



December 17, 2004

Gloria Blue

Executive Secretary

Trade Policy Staff Committee

ATTN: Section 1377 Comments
Office of the United States Trade Representative
600 17th Street, N.W.

Washington, D.C. 20508

RE: FRANCE, GERMANY, *WTO General Agreement on Trade in Services*

Dear Ms. Blue:

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

ECTA, the European Competitive Telecommunications Association, is a trade association representing over 150 communications companies, delivering innovation, competition and choice to Europe’s businesses and citizens. ECTA’s comments, therefore, will focus on European Member states

ECTA believes that the two main concerns affecting trade between the US and Europe are excessive and discriminatory fixed-to-mobile termination rates; and excessive pricing and discriminatory provisioning of local access leased lines. As described below, both these concerns constitute violations of relevant trade agreements.

The WTO panel decision in the U.S.-Mexico case¹ gives USTR firm legal grounds upon which to act against both excessive fixed-to-mobile termination rates and lack of access to leased lines. ECTA, therefore, urges USTR to use the key conclusions made by the panel to finally remove these anti-competitive and illegal market barriers.

¹ Mexico- Measures Affecting Trade in Telecommunications Services, WT/DS/204/8 (June 9, 2004) (“U.S.-Mexