44,30 at 31 December 1999; the T-DSL services provided over other ISDN variants are so few in number that their prices can be left out of this calculation, cf. DT's letter of 31 January 2003.

- (144) As can be seen from the calculations below, at the end of 2002 the average retail price for all services provided by DT over local loops came to EUR 15,17 per month and per line.

Table 3

(31 December 2002)

|                                              |             |             |
|----------------------------------------------|-------------|-------------|
| — [...] T-Net                                | × EUR 11,49 | = [...]     |
| — [...] T-ISDN multi-device mode, simple     | × EUR 19,56 | = [...]     |
| — [...] T-ISDN multi-device mode, standard   | × EUR 20,34 | = [...]     |
| — [...] T-ISDN multi-device mode, comfort    | × EUR 22,55 | = [...]     |
| — [...] T-ISDN point-to-point mode, simple   | × EUR 25,56 | = [...]     |
| — [...] T-ISDN point-to-point mode, standard | × EUR 25,56 | = [...]     |
| — [...] T-ISDN point-to-point mode, comfort  | × EUR 28,12 | = [...]     |
| — [...] T-DSL/T-Net                          | × EUR 28,72 | = [...]     |
| — [...] T-DSL/T-ISDN                         | × EUR 32,65 | = [...]     |
| Total                                        |             | = [...]     |
| divided by [...] lines                       |             | = EUR 15,17 |

- (145) Using the same model, the average monthly retail prices at the end of 2001, 2000, 1999 and 1998 can be calculated as follows:

Table 4

(31 December 2001)

|                                              |             |             |
|----------------------------------------------|-------------|-------------|
| — [...] T-Net                                | × EUR 10,93 | = [...]     |
| — [...] T-ISDN multi-device mode, simple     | × EUR 19,56 | = [...]     |
| — [...] T-ISDN multi-device mode, standard   | × EUR 19,78 | = [...]     |
| — [...] T-ISDN multi-device mode, comfort    | × EUR 21,99 | = [...]     |
| — [...] T-ISDN point-to-point mode, simple   | × EUR 25,56 | = [...]     |
| — [...] T-ISDN point-to-point mode, standard | × EUR 25,56 | = [...]     |
| — [...] T-ISDN point-to-point mode, comfort  | × EUR 28,12 | = [...]     |
| — [...] T-DSL/T-Net                          | × EUR 28,52 | = [...]     |
| — [...] T-DSL/T-ISDN                         | × EUR 29,66 | = [...]     |
| Total                                        |             | = [...]     |
| divided by [...] lines                       |             | = EUR 13,82 |

Table 5

(31 December 2000)

|                                            |             |         |
|--------------------------------------------|-------------|---------|
| — [...] T-Net                              | × EUR 10,93 | = [...] |
| — [...] T-ISDN multi-device mode, simple   | × EUR 19,56 | = [...] |
| — [...] T-ISDN multi-device mode, standard | × EUR 19,78 | = [...] |
| — [...] T-ISDN multi-device mode, comfort  | × EUR 21,99 | = [...] |
| — [...] T-ISDN point-to-point mode, simple | × EUR 25,56 | = [...] |

|                                              |             |             |
|----------------------------------------------|-------------|-------------|
| — [...] T-ISDN point-to-point mode, standard | × EUR 25,56 | = [...]     |
| — [...] T-ISDN point-to-point mode, comfort  | × EUR 28,12 | = [...]     |
| — [...] T-DSL/T-Net                          | × EUR 24,10 | = [...]     |
| — [...] T-DSL/T-ISDN                         | × EUR 27,45 | = [...]     |
| Total                                        |             | = [...]     |
| divided by [...] lines                       |             | = EUR 12,88 |

Table 6

(31 December 1999)

|                                              |             |             |
|----------------------------------------------|-------------|-------------|
| — [...] T-Net                                | × EUR 10,93 | = [...]     |
| — [...] T-ISDN multi-device mode, simple     | × EUR 19,56 | = [...]     |
| — [...] T-ISDN multi-device mode, standard   | × EUR 20,45 | = [...]     |
| — [...] T-ISDN multi-device mode, comfort    | × EUR 22,67 | = [...]     |
| — [...] T-ISDN point-to-point mode, simple   | × EUR 26,23 | = [...]     |
| — [...] T-ISDN point-to-point mode, standard | × EUR 28,45 | = [...]     |
| — [...] T-ISDN point-to-point mode, comfort  | × EUR 30,68 | = [...]     |
| — [...] T-DSL/T-ISDN                         | × EUR 44,30 | = [...]     |
| Total                                        |             | = [...]     |
| divided by [...] lines                       |             | = EUR 12,48 |

Table 7

(31 December 1998)

|                                              |             |             |
|----------------------------------------------|-------------|-------------|
| — [...] T-Net                                | × EUR 10,93 | = [...]     |
| — [...] T-ISDN multi-device mode simple      | × EUR 19,56 | = [...]     |
| — [...] T-ISDN multi-device mode standard    | × EUR 20,45 | = [...]     |
| — [...] T-ISDN multi-device mode comfort     | × EUR 22,67 | = [...]     |
| — [...] T-ISDN point-to-point mode, simple   | × EUR 26,23 | = [...]     |
| — [...] T-ISDN point-to-point mode, standard | × EUR 28,45 | = [...]     |
| — [...] T-ISDN point-to-point mode, comfort  | × EUR 30,68 | = [...]     |
| Total                                        |             | = [...]     |
| divided by [...] lines                       |             | = EUR 12,04 |

- (146) In addition to the monthly fees, DT also charges its customers a one-off fee for taking over an existing line or opening a new one. From 1998 to the present, the one-off charge for taking over a serviceable T-Net or T-ISDN connection has been EUR 22,22 and the charge for provision of a serviceable connection EUR 44,45. New connections are more frequent than takeovers ([...] % of cases compared with [...] %) <sup>(133)</sup>. The average one-off charge to end-users for T-Net and T-ISDN therefore comes EUR [...] <sup>(134)</sup>.

<sup>(133)</sup> DT's letter of 6 February 2003.

<sup>(134)</sup>  $([...] \times \text{EUR } 22,22) + ([...] \times \text{EUR } 44,45) / 100 = \text{EUR } [...]$ .

(147) When the market was opened up to competition in 2000, DT initially charged a one-off fee of EUR 44,45 for providing T-DSL. It then raised this charge to EUR 64,61 from 1 July 2002 and to EUR 86,16 from 1 January 2003. So the average one-off charge for all DT end-user lines was EUR [...] from 1 July 2002 and EUR [...] from 1 January 2003 <sup>(135)</sup>.

(148) Assuming that the average end-user keeps the same telephone subscription for a period of [...] months, allowing in particular for changes of residence <sup>(136)</sup>, these average one-off charges should be divided by [...]. The result must then be added to the monthly charge in order to obtain an average monthly retail price for access to the local network. Using this method, DT's average total retail prices are as follows:

Table 8

|                                   | 31.12.2002/<br>1.1.2003 | 31.12.2001 | 31.12.2000 | 31.12.1999 | 31.12.1998 |
|-----------------------------------|-------------------------|------------|------------|------------|------------|
| Average monthly charge            | EUR 15,17               | EUR 13,82  | EUR 12,88  | EUR 12,48  | EUR 12,04  |
| Pro rata weighted one-off charges | EUR [...]               | EUR [...]  | EUR [...]  | EUR [...]  | EUR [...]  |
| Average total retail price        | EUR [...]               | EUR [...]  | EUR [...]  | EUR [...]  | EUR [...]  |

**(bb) Calculation of the wholesale price for local network access**

(149) Like the retail price, DT's wholesale price for local loop access is also composed of two items — the monthly rental charge payable periodically and the one-off charge for opening a new connection or taking over or discontinuing an existing connection.

(150) From 1 April 2001 the monthly charge for DT's competitors was EUR 12,48 and it has been reduced to

EUR 11,80 as of 1 May 2003. From 1 April 2001, the one-off charges were EUR 92,59 for a straightforward takeover, EUR 86,51 for a straightforward new connection and EUR 38,06 or EUR 59,24 for discontinuing a connection with or without transferring the customer. Since 1 April 2002 the one-off charges have been in the first place EUR 70,56 for a straightforward takeover, EUR 81,12 for a straightforward new connection and EUR 34,94 or EUR 50,71 for discontinuance with or without transfer <sup>(137)</sup>.

(151) The discontinuance charge is payable for re-connecting an unbundled line to DT's network and is imposed only on competitors at wholesale level <sup>(138)</sup>. The discontinuance charge and the charge for access provision are the only one-off wholesale charges which competitors must pay to DT. In practice, takeovers of lines that are still activated are more frequent than the reopening of deactivated lines <sup>(139)</sup>. This can be used to work out the average one-off wholesale price charged to competitors. As with the one-off retail prices (see recital 148), these average total one-off charges must be divided by [...] and the result added to the monthly charge in order to calculate DT's average prices for providing its competitors with wholesale access services. DT's total wholesale prices calculated in this manner are set out below.

Table 9

|                           | 31.12.2002 | 31.12.2001 | 31.12.2000 | 31.12.1999 | 31.12.1998 |
|---------------------------|------------|------------|------------|------------|------------|
| Monthly charge            | EUR 12,48  | EUR 12,48  | EUR 12,99  | EUR 12,99  | EUR 10,56  |
| Pro rata one-off charges: |            |            |            |            |            |
| — takeover/Installation   | EUR [...]  | EUR [...]  | EUR [...]  | EUR [...]  | EUR [...]  |
| — discontinuance          | EUR [...]  | EUR [...]  | EUR [...]  | EUR [...]  | EUR [...]  |

<sup>(135)</sup> At present around [...] % of all DT's end-user connections are T-DSL (3,1 million lines compared with [...] million analogue and ISDN lines); see recitals 27 and 28.

<sup>(136)</sup> DT's letter of 14 March 2003 and of 18 March 2003; a shorter period, f. e. 40 months, as proposed in the complaint in Case COMP/C-1/37.579, p. 11, or 20 months, as proposed in the Case COMP/C-1/37.451, p. 17, would be a less favourable basis for calculation, as the one-off retail charges have always been and still are lower than the one-off wholesale charges.

<sup>(137)</sup> For more details on developments in these charges since 1998, see paragraphs 18 seq. above.

<sup>(138)</sup> See footnote 25.

<sup>(139)</sup> In [...] % of all cases the existing line is taken over without customer transfer; in [...] % of cases a new connection is installed without customer transfer; cf. complainants' letter of 12 September 2002 in Cases COMP/C-1/37.578 and 37.579, p. 21, footnotes 1 and 2; complainants' letter of 18 September 2002 in Case COMP/C-1/37.451, p. 23, footnotes 58 and 59; the same applies for the discontinuance with customer transfer in relation the discontinuance without customer transfer; see DT's letter of 18 March 2003.

|                        | 31.12.2002 | 31.12.2001 | 31.12.2000 | 31.12.1999 | 31.12.1998 |
|------------------------|------------|------------|------------|------------|------------|
| Total whole-sale price | EUR [...]  | EUR [...]  | EUR [...]  | EUR [...]  | EUR [...]  |

(cc) **Spread between retail and wholesale prices**

- (152) As can be seen from the calculations below, the spread between DT's average retail access price and its average wholesale access price was always negative from the time when local loop unbundling became a legal obligation in Germany in 1998 up to the end of 2001.

Table 10

|                            | 31.12.2002/<br>1.1.2003 | 31.12.2001 | 31.12.2000 | 31.12.1999 | 31.12.1998 |
|----------------------------|-------------------------|------------|------------|------------|------------|
| Average total retail price | EUR [...]               | EUR [...]  | EUR [...]  | EUR [...]  | EUR [...]  |
| Total whole-sale price     | EUR [...]               | EUR [...]  | EUR [...]  | EUR [...]  | EUR [...]  |
| Spread                     | EUR [...]               | EUR [...]  | EUR [...]  | EUR [...]  | EUR [...]  |

- (153) Since the spread between DT's retail and wholesale prices was always negative between 1998 and 2001, there is not even any need, for the purposes of proving the existence of a margin squeeze over that period, to determine whether this spread was sufficient to cover DT's downstream costs for customer relations. These negative spreads per month and per line are a direct measure of the margin squeeze between the beginning of 1998 and the end of 2001.

- (154) After DT had increased certain monthly and one-off charges in 2002 (see recitals 44, 50 and 51), there was a positive spread between its retail and wholesale prices, which amounted to EUR [...] per month and per line at 31 December 2002 or 1 January 2003 and rose to EUR [...] on 1 February 2003 as a result of the EUR 0,33 increase in monthly charges for T-Net connections approved by the regulatory authority on 19 December

2002. Consequently, in order to prove that a margin squeeze exists for 2002 and at the present time, DT's product-specific costs must be determined in order to assess whether this positive spread is sufficient to cover DT's product-specific costs for providing retail services.

(dd) **Product-specific costs**

- (155) To determine DT's product-specific costs for providing retail access to the local network, it is necessary to deduct the overheads, i.e. the cost of merely providing the network infrastructure, from the total costs. Product-specific costs would arise from any special equipment required to provide analogue, ISDN and ADSL services and from DT's customer relations.
- (156) No extra equipment is needed to provide local network access for end-users over analogue lines, so that here the product-specific costs derive simply from the customer relations services such as marketing, maintenance and invoicing. However, specific equipment is required to provide simple local network access over digital narrow-band lines (ISDN), generating separate costs. Here too there are product-specific costs arising out of customer relations.
- (157) Extra equipment is also needed to provide ADSL services, pushing up further the product-specific costs. The most important cost factors for ADSL services include technical devices at both ends of the copper pair (i.e. a modem and a splitter at the consumer's premises and at the local exchange), multiplexing equipment located at the exchange to manage the data streams from several hundreds of ADSL connections, known as a digital subscriber line access multiplexer (DSLAM), and a broadband access server (BAS) located upstream in the network, to organise the traffic generated by several DSLAMs and sent into a backhaul transmission network, so as to manage the IP layer of the service.
- (158) According to DT, the total monthly cost of retail services per analogue line comes to EUR [...] <sup>(140)</sup>, the monthly retail cost per ISDN line comes to EUR [...] <sup>(141)</sup> and the monthly retail cost per ADSL line comes to EUR [...] <sup>(142)</sup>. These amounts may however include

<sup>(140)</sup> Annex U to DT's reply of 24 September 2001 to the request for information of 29 August 2001 in Case COMP/C-1/37.451: sum of individual costs [...] per year (= [...] per month).

<sup>(141)</sup> Annex W to DT's reply of 24 September 2001 to the request for information of 29 August 2001 in Case COMP/C-1/37.451: sum of individual costs [...] per year (= [...] per month).

<sup>(142)</sup> DT's reply of 20 November 2001 to the request for information of 30 October 2001 in Case COMP/C-1/37.451, pp. 3 and 4: [...].

components of network costs (i.e. the cost of the copper pair) and product-specific costs (other service-specific costs of connecting up to the final customer) and should therefore be broken down further in order to determine DT's product-specific costs for providing retail access to its local loop network.

February 2003, the margin squeeze still exists, as the product-specific costs still exceed the positive spread between retail and wholesale prices<sup>(146)</sup>. Moreover, DT's average product-specific costs rise considerably with each new T-DSL customer it gains. The size of the margin squeeze after DT's latest price adjustments is shown below:

- (159) It can be concluded from DT's data for 2001 that the monthly product-specific costs for providing lines are EUR [...] per analogue line<sup>(143)</sup>, EUR [...] per ISDN line<sup>(144)</sup> and EUR [...] per ADSL connection<sup>(145)</sup>. These costs produce a weighted average product-specific cost of EUR [...] per line, as shown in the calculation set out below:

Table 11

(31 December 2001)

|                                              |             |             |
|----------------------------------------------|-------------|-------------|
| — [...] T-Net                                | × EUR [...] | = [...]     |
| — [...] T-ISDN multi-device mode, simple     | × EUR [...] | = [...]     |
| — [...] T-ISDN multi-device mode, standard   | × EUR [...] | = [...]     |
| — [...] T-ISDN multi-device mode, comfort    | × EUR [...] | = [...]     |
| — [...] T-ISDN point-to-point mode, simple   | × EUR [...] | = [...]     |
| — [...] T-ISDN point-to-point mode, standard | × EUR [...] | = [...]     |
| — [...] T-ISDN point-to-point mode, comfort  | × EUR [...] | = [...]     |
| — [...] T-DSL/T-Net                          | × EUR [...] | = [...]     |
| — [...] T-DSL/T-ISDN                         | × EUR [...] | = [...]     |
| Total = [...]                                |             |             |
| divided by [...] lines                       |             | = EUR [...] |

#### (ee) Result

- (160) The average cost calculation shows that, even after DT's price increases in May and July 2002 and January and

Table 12

|                                           | 5/2002    | 7/2002    | 1/2003    | 2/2003    | 5/2003    |
|-------------------------------------------|-----------|-----------|-----------|-----------|-----------|
| Spread between retail and wholesale price | EUR [...] | EUR [...] | EUR [...] | EUR [...] | EUR [...] |
| Average product-specific cost per line    | EUR [...] | EUR [...] | EUR [...] | EUR [...] | EUR [...] |
| Margin squeeze                            | EUR [...] | EUR [...] | EUR [...] | EUR [...] | EUR [...] |

- (161) These calculations show that a margin squeeze still exists in access to the local network, even though it may be decreasing slightly over time. To prove that DT is abusing its dominant position, the margin squeeze affecting competitors under the present tariff structure can be quantified — using a weighted approach — at EUR [...] per line and per month (see recitals 111 and 112). Although DT's price changes in 2002 produced a positive spread between the average retail and wholesale prices, under the calculation method used in this Decision, this spread has hitherto been insufficient to cover DT's product-specific costs for providing retail services.

<sup>(143)</sup> Annex to DT's reply of 20 November 2001 to the request for information of 30 October 2001 in Case COMP/C-1/37.451, Table TelAs: total cost [...] - network infrastructure cost [...] = [...].

<sup>(144)</sup> DT's letter of 17 January 2003, p. 5 (for exact breakdown, see table 11).

<sup>(145)</sup> DT's reply of 20 November 2001 to the request for information of 30 October 2001 in Case COMP/C-1/37.451, p. 3: total cost [...] - network infrastructure cost [...] = [...].

<sup>(146)</sup> From 1 May 2002: average monthly charge EUR 15,17 + pro rata one-off charge [...] = [...] - [...] wholesale charge = EUR [...] positive spread; from 1 July 2002: average monthly charge EUR 15,17 + pro rata one-off charge [...] = [...] - [...] wholesale charge = EUR [...] positive spread; from 1 January 2003: average monthly charge EUR 15,17 + pro rata one-off charge [...] = [...] - [...] wholesale charge = EUR [...] positive spread; from 1 February 2003: average monthly charge EUR 15,41 + pro rata one-off charge [...] = [...] - [...] wholesale charge = EUR [...] positive spread; from 1 May 2003: average monthly charge EUR 15,41 + pro rata one-off charge [...] = [...] - [...] wholesale charge = EUR [...] positive spread.

(162) DT argues that, leaving aside analogue access, no margin squeeze has been applied either in the past or in the present in the higher-value variants of local access<sup>(147)</sup>. However, to examine individual local loop variants on their own would from the outset be inconsistent with the approach followed here, which is to look at average retail access prices in relation to wholesale prices, thereby obtaining a picture of DT's customer structure (see recital 112 et seq.). But even if every unbundled line were to be used by competitors for the highest-value retail service (DSL over ISDN connections), there would still have been a margin squeeze up to 30 April 2002<sup>(148)</sup>. The weighted approach is therefore more advantageous to DT than its own.

(d) SCOPE FOR AVOIDING THE MARGIN SQUEEZE

(163) The facts and figures set out in this decision prove that since 1 January 1998 DT could have avoided the margin squeeze in access to the local network, for example by increasing the existing retail charges for analogue, ISDN and ADSL connections. The fact that such scope does exist is evidenced by the retail price increases so far introduced by DT since the local loop in Germany was unbundled and by reductions in wholesale charges. These are steps in the right direction, but insufficient in volume to rectify the unfair pricing abuse.

(aa) *Price cap periods 1998/99 and 2000/01*

(164) During the first two price cap periods DT could have avoided the margin squeeze by increasing retail charges for analogue and ISDN connections, because it was entitled to apply to the regulatory authority at any time asking for adjustments to charges (see recital 36). By reducing call charges it could secure an increase in access charges within baskets of services for residential

and business customers, provided that the average basket price did not exceed the prescribed price cap index.

(165) The price cap system set up by the Federal Ministry of Posts and Telecommunications and the regulatory authority thus gave DT sufficient scope, during the period between 1998 and 2001, to restructure entirely its tariff system on the basis of the specific costs of the individual services forming part of the baskets. Increases in retail access charges could be offset within the price cap system by reducing call charges within the baskets for residential and business customers. The original price cap system laid down no limits on reductions in tariffs for individual services, so that DT was free to reduce certain individual charges while increasing others by a corresponding amount and hence complying with its obligations for the basket in question. As a lower limit on reductions in call charges, the regulatory authority merely applied the rule that such charges must always be at least 25 % higher than the respective interconnection charges. Accordingly, each time DT submitted applications for the approval of adjustments to charges under the price cap system, the regulatory authority made only a rough assessment to check that the applicable index figures were respected and that the proposed charges did not manifestly breach the requirements of the Telecommunications Act. In the majority of all six tariff adjustment applications between 1998 and 2001 this was the case<sup>(149)</sup>.

(166) During the first price cap period from 1 January 1998 to 31 December 1999, DT reduced the tariffs for calls by more than 20 %, i.e. by much more than the 4,3 % mandatory reduction<sup>(150)</sup>. This meant that, after only a short time, the tariffs lay well below the mandatory levels. Since then DT has further reduced call charges.

<sup>(147)</sup> DT's observations on the Statement of Objections in Cases COMP/C-1/37.451, 37.578 and 37.579, 29 July 2002, p. 92.

<sup>(148)</sup> Cf. the following hypothetical calculation based on the charges applicable up to 30 April 2002:  
Retail T-DSL/T-ISDN: EUR 28,56/month + EUR [...] (weighted one-off charges) = EUR [...]  
Wholesale ULL: EUR 12,48/month + EUR [...] (weighted one-off charges) = EUR [...]  
Spread between retail and wholesale charges = EUR + [...]  
Product-specific costs for retail T-DSL/T-ISDN services = EUR - [...]  
Margin squeeze = EUR [...] Under this hypothetical calculation, the margin squeeze ceased to exist only after the new retail charges came into effect on 1 May 2002.

<sup>(149)</sup> In the first decision of 30 January 1998 the regulatory authority has approved all of DT's requested tariff changes except the tariffs 'City Plus 2' and 'City Plus 3' which did not fall under the price cap regime. In the second decision of 11 December 1998 the regulatory authority approved all of DT's requested tariff changes. In the third decision of 16 March 1999 the regulatory authority approved all of DT's requested tariff changes except the tariff for local calls with a time measure length of 60 seconds on working days, Saturdays, Sundays and official holidays and from 24 December until 1 January in the time between 9 p.m. and 6 a.m. because this tariff contained obviously unjustified discounts. In its fourth decision of 16 April 1999 the regulatory authority approved all of DT's requested tariff changes except those for connection to the Faeroe Islands, Greece, San Marino, Turkey, Portugal and Gibraltar. In the fifth decision of 21 January 2000 and in the sixth decision of 16 February 2000 the regulatory authority approved all of DT's requested tariff changes.

<sup>(150)</sup> Regulatory authority decision of 23 December 1999, p. 13 (see footnote 45).

All in all, the regulatory authority approved six applications for reductions in call charges between January 1998 and February 2000 <sup>(151)</sup>. The considerable drop in call charges undertaken by DT between 1998 and 2000 meant that an increase in its monthly and/or one-off charges for retail access was not only economically feasible but, in view of the margin squeeze, a legal requirement, provided that there was no breach of the price cap provisions in force.

through more cost-oriented pricing of the services included in the baskets.

(167) More specifically, during the first price cap period between 1 January 1998 and 31 December 1999, DT released turnover of EUR [...] million over and above the mandatory 4,3 % price reduction. During the second price cap period between 1 January 2000 and 31 December 2001, the volume of turnover released, after taking away the reduction laid down by the price cap system, came to an additional EUR [...]. If these amounts had been redirected to connections for residential and business customers, they could have been used entirely to increase retail access charges — either the monthly or the one-off charges <sup>(152)</sup>.

(169) DT argues that under the price cap mechanism all retail charges are fixed by law and no deviations from the approved charges are admissible <sup>(154)</sup>. However, this argument overlooks the two-tier system for approving charges under the price cap mechanism (see recital 36). It is certainly true that the regulatory authority also investigates and approves adjustments to charges undertaken within the price cap to ensure they comply with the mandatory index figures <sup>(155)</sup>. However, there is nothing to prevent DT exerting a constant influence on retail charges by submitting further applications for adjustments to charges, provided that these adjustments stay within the price cap. Indeed DT has explicitly recognised that within the price cap system it enjoys legal scope to restructure further its charges for local network access on the basis of the relevant specific costs <sup>(156)</sup>.

(168) Furthermore, these amounts should merely be regarded as a minimum, as DT was very much in a position to undertake further reductions in call charges at any time within the baskets of services for residential and business customers, in particular tariffs for local calls, and thereby to obtain more leeway for price increases in the monthly and one-off charges for analogue and ISDN connections. The wholesale prices for interconnection between fixed networks, which in accordance with Article 7(2) of Directive 97/33/EC must be cost-oriented, can be used as an indication of the cost of individual telephone calls. However, even after the reduction in tariffs in May 2002, all DT's retail call charges remained considerably higher than the corresponding interconnection charges, indeed up to 570 % higher, depending on the type of call <sup>(153)</sup>. This margin provided scope for DT to end the margin squeeze between access charges at wholesale and retail level

(170) DT also concedes that it took steps in that direction, applying 'soft' restructuring measures in the form of optional tariffs with higher access charges and lower call charges <sup>(157)</sup>. However, these are not to be taken into consideration in this Decision (see recital 130 and 131). DT undertook no such price increases in standard access tariffs, which are the only ones relevant here: it refrained from raising retail access charges over the entire four-year period.

