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The Future Regulatory Framework for Telecommunications: General Competition Law instead of Sector-Specific Regulation – A German Perspective

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Abstract
The legal framework of telecommunications regulation is about to change. This is due to the reform package which the Commission submitted in November 2007. The European Parliament and the Council of Ministers are still to approve. There is ongoing political debate. Unfortunately, it does not cover the crucial issue: is the sector-specific ex ante telecommunications regulation still justified after ten years of liberalisation and a partly dramatic evolution towards competition? The author replies in the negative from a historical, a regulatory policy and an analytical perspective. De lege lata, the three-criteria test, if applied correctly, induces this outcome. De lege ferenda, a sunset rule, if need be a qualified one, would be useful.

Keywords: sector-specific regulation, telecommunications, transitional nature of regulation.

1. INTRODUCTION

At the start of the 1980s, the world's developed economies embraced a policy of out-and-out deregulation, encompassing sectors such as banking, insurance, transport, aviation and grid-bound energy. Deregulation proved highly successful in the telecommunications sector, with the USA, the UK and Japan setting the pace. The EC created a European legal framework with five Directives in 2002. At the end of 2007, the Commission passed a telecommunications reform package, due to come into force by the end of 2009, with enactment subject to approval by the European Parliament and the EU Council of Ministers. Too little time is devoted to addressing the basic issue of whether sector-specific telecommunications regulation, particularly the regulatory authority's *ex ante* review powers, should not be pared back in favour of the general application of competition laws – in Germany: the Act against Restraints of Competition (GWB), the Unfair Competition Act (UWG) and EU competition rules.[1] The current regulatory regime risks becoming entrenched, thus undermining Germany's and Europe's prospects as a centre of business. We stand at a crucial regulatory crossroads which will shape development for the next 10 years at least.

[1] See Monopolkommission, 'Wettbewerbsentwicklung bei der Telekommunikation 2007: Wendepunkt der Regulierung', *Sondergutachten 50* (Baden-Baden, Nomos 2008), at p. 67 et seq.

2. THE HISTORICAL PERSPECTIVE

The need for sector-specific regulation above and beyond the application of general competition laws was justified for telecommunications by virtue of the particular market conditions. Recall, for example, the situation in the Federal Republic of Germany:[2]

- A 100% Deutsche Bundespost monopoly, in its role as the incumbent telecommunications organisation covering a host of interlinked markets;
- These market positions had been consolidated over generations;
- Corporate structure as part of the state administration.

None of which still exist today.

2.1 The monopoly argument

Deutsche Telekom AG, as the successor to the former Deutsche Bundespost, is exposed to fierce competition.

- Rivals of the one-time monopolist account for more than 50% of revenue in the telecommunications sector. The 50% mark was passed in 2006;
- Prices in the voice, broadband and mobile communications sectors have fallen significantly; in certain areas – such as international telephone traffic – the fall has been dramatic;
- Competitors account for more than 50% of the traffic volume in the fixed-line segment, with the figure growing all the time. This effect is even more pronounced in the DSL line segment;
- 87% of interconnection traffic now relates to local interconnection since competitors have set up suitable infrastructures.

2.2 The time argument

The duration of the original regulatory regime no longer bears any causal relationship with the current market situation. Globally, throughout Europe and Germany, a host of new players have entered the markets, thanks to deregulation. There are no signs that the pace of this development may have slackened, quite the contrary in fact.

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[2] Cf., Bundestag printed paper 13/3609 (1996), Begründung des Gesetzesentwurfs, at pp. 1/2 and 33/34; see also Bundestag printed paper 15/2316 (2004), Entwurf eines Telekommunikationsgesetzes, at p. 55, under A.3; see also the omnibus volume A. Picot, ed., *10 Jahre Wettbewerbsorientierte Regulierung von Netzindustrien in Deutschland. Bestandsaufnahme und Perspektiven der Regulierung* (Munich, C.H. Beck 2008).

2.3 The government argument

The move toward deregulation has always gone hand in hand with a move toward privatisation. Most governments have exited their ownership position relating to the incumbent. Where government minority holdings still exist – such as in the Federal Republic of Germany – the protection afforded by corporate group law intervenes on behalf of private shareholders. In other words, in the competitive marketplace the incumbent can and must behave just like any other company with a private legal form.

2.4 The transitional nature of regulation

Sector-specific telecommunications regulation was conceived as transitory from the outset. That holds true on both a German and a European level. For instance, the explanatory memorandum accompanying the Telecommunications Act (TKG) of 1996 states: 'The need for particular regulation of the telecommunications sector is a product of history – the hundred-year-plus monopoly of the telecommunications administrations – which initially requires the creation and promotion of competition in this area *before the general provisions of antitrust supervision can take effect.*'[3] [emphasis added]. In the Act itself, this becomes clear in the duty to report, assumed by the regulatory authority and the Monopoly Commission pursuant to § 81, para. 3, TKG 1996, now § 121, para. 2, TKG 2004, as to whether there is now 'effective competition' in the telecommunications markets or whether 'sustainably competitive-oriented telecommunications markets exist in the Federal Republic of Germany.' The Telecommunications Act of 2004 included the notion explicitly in §§ 9-11 TKG 2004: markets are only subject to regulation where the three-criteria test is fulfilled in accordance with § 10 and for which a market analysis in accordance with § 11 TKG has shown that there is no effective competition. Accordingly, the explanatory memorandum accompanying the government bill states: 'A great deal of importance was attached to the concept of effective competition even in the existing Telecommunications Act since it set the threshold *which, once reached, was meant to do away with sector-specific regulatory intervention designed to control markets.*'[4] [emphasis added]. The legislative intention becomes even clearer in the supporting legislation. For instance, the 6th Amendment to the Act against Restraints of Competition of 1998, which introduced into German law the essential facilities doctrine in the guise of § 19, para. 4, no. 4 GWB, refers to the special provisions of the Telecommunications Act: 'Insofar as special legal provisions exist, these shall remain

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[3] Bundestag printed paper 13/3609, *supra* n. 2, at p. 37 left col. (re. § 2, para. 3 bill).

[4] Bundestag printed paper 15/2316, *supra* n. 2, at p. 57 right col. (re. § 3 No. 10 government bill).

unaffected and take precedence. The general provision in § 19, para. 4, no. 4 aims to combat further sectorisation of antitrust law. It also provides an omnibus clause which then kicks in *if in future – as envisaged – sector-specific regulation in the area of telecommunications is repealed by the legislator.*'[5] [emphasis added]. This is also the view currently held by the Federal government. A strategy paper from the Federal Ministry of Economics and Technology regarding the EU review process states:[6]

- 'The discussion paper therefore focuses on proposals suitable for consistently pushing forward the smooth transition toward competition law;
- The aim enshrined in the Directives of at least partially transferring regulation to general competition law must be pursued seriously and vigorously.'
- It goes on to specify: 'In sectors where sustainable competitive developments are discernible, sector-specific control of abusive practices, say to prevent tactics designed to stifle competition, is sufficient. This will facilitate a subsequent transition to general competition law, as intended by the Directives.'

Along these lines, the former Federal Minister of Economics, Günter Rexrodt, made the frequently quoted statement, during the public presentation of the Regulatory Authority for Telecommunications and Posts (RegTP) on 7 January 1998, that the regulatory authority should 'gradually make itself superfluous'.[7]

This fundamentally transitory nature of sector-specific regulation is likewise discernible within the European legal framework. The decisive three-criteria test is set out explicitly in Recitals 9-16 of the Commission's Markets Recommendation[8] and in Recital 27 of the Framework Directive.[9] Implicitly, it also follows from Article 15, para. 1, of the Framework Directive. Entirely in tune with this approach, the rapporteur for the Committee on Industry, Research and Energy of the European Parliament, Catherine Trautmann, recently stated in regard to the

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[5] Bundestag printed paper 13/9720 (1998), Entwurf eines Sechsten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, at p. 37 (re. I. Allgemeines, 3. Grundzüge des Entwurfs c) ff)).