#### (bb) *Price cap period 2002*

(171) Under the present price cap system, which has been in force since 1 January 2002, there is explicit scope for the restructuring of tariffs through the negative price cap index for the access basket. Since the price cap sets no minimum access price but a price ceiling, it was left to DT to decide whether and how to exploit the 1 % margin available for increasing prices in the basket.

<sup>(151)</sup> See footnote 149.

<sup>(152)</sup> DT concedes that it could have increased the monthly access charge per residential customer during the first price cap period by EUR [...] (DT's observations on the Statement of Objections, 29 July 2002, p. 66).

<sup>(153)</sup> Local level: call charge EUR 0,0345/min. compared with EUR 0,0065/min. for local interconnection (peak times) = 530 % and EUR 0,0172/min. compared with EUR 0,0044/min. (off-peak) = 390 % /national level: call charge EUR 0,106/min. compared with EUR 0,0186/min. double transit interconnection (peak times) = 570 % and EUR 0,0267/min. compared with EUR 0,0122/min. (off-peak) = 220 % (all prices net, interconnection charges laid down by the regulatory authority decision of October 2001, see regulatory authority press release of 15 October 2001).

<sup>(154)</sup> DT's observations on the Statement of Objections, 29 July 2002, p. 38 et seq.

<sup>(155)</sup> Under Section 27(2), second sentence, of the Act.

<sup>(156)</sup> DT's reply of 14 May 1999 to the complaint in Case COMP/C-1/37.451, p. 21; DT's reply of 16 September 1999 to the complaint in Case COMP/C-1/37.578, p. 20.

<sup>(157)</sup> DT's reply of 23 July 2001 to the request for information of 22 June 2001 in Case COMP/C-1/37.451.

- (172) At first DT argued that the restructuring of tariffs with higher retail access charges would have been unacceptable to customers, was unfeasible because of the competition situation in Germany and would be rejected by politicians on social grounds<sup>(158)</sup>. On 15 January 2002, DT announced a first voluntary increase in monthly access charges. The new tariffs came into force on 1 May 2002, but even after this increase, the margin squeeze is still EUR [...] per month and per line<sup>(159)</sup>.
- (173) DT now claims that the margin it enjoyed for increasing prices in basket A for 2002 was entirely exhausted by the increase made on 1 May 2002<sup>(160)</sup>. But DT's commercial freedom to avoid the margin squeeze did not arise only from the access charges for analogue and ISDN connections regulated under the price cap system: the retail access charges for ASDL connections, which were not regulated by the price cap, must also enter into consideration.
- (174) Irrespective of the regulatory conditions of the price cap system, DT is free at any time to raise access charges for ADSL broadband access (see recital 46 et seq.), thereby further reducing the margin squeeze. In March 2001 the regulatory authority noted that most of the T-DSL services offered by DT did not cover costs (see recitals 48 and 49)<sup>(161)</sup>. This situation was not fundamentally altered by the adjustments to DT's charges in 2002 (see recitals 51 and 160)<sup>(162)</sup>.
- (175) DT is not required to seek approval from the regulatory authority before increasing T-DSL charges, so it has had considerable leeway to reduce the margin squeeze since T-DSL services were introduced onto the market in 2000. This applies above all to the present price cap period, during which DT has generally complied with the regulatory conditions for access charges, which are regulated by the price cap, but has left its T-DSL charges unchanged — save for the one-off charge for access provision. Even if it is assumed that DT would not have been able to use the legally unlimited possibility for increasing T-DSL charges due to a limited elasticity in demand, there is no question that DT could have at least partially closed the margin squeeze.

## (e) EFFECT ON THE MARKET

- (176) DT argues that, in order to establish abuse of a dominant market position within the meaning of Article 82 of the EC Treaty, the Commission must not only prove there is a margin squeeze, but also demonstrate that this margin squeeze has negative effects on the market, for example by hindering competitors or restricting competition downstream in the form of barriers to market entry for competitors<sup>(163)</sup>.
- (177) What DT fails to realise here is that the question of barriers to market entry for competitors is significant only for the purposes of establishing the existence of a dominant position and not for determining possible abuse.
- (178) The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition<sup>(164)</sup>. An undertaking in a dominant market position has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market<sup>(165)</sup>.
- (179) Contrary to the view taken by DT, the Court of Justice of the European Communities has found that there is abuse of a dominant market position where a dominant undertaking uses its pricing policy to eliminate its competitors and hence strengthen its own position<sup>(166)</sup>. This is the case for example where a dominant undertaking supplies both a primary product and the end product manufactured from that primary product, and

<sup>(158)</sup> DT's reply of 14 May 1999 to the complaint in Case COMP/C-1/37.451, p. 21; DT's reply of 24 September 2001 to the request for information of 29 August 2001 in Case COMP/C-1/37.451, p. 14.

<sup>(159)</sup> See table 12.

<sup>(160)</sup> DT's observations on the Statement of Objections, 29 July 2002, p. 41.

<sup>(161)</sup> See also footnote 69; the regulatory authority determined in its decision of 30 March 2001: 'The tariffs for T-DSL connections include discounts below the costs of an effective service provision.' (p. 31) and 'The determined discounts from the costs of an effective service provision are resulting in an objectively unjustified restriction of the competitive chances of the concurrents.' (S. 44).

<sup>(162)</sup> See table 12; in this respect the decision of the regulatory authority of 25 January 2002 to close the reopened proceeding with regard to T-DSL charges (decision of 18 December 2001) contains now new calculations about the degree of cost covering.

<sup>(163)</sup> DT's observations on the Statement of Objections, 29 July 2002, pp. 83 ff.; DT's letter of 25 October 2002, p. 27 et seq.

<sup>(164)</sup> Court of Justice in Case 85/76 *Hoffmann-La Roche* [1979] ECR 461, paragraph 91.

<sup>(165)</sup> Court of First Instance in Case T-83/91 *Tetra Pak II* [1994] ECR II-755, paragraph 114.

<sup>(166)</sup> Court of Justice in Case C-62/86 *AKZO* [1991] ECR I-3359, paragraph 70.

its end product prices lie below the variable unit costs or overall costs of that product and are set as part of a plan aimed at eliminating a competitor<sup>(167)</sup>. There is also sufficient evidence of abuse where a dominant undertaking continually and deliberately bears sales losses which, by their scale and very nature, reflect an economic rationale of ousting other competitors from a common market, or where a dominant undertaking unilaterally grants fidelity rebates to ensure that a customer obtains its requirements exclusively from it<sup>(168)</sup>. Finally, the Commission also considers that there is an abusive pricing policy where an undertaking is dominant in the markets for both a raw material and a product derived therefrom and maintains a margin between the price it charges for the raw material to the undertakings competing with it to produce the derived product and the price it charges for the derived product itself which is insufficient to reflect its own costs for the derived product, thereby restricting competition in the derived product<sup>(169)</sup>.

(180) By proving the existence of a margin squeeze, the Commission has therefore done enough to establish the existence of an abuse of a dominant market position.

(181) But even if evidence of abuse could be furnished only by establishing that DT restricted competition by raising barriers to the market entry of competitors, such barriers do exist, as competitors, including the complainants, are still unable to connect end-users to their own networks at competitive rates. This is illustrated in particular by the fact that the competitors have so far achieved market shares of only 4,4 % in narrowband access and 10 % in broadband access. At the end of 2002 all 64 competitors together held only 2,35 million of the total of 53,72 million telephone channels in Germany. At the end of 2001, they held 1,59 million channels and at the end of 2000 only 0,86 million<sup>(170)</sup>. These figures alone illustrate the sluggish development of competition in this field. The number of telephone channels held by the competitors consist of their own networks and unbundled local loops rented from DT. The total number of local loops rented to competitors is still increasing, but the rate of quarterly growth has remained unchanged since the beginning of 2001<sup>(171)</sup>, so that here too there is no discernible improvement in the situation as regards competition.

(182) The negative effects of DT's restriction of competition on the development of the market are particularly obvious in the number of analogue connections, which still account for 75 % of all connections in Germany and hence play a crucial role for the mass market. Admittedly, some of the competitors offered their end-users analogue connections in spite of the existing margin squeeze. However, they did so mainly in order to offer customers a full range of products or to encourage them to take up higher-value services<sup>(172)</sup>. Right from the outset the overwhelming majority of complainants have refrained from taking up the offer of analogue local loops. And even in the case of the remaining competitors the share of analogue connections has fallen from 21 % in 1999 to 10 % in 2002<sup>(173)</sup>.

(183) Lastly, since the complainants form a heterogeneous group whose members apply different business models, one cannot be convinced by DT's sweeping argument that market entry is open to competitors because access and call services can be offset against each other<sup>(174)</sup>, as such offsetting has clearly not allowed the majority of the complainants to cover their costs or offered them the prospect of profits. It is true that in the meantime some competitors have been able to gain a larger number of telephony customers in limited areas as for example big cities or areas of industrial concentration because of unbundling and have partially gained market shares of more than 20 %. But out of this cannot be concluded that DT's tariff structure does not create barriers to entry. Because with DT's tariff structure a geographically extended competition as aimed at by some competitors like Arcor cannot or only to a limited degree be achieved.

#### D. EFFECT ON TRADE BETWEEN MEMBER STATES

(184) Trade between Member States is generally affected by the conditions governing access to the telecommunications infrastructure and wholesale services of the dominant network operators, in particular those of the historical operators of fixed and mobile networks, who formerly enjoyed a State monopoly in national markets that were defined geographically and segregated. This is

<sup>(167)</sup> Ibid., paragraphs 71 et seq.

<sup>(168)</sup> Court of Justice in *Hoffmann-La Roche* (see footnote 164), paragraph 89; Court of First Instance in *Tetra Pak II* (see footnote 165), paragraph 221, with further references.

<sup>(169)</sup> Commission Decision in *Napier Brown — British Sugar*, see footnote 104.

<sup>(170)</sup> Regulatory authority annual report for 2002, p. 18.

<sup>(171)</sup> Regulatory authority annual report for 2002, p. 19.

<sup>(172)</sup> Complainants' letter of 12 September 2002 in Cases COMP/C-1/37.578 and COMP/C-1/37.579, pp. 23 and 24.

<sup>(173)</sup> See footnote 170.

<sup>(174)</sup> DT's letter of 25 October 2002, pp. 31 and 32.

because the services provided over telecommunications networks can be traded within the Community and the conditions governing access to infrastructure and wholesale services determine the capabilities of competitors, who require such access in order to offer their own services <sup>(175)</sup>.

- (185) In the present case, trade between Member States is affected because the pricing policy described above relates to the access services of the dominant operator, which extend over the entire territory of the Federal Republic of Germany, and that territory constitutes a substantial part of the internal market. These practices affect market structure by raising the barriers to entry to telecommunications markets in Germany, particularly for operators such as Arcor, which forms part of a group of undertakings providing telecommunications services throughout the EU. DT has made no specific observations on this point during the proceedings.

#### E. NO EXCEPTION UNDER ARTICLE 86(2) OF THE EC TREATY

- (186) DT takes the view that, in any event, pursuant to Article 86(2) of the EC Treaty, no objection can be raised concerning a possible abuse of a dominant market position, as DT is entrusted with the operation of services of general economic interest in the field of voice telephony, and would be prevented from performing that particular task if the tariff structure were different <sup>(176)</sup>.
- (187) Universal telecommunications services are to be regarded as services of general economic interest <sup>(177)</sup>. In accordance with the Directives 97/33/EC and 98/10/EC and with Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal service directive) <sup>(178)</sup> the European Community therefore demands that Member States impose universal service obligations on Member States in order to ensure the wide-ranging basic provision of voice telephony. The rules on universal service stipulate that all users, irrespective of their location, must be offered a defined minimum set of services of a certain standard at an affordable price. The rules lay down which services are covered by the universal service obligation, which procedure should be used to select the operators who will carry special obligations and how the net costs of these obligations are to be passed on to market participants <sup>(179)</sup>.