[6] Federal Ministry of Economics, *Perspektiven der Regulierung der europäischen Kommunikationsmärkte* (December 2005), at pp. 2, 4 and 5.

[7] Printed in Zentralverband Elektrotechnik und Elektroindustrie e.V., *Circular FJ 8/98 Annex 1*; regarding the issue as a whole, see Möschel, 'Der 3-Kriterien-Test in der Telekommunikation', *MultiMedia und Recht (MMR)* (2007) p. 343 et seq.

[8] Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, *OJ* 2003 L 114 of 8 May 2003, at pp. 45-49.

[9] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), *OJ* 2002 L 108 of 24 April 2002, at pp. 33-50.

Commission's reform proposals: 'The objective of the Telecom regulation is to achieve a fully competitive market and, consequently, that in due time electronic communications be ruled only by competition law.'[10] Ultimately, it is a question of proportionality: sector-specific measures need to be geared to the criterion of necessity, otherwise general competition law should be applied.

Needless to say, these promises are still waiting to be put into practice.

3. THE REGULATORY POLICY OUTLOOK

Niskanen developed the bureaucracy theory of regulation. According to his theory, regulatory institutions have no incentive to abolish themselves once regulation has successfully been put in place. Quite the opposite; regulation tends to be extended, or, at best, modified.

3.1 Persistence of the regulatory institution

The development of telecommunications regulation in Germany and also in Europe serves as a prime empirical example. The Federal Network Agency – the former RegTP – has now added to its competencies in telecommunications and posts the regulation of the grid-bound energy sector as well as rail networks. A mega-institution has arisen in the space of a few years. Jurisprudence rushing ahead of the game is considering creating a general, cross-industry regulatory law.[11] Particularly in the telecommunications sector, the number of regulatory personnel has increased inversely proportionally to the sharp fall in the previous incumbent's market share. Additionally, the framing of regulatory measures has become more and more intricate.[12]

- *Ex ante* regulation currently covers markets that were never monopolistic, e.g., mobile communications markets;

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[10] Draft Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and Directive 2002/20/EC on the authorisation of electronic communications networks and services, Explanatory Statement under 3 (Transition towards Full Competition), dated 16 April 2008 (2007/0247(COD)).

[11] Cf., J. Masing, 'Soll das Recht der Regulierungsverwaltung übergreifend geregelt werden?', *Verhandlungen des 66. Deutschen Juristentages 2006, Vol. I, Gutachten D* (Munich, C.H. Beck 2006).

[12] Regarding the issue as a whole, see H. Schedl and A. Kuhlmann, 'Sektorspezifische Regulierung: Transitorisch oder ad infinitum? Eine internationale Bestandsaufnahme von Regulierungsinstitutionen', 40 *ifo Forschungsbericht* (Munich 2008).

- The European Roaming Regulation dated June 2007[13] entails the setting of prices in wholesale and end-customer markets;
- New markets (e.g., VDSL or Voice-over-IP) are subject to *ex ante* regulation. The intention of the legislator in § 9a, para. 1 TKG basically not to subject these kinds of markets to such wide-ranging regulation has been watered down on the administrative level. Self-formulated interpretation principles and decrees are the means used;
- Quality is regulated with IP networks instead of trying to develop international standards;
- The Decree of the Federal Network Agency dated 27 June 2007 effectively forced the incumbent to provide competitors with access to cable-ducting installations and, subsidiary to this, to the dark fibre between the main distributors and the cable distributors. This promotes inferior services competition based on a uniform network instead of infrastructure competition based on competing equipment. At the same time, it perpetuates the need for regulation;[14]
- The administrative case law provides the regulatory authority with 'extensive discretion in terms of choice between alternative measures and their implementation.'[15]

Faced with this situation, it is difficult to imagine how a 'smooth transition to competition law' could be promoted without additional effective impetus from the legislator.

3.2 Fall in growth

This situation is all the more regrettable as telecommunications *per se* is among the fastest-growing sectors of the economy, with all the implications for jobs and tax revenue. Moreover, it is an important preliminary product for a host of other markets within the economy as a whole. The competitiveness of companies in these kinds of markets is influenced directly by the competitiveness of telecommunications. In the aforementioned Federal Ministry of Economics and Technology strategy paper covering the European review process, the following echoes the generally held view: 'The primary aim is a highly competitive telecommunications market, which ensures an optimum offering of telecommunications services for businesses and consumers and, in turn, provides the best

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[13] Regulation No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC, *OJ* L 171 of 27 June 2007, at pp. 32-40.

[14] See W. Möschel, 'Fehlsame Weichenstellung in der TK-Regulierung', *MMR* (2007) p. 547 et seq.

[15] Cf., Federal Administrative Court Decision of 28 November 2007 (6 C 42/06), margin number 28 et seq.

possible contribution to growth, innovation and employment in the economy as a whole. This aim can only be achieved through competition which equally reflects static and dynamic competitive aspects, i.e. safeguards, prices and cost efficiency on the one hand while offering sufficient incentives for innovation and investment on the other.'[16]

In this respect, the theory goes: since telecommunications is not a mature industry, but is rather characterised by extremely dynamic innovation, the second aspect, the protection of competition in its dynamic aspect, must take centre stage. Regulatory restrictions on freedom of investment discourage investment in this regard. The incumbent will not invest in network technologies in a regulatory environment that promotes the desired services competition in a unified network. It does not make economic sense for the incumbent to shoulder the inevitable investment risks while having to share the potential opportunities with competitors. The latter, for their part, embrace a wait-and-see policy, shying away from investing since the position of 'free rider' is extremely attractive.[17] The idea of wanting to help through regulatory fine-tuning, say setting 'reasonable' prices for the use of third-party investment, is a one-way street into a legal quagmire. Uncertainties of this kind are anathema to investment. Demands along the lines of 'Regulatory authorities are particularly obliged to facilitate compensation for *ex ante* risks of investment projects, which also include the risk of a project failing',[18] are simply utopian.

The few empirical studies that do exist attest to the generally held view expressed here: for example, Europe is lagging far behind its less 'statically' regulated competitors from the USA, Japan and Korea in terms of per capita telecommunications investment. Per capita investment in, for example, the USA, is 50% higher than in Europe. Reference is made to an investment gap that continues to widen.[19] A current empirical study by Waverman, et al., has come up with the following calculations for Europe:[20] a 10% reduction in network usage prices leads to an accumulated fall in investment of around €12 billion (2010) among alternative competitors alone. Even the recently presented empirical study by Röller, et al., the Commission's former chief economist, concludes in its analysis of 27 European Member States over 10 years that access regulation

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[16] *Supra* n. 6, at p. 1.

[17] Cf., W. Möschel, 'Investitionsfreiheit ist ein hohes Gut', *Festschrift für Otto Graf Lambsdorff zum 80. Geburtstag* [Publication in honour of Otto Graf Lambsdorff] (Stuttgart 2007), at p. 127 et seq.

[18] According to G. Knieps, 'Sektorspezifische Regulierung: Transitorisch oder ad infinitum?', 21 *ifo Schnelldienst* (2007) p. 7, at p. 9.

[19] OECD, *Communications Outlook* (2007), at p. 127, ISBN: 978-92-64-00704-8, http://www.oecd.org/document/17/0,3343,de_2649_201185_38876369_1_1_1_1,00.html.

[20] L. Waverman, et al., *Access Regulation and Infrastructure Investment in the Telecommunications Sector: An Empirical Investigation* (London and Brussels 2007).

stifles investment.[21] One may well argue about the accuracy of such econometric calculations when it comes to detail, but that will do nothing to change the core message that telecommunications regulation in its current form stifles innovation.