#### (a) DT'S STATUS

- (188) It is doubtful whether DT is 'entrusted' with the operation of services of general economic interest on the basis of the universal service arrangements in force in Germany. To be exempt from the competition rules, an undertaking must be entrusted with providing services of general economic interest by an act of the public authority <sup>(180)</sup>. Under consistent case-law the requirements for entrustment are defined narrowly, in order to ensure that exemptions from the application of the competition rules cannot be obtained simply by invoking measures that are taken by the State but are not binding <sup>(181)</sup>.
- (189) Up to now the services classified under universal service provision have been provided predominantly by DT. Relying on section 97(1) of the Act, DT therefore assumes that it has been entrusted with services of general economic interest <sup>(182)</sup>. Under this transitional measure, DT must inform the regulatory authority in advance that it is planning not to offer in their entirety the services described as universal in the order adopted pursuant to section 17(2) of the Act, or is planning to offer them on less favourable terms. Accordingly, under section 97(1) of the Act, DT may at any time, giving one year's notice, end the task it has assumed of ensuring blanket basic provision of the services declared as universal. To date DT has addressed no such notification to the regulatory authority.
- (190) However, the provisions of section 97(1) of the Act do not as such mean that DT is entrusted with providing universal services <sup>(183)</sup>, as they provide no leverage for forcing DT to perform the universal service against its will.
- (191) Nevertheless, the Federal Republic of Germany is obliged by Community rules to ensure that the entire German population is provided with a voice telephony service <sup>(184)</sup>. The Community rules also require that the Commission be specially notified of the undertakings which provide universal services. This had been done in the case of DT, so that it may be possible to infer for purposes of the present proceedings that it has been entrusted with services of general economic interest.

<sup>(175)</sup> Access notice (see footnote 79), paragraphs 144 to 148.

<sup>(176)</sup> DT's observations on the Statement of Objections, 29 July 2002, p. 119 et seq.

<sup>(177)</sup> Regulated in Germany by section 17 et seq. of the Act and by the Telecommunications universal service order (*Telekommunikations-Universaldienstleistungsverordnung* (TUDLV)).

<sup>(178)</sup> OJ L 108, 26.4.2002, p. 51.

<sup>(179)</sup> Communication from the Commission: 'Services of general interest in Europe', 20 September 2000, OJ C 17, 19.1.2001, p. 4.

<sup>(180)</sup> Court of Justice in Case 127/73 *BRT v SABAM* [1974] ECR 313, paragraph 20.

<sup>(181)</sup> See footnote 180, paragraph 22 et seq.; most recently Case C-242/95 *GT-Link v DSB* [1997] ECR I-4449, paragraph 50.

<sup>(182)</sup> DT's observations on the Statement of Objections, 29 July 2002, p. 120, with references to similar regulations for the postal sector.

<sup>(183)</sup> Unlike in the postal sector, where Deutsche Post AG has an exclusive licence entrusting it with handling letters in the reserved sector.

<sup>(184)</sup> See footnote 178.

(b) NO OBSTRUCTION TO THE PERFORMANCE OF PARTICULAR TASKS

(192) But even assuming that DT is entrusted with performing universal services, this does not mean in the present case that it is exempt from the competition rules of the EC Treaty. For in any event DT is not obstructed in law or in fact in the performance of its particular task by the application of the competition rules, and in particular Article 82 of the EC Treaty.

(193) DT assumes that the charges for analogue connections form the core of the universal service and that a drastic increase in these charges with the aim of ending the margin squeeze would run counter to its universal service obligation<sup>(185)</sup>. However, the offsetting of access and call charges and the resulting margin squeeze between wholesale and retail prices in order to fulfil the universal service obligation is neither required by law nor proportionate.

(194) DT's charges for wholesale and retail services must in theory be oriented to the cost of efficient service provision<sup>(186)</sup>. The principle of uniform tariffs also requires that access charges be at the same level throughout the country<sup>(187)</sup>. Added to this is the requirement that all users of universal services must have access at an affordable price, irrespective of where they live or do business<sup>(188)</sup>. Affordability is determined according to the real prices for the average telephone services demanded by a private household outside towns with 100 000 inhabitants at 31 December 1997<sup>(189)</sup>.

(195) In accordance with Community rules, Germany introduced a price cap system with a maximum price for retail services in order to apply the principle of affordability<sup>(190)</sup>. Under this price cap system, DT has set retail charges in such a way that analogue connections are still offered at less than cost price and the resulting revenue shortfall on connections is funded from higher revenue from the charges for call services, even though it has at all times enjoyed scope for deciding on more extensive restructuring.

(196) However, under the price cap system, privileged treatment of access charges compared with call charges to

the extent identified here cannot be justified in law on the basis of the definition of affordable universal service, as the very objective of the price cap system is to allow tariffs to be continually restructured.

(197) Nor has DT proved that ensuring provision of a universal service presupposes any such offsetting between profitable and less profitable sectors of activity. For only then could the restriction of competition be justified in economically profitable sectors under Article 86(2) of the EC Treaty<sup>(191)</sup>. The European Court of Justice does in theory acknowledge the possibility of protecting a reserved sector against selective market entry in the case of economically profitable sectors of activity<sup>(192)</sup>. However, since 1 January 1998, voice telephony is no longer a reserved sector, in which DT could have undertaken an adjustment of its tariff structure in a legally admissible manner and without incurring financial losses. Under Directives 98/10/EC and 2002/22/EC, given the Member States' obligation to ensure that individual charges are cost-oriented, offsetting in this sector would in fact be against the law.

(198) DT's argument that offsetting in the local network is necessary to ensure that customers are attainable at a favourable cost cannot be accepted<sup>(193)</sup>, as it is irrelevant to the legal assessment. The provisions on universal service do not prescribe privileged treatment for access charges compared with call charges. Nor is DT forced into such offsetting by the price cap system. On the contrary, the provisions in force allow DT enough leeway for tariff adjustments. The exception in Article 86(2) does not therefore apply in the present case.

## V. CONCLUSION

(199) The Commission concludes that DT is abusing its dominant position on the relevant markets for direct access to its fixed telephone network. Such abuse consists in charging unfair prices for wholesale access services to competitors and retail access services in the local network, and is thus caught by Article 82(a) of the EC Treaty. In the period from the beginning of 1998 to

<sup>(185)</sup> DT's observations on the Statement of Objections, 29 July 2002, p. 120.

<sup>(186)</sup> Section 24(1), first sentence, of the Act.

<sup>(187)</sup> Under Section 24(2)(3) of the Act; cf. DT's observations on the Statement of Objections, 29 July 2002, p. 120.

<sup>(188)</sup> Section 17(1) first sentence, and section 24(1), first sentence, of the Act.

<sup>(189)</sup> Section 2(1) of the Telecommunications universal service order.

<sup>(190)</sup> Schütz in *Beck'scher TKG-Kommentar*, § 2 TUDLV, Anhang zu § 17, Rn. 1.

<sup>(191)</sup> Court of Justice in Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 17.

<sup>(192)</sup> *Ibid.*, paragraph 18.

<sup>(193)</sup> DT's observations on the Statement of Objections, 29 July 2002, p. 120 and Annex DT St. 12.

the end of 2001, DT was in a position to end the margin squeeze entirely by adjusting its retail charges. Since the beginning of 2002, DT could in any event have reduced the margin squeeze, by increasing the ADSL retail access charges not subject to the price cap system.