4. THE ANALYTICAL PERSPECTIVE

While historical motivation for regulation is now obsolete, justification from an analytical perspective should not be ruled out. Yet, this is anything but the case in the telecommunications sector.

A separation between constitutive and special regulations in telecommunications paves the way for an initial simplification.[22] The former include framework regulations, which can dispense with the need for special regulation; take, for example, frequency management, number allocation and number portability, and access to public rights of way. Interconnection to public networks rather seems to be a different case; here, we could rely on the market as a problem-solving mechanism. The transfer from regulation to general competition law concerns special, mainly price and access regulations and not these constitutive regulations.

4.1 **Unclear concept of competition**

An unclear concept of competition lies at the heart of the problem. European and, following in its wake, German telecommunications law embraces the concept of 'significant market power'. It is generally interpreted largely on the basis of the antitrust law criterion of a market-dominant position. In conjunction with the aforementioned conflict between Telecommunications Act regulation and the application of general competition laws, this gives rise to contradictions, if not to flawed logic: a criterion that generally facilitates the application of competition laws cannot be sufficient in itself to justify increased sector-specific regulation. This notion would also be bordering on the absurd from a competition policy viewpoint: The general competition rules regarding market-dominant companies do not combat market dominance as such. Process monopolists that have fought

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[21] 'According to a simulation based on operators in our sample, the introduction of regulated access to incumbents' networks costs Europe a lost investment in the amount of 25.1% of the entrants' infrastructure stock in the first year. This loss accumulates over time and reaches 111.5%, which is equivalent to €18.1 billion, over 5 years. In other words, our results suggest that the entrants would more than double their infrastructure over 5 years had they no regulated access to the incumbents' local loops. In terms of the total telecommunication investment in Europe, the lost investment is equivalent to 8.4%, which is a significant amount.'; H.W. Friederiszick, M. Grajek and L.H. Röller, 'Analysing the Relationship between Regulation and Investment in the Telecommunication Sector', *ESMT Competition Analysis* (28 November 2007), at p. viii, http://www.esmt.org/en/114288.

[22] For details, see Möschel, *supra* n. 7, p. 343, at p. 344.

for their market position on the basis of superior efficiency, remain most welcome. These are the well-known Schumpeter entrepreneurs that provide the dynamism behind competition processes.

This intellectual lack of clarity clouds the specific issue of why the application of general competition laws should not be sufficient. There are no differences in terms of the forms which abuses may take:[23]

- Abusive price hikes;
- Predatory measures to eliminate competition, also in the form of discounts;
- Price-cost gaps;
- Access obligations;
- Bundling;
- Other positive rulings, e.g., regarding cost accounting.

The processes in antitrust law are also similarly efficient. This applies to:

- Requirements in terms of the authority's onus of presentation and proof;
- The possibility to intervene quickly and repeatedly where market-dominant companies abuse their position;
- The aspect of legal certainty for all those involved;
- The deterrent of possible sanctions (fine, skimming off economic advantages, private enforcement seeking injunctions or damages);
- Since the 8th Amendment to the Act against Restraints of Competition (GWB) in 2007, complaints against antitrust authority rulings under §§ 19-21 GWB no longer have a suspensive effect (abolition of the former § 64, para. 1, no. 1 GWB).

A need for sector-specific regulation is no longer clearly discernible.

4.2 **Remaining problem areas**

Problem areas may remain. In telecommunications, a precise distinction should be made between two different types: monopolistic bottlenecks on the one hand and termination monopolies in third-party networks on the other.

4.2.1 *Monopolistic bottlenecks*

Here, pronounced bundling advantages combined with sunk costs provide scope for behaviour that stifles competition – an issue that cannot be resolved through

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[23] Re the following and Möschel, *supra* n. 7, at pp. 343, 345 et seq.

the market entry of potential competitors.[24] There is a need for regulation, justified on the basis of competition policy considerations, such as the abolition of discrimination-free access to the relevant resource. This regulation need not be sector-specific or necessarily *ex ante*. The application of the essential facilities doctrine within general antitrust law may very well be sufficient. It has the excellent advantage of a built-in phasing out: as competition develops, the need for regulatory intervention automatically expires. In the case of sector-specific *ex ante* regulation, the legislator has to be involved first. Moreover, it is difficult to predict how the regulator will act. Two case groups also need to be distinguished in this respect. The bottleneck situation may be considered permanent, given the current and foreseeable state of knowledge. And so regulatory intervention will also be permanent. Rail and electricity networks are two examples in this context. Alternatively, the bottleneck situation may be temporary. One example is the last mile, i.e., the direct access to the end user in telecommunications. Originally, the incumbent enjoyed a monopoly, based on the copper pair. We now have wireless access (mobile, satellite), which will develop further, along with wire line access via TV cables (triple-play connections). In this case group, there is a conflict of objectives between regulation on the one hand and the incentive to invest in infrastructure on the other. Two flawed merger control decisions taken by the Federal Cartel Office, which prevented foreign groups of investors from accessing a consolidated TV cable network, have seriously hampered development in Germany.[25] Only recently has the Cartel Office disassociated itself from these decisions.[26]

4.2.2 *Termination monopoly*

This is an entirely different situation.[27] A calling network can only have the call terminated in the called subscriber's network. Each network constitutes a monopoly in this respect. That monopoly does not disappear through competition unless the recipient could be contacted on various numbers in different networks. The problem is only of limited importance since the monopoly applies to both the calling and the called network reciprocally, so that the resulting payments broadly offset each other. In Europe, the calling network pays in combination with a charge levied on the calling end user. The USA has adopted a different solution, where the call recipient is involved in the payment. There, the terminating network collects its costs from its own customers.

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[24] See, e.g., Knieps, *supra* n. 18, at p. 7.

[25] See Federal Cartel Office (*Liberty/VIOLA*) Decision of 22 February 2007, WuW/E DE-V 558, and Federal Cartel Office (*KDG/Kabel BW etc*) press release of 24 August 2004.

[26] Judicial release of 3 April 2008, WuW/E DE-V 1567 (*Kabel Deutschland*).

[27] See I. Vogelsang, 'Regulierungsbedürftigkeit und Deregulierung', 21 *ifo Schnelldienst* (2007) p. 10, at p. 11 et seq.

Overall, these remaining problem areas should not block the transition from sector-specific regulation to the application of general competition law. The associated residual risks are tenable.

5. THE LEGAL STEPS

Reforms are possible, to a certain extent, on the basis of current law; in other respects they require the involvement of the legislator.

5.1 Based on current law

The three-criteria test enshrined in European and German law (§ 10, para. 2 TKG) has provided for the transition to a predominant application of general competition law. The test now only needs to be taken seriously in practice. Three conditions have to exist *in tandem* for sector-specific regulation to intervene:

- Permanent, contingent structural or legal market entry barriers exist;
- No long-term trend toward effective competition is apparent in the affected market;
- General competition law is not sufficient to combat the aforementioned market failings.

In particular, the third criterion is brushed aside using stereotype, cliché-ridden expressions.[28] The aforementioned repeal of § 64, para. 1, no. 1 GWB through the 8th Amendment may give the regulatory authority sufficient cause to reconsider its existing practices. This would be possible without losing face.

Fortunately, current law is not geared to specific technologies. The regulatory concept is technology-neutral. Yet, this should not be used as an excuse to automatically transfer existing regulations to new developments and markets.

5.2 Intervention of the legislator

The legislator needs to be involved if reforms based on current law are not considered realistic. The legislator will then have to modify current law or emphatically resort to clarifications.

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[28] For details and supporting evidence, see Möschel, *supra* n. 7, at p. 343 et seq.