## VI. CONSEQUENCES

(200) Article 15(2) of Regulation No 17 empowers the Commission to impose a fine of from EUR 1 000 to EUR 1 million, or a sum in excess thereof but not exceeding 10 % of the previous year's turnover of the undertaking which has infringed the EC Treaty. In fixing the amount of the fine, the Commission is to have regard in particular to the gravity and duration of the infringement.

### A. GRAVITY

(201) The abuse committed by DT consists in the imposition of unfair prices in the form of a margin squeeze to the detriment of DT's competitors. A similar abuse has already been the subject of a Commission decision pursuant to Article 82 of the EC Treaty <sup>(194)</sup>.

(202) The abuse involves the whole territory of the Federal Republic of Germany and jeopardises the proper functioning of the common market by raising barriers to effective entry to the relevant telecommunications markets in Germany, thus impeding the establishment of transnational markets.

(203) Through this abuse, DT is jeopardising the objective of achieving EU-wide establishment of an internal market for telecommunications networks and services with undistorted competition.

(204) This type of abusive pricing strategy by a dominant undertaking could certainly be ranked as a very serious infringement under the guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 <sup>(195)</sup>. The result of DT's abusive pricing strategy was and is that competitors on the market for

access to the local network in Germany are seriously impeded. DT has accordingly been able, since full liberalisation following the unbundling requirement on 1 January 1998 and for a period of more than five years, to maintain a market share of more than 95 % on the German market for local network access and to prevent further market entry by competitors, particularly those with customer connections throughout Germany. This is made particularly clear by the large number of complainants (15) lodging the three complaints leading to this decision.

(205) The relevant markets for the purposes of this decision are markets of considerable economic importance. The rental of fixed-network connections provides DT not only with direct income but with a considerable amount of other indirect income. The fixed-network connections are in reality a prerequisite for the provision of a variety of telecommunications services to end-users. All in all, DT achieved a total turnover of EUR 30,2 billion from its fixed-network business in financial year 2002 <sup>(196)</sup>.

(206) However, an argument against ranking this as a very serious infringement is the fact that the weighted method applied in this decision to determine the margin squeeze has not previously been the subject of a formal Commission decision. This having been said, the margin squeeze test as such forms part of the well-established decision making practice of the Commission, and the new element is the weighted approach which had to be used in this case to take into account the fact that in Germany, a single wholesale tariff for local loop unbundling has been fixed, while the tariffs for the corresponding retail services differentiate between analogue, ISDN and ADSL lines. A second argument for ranking the infringement as serious and not very serious is that through tariff adjustments at retail and wholesale level, DT has steadily reduced the margin squeeze, since 1999 at least. Lastly, for the period since 1 January 2002, DT's only legal means of reducing the margin squeeze has been limited to increases in the T-DSL charges.

(207) In view of these particular circumstances, the infringement of Article 82 of the EC Treaty in this case must be assessed as being only a serious infringement for the period from the beginning of 1998 to the end of 2001 and as only a minor infringement for the period since the beginning of 2002. The amount of the fine to take account of the gravity of the infringement is therefore set at a total of EUR 10 million, reflecting the nature, scale and impact of the infringement.

<sup>(194)</sup> See footnote 104.

<sup>(195)</sup> OJ C 9, 14.1.1998, p. 3, point 1(A).

<sup>(196)</sup> <http://www.telekom3.de/de-p/konz/2-st/4-t-/star/030310-t-com-kurzprofil-ar.html>.

## B. DURATION

- (208) Because of the charge structure applicable the margin squeeze on access to the local network to the detriment of DT's competitors already existed on 1 January 1998, when the unbundling of access to the local loop in Germany and the complete restructuring of charges in the light of the relevant costs of the individual services throughout the EU were prescribed. Since competitors lodged the complaints underlying this proceeding in April and August 1999, DT was also aware of the accusation of possible abuse in the charge structure for access to the local network.
- (209) Despite the various changes in the access charges at wholesale and retail level in recent years and the increase in the use of broadband services, nothing has changed in this situation since that time.
- (210) Even the increases introduced by DT in 2002/2003 in the monthly retail access charges and the monthly and one-off T-DSL charges are insufficient to eliminate the margin squeeze identified. DT's infringement of Article 82 of the EC Treaty has thus existed for more than five years and has not yet been terminated.
- (211) The infringement is therefore of long duration. Under the guidelines on the method of setting fines, infringements of long duration can entail an increase of up to 10 % per year in the amount determined for gravity<sup>(197)</sup>. For the period from January 1998 to December 2001, the Commission considers an increase of 10 % per year appropriate. For the period from January 2002 to May 2003, in view of the regulatory restrictions on DT's scope for adjusting tariffs, the Commission considers it appropriate to dispense with a further increase in the fine. The basic amount is thus EUR 14 million.

## C. AGGRAVATING AND MITIGATING CIRCUMSTANCES

- (212) There are no aggravating circumstances. As a mitigating circumstance has to be taken into consideration in favour of DT that the retail and wholesale charges in question in the current proceeding were subject to sector specific regulation since 1988 on national level until today. Therefore in the present case a 10 % reduction from the basic amount mentioned in recital 211 is to be made, which leads to the final amount of EUR 12,6 million.

## HAS ADOPTED THIS DECISION:

*Article 1*

Deutsche Telekom AG has since 1998 infringed Article 82(a) of the EC Treaty by charging its competitors and end-users unfair monthly and one-off charges for access to the local network, thus significantly impeding competition on the market for access to the local network.

*Article 2*

Deutsche Telekom AG shall immediately bring to an end the infringement referred to in Article 1 and shall refrain from repeating any act or conduct described in Article 1.

*Article 3*

For the infringement referred to in Article 1, a fine of EUR 12,6 million is hereby imposed on Deutsche Telekom AG.

The fine shall be paid, within three months of the date of notification of this decision, into bank account No 001-3953713-69 of the Commission of the European Communities, FORTIS Banque, IBAN BE 71 0013 9537 1369, SWIFT GEBABEBB, Rue Montagne du Parc 3, B-1000 Brussels. After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first working day of the month in which this decision was adopted, plus 3,5 percentage points, namely 6 %.

*Article 4*

This decision is addressed to:

Deutsche Telekom AG  
Friedrich-Ebert-Allee 140  
D-53113 Bonn.

*Article 5*

This decision shall be enforceable pursuant to the first paragraph of Article 256 of the EC Treaty.

Done at Brussels, 21 May 2003.

*For the Commission*

Mario MONTI

*Member of the Commission*

---

<sup>(197)</sup> See footnote 195, point 1(B).