5.2.1 *Small steps*

Small steps may take the form of approving a principle according to which sector-specific regulation in end-customer markets is always ruled out if such regulation already covers an essential upstream product. The Commission's Roaming Regulation has unfortunately gone the opposite way. Similarly, a checklist could be specified within the specific scope of § 10, para. 2 TKG, which dramatically reduces, or at any rate precisely channels, the discretion which the Federal Network Agency has in making judgments. Such measures can also be implemented in the form of administrative regulations.

5.2.2 *Sunset rule*

A major step would be to put in place a sunset rule. In its widest-ranging form, such a rule would promote the idea of abolishing sector-specific regulation in telecommunications. If one believes the time is not yet ripe for such a proposal, one needs to think about a qualified, limited sunset rule.

- One clear solution would be to set a final date for existing regulation, e.g., 1 January 2014. All those involved would have sufficient time to adapt accordingly. The desired certainty for investors would be ensured. One model is, for instance, the Commission's Roaming Regulation, which will expire on 30 June 2010, or § 29 GWB in the version of the 8th Amendment. § 29 will no longer apply after 31 December 2012 (§ 131, para. 7 GWB);
- Such a sunset rule could be tied into a regular duty on the authority to examine whether regulation needs to be abolished. This all too tentative solution is suggested in the report by the European Parliament's Industry, Research and Energy Committee regarding the Commission's reform proposals (gradual approach).[29] Based on the previous bad experiences with this instrument, one could think of involving independent review committees. § 121, para. 2 TKG includes a proposal along these lines. Greater pressure will be exerted if regulation basically expires on a final date unless the legislator decides to extend it. Then the political burden to act would remain with the legislator;
- In problem areas such as the last mile, a sunset rule could be linked to existing infrastructure competition. But this should happen in a formalised way so that provisions cannot be watered down by the implementing authority. For instance, whenever a customer can choose between two networks, sector-specific regulation should be abolished;

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[29] Cf., *supra* n. 10.

- Temporary suspension of regulation (access holidays) to promote investment would represent progress over current legislation. However, it remains a half-hearted solution since it ultimately leads back to regulation.

5.3 **Multilayered approach**

5.3.1 *Functional separation*

Under the Commission's reform package, national regulators should be provided with the instrument of functional separation.[30] A vertically integrated provider of telecommunications services can then be forced to transfer activities 'down-stream' to separate companies. Structural separations may have benefits over controlling behaviour in certain network industries. But that would be giving the wrong signal to the telecommunications markets: what needs to be done is to reduce rather than extend regulation.

5.3.2 *A new European regulatory authority*

The Commission proposes setting up a European regulatory authority for the electronic communications markets. From the viewpoint of a desired transition from special telecommunications law to general competition law, this proposal is counter-productive. It would never be possible to abolish this new supervisory authority. In any case, abolishing it would not be within the power of an individual Member State.

6. SUMMARY OF PROPOSITIONS

1. Special telecommunications regulation as opposed to the application of general competition laws was conceived as transitory from the outset. Today's market conditions no longer justify retaining such special regulation;
2. Without effective impetus from the legislator, a transition to general competition law is unlikely. The regulatory institution is highly persistent, as is the urge for increasingly detailed regulation. This stunts economic growth, with all its consequences for jobs and tax revenue;
3. The current regulatory regime is based on an unclear concept of competition. Erroneously, significant market power is being combated without sufficient account being taken of the dynamic aspects of competition. No comparison is actually made between the effectiveness of telecommunications regulation on

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[30] For general information on the Commission's reform proposals, see in particular Monopolkommission, *supra* n. 1, at p. 82 et seq.

the one hand and the application of general competition laws on the other. Existing problem areas (last mile, termination monopolies) are being pared back, and can be solved more intelligently than through traditional regulation;

4. The desired transition could already be implemented on the basis of current legislation. This would only require the bodies applying the law to use the three-criteria test correctly;
5. The legislator could take the major step of a sunset rule, in addition to smaller steps. Sector-specific regulation would then expire after a transition period. A sunset rule can be qualified in a variety of ways;
6. The Commission's proposals regarding the instrument of functional separation and setting up a European regulatory authority are not conducive to achieving the transition to general competition law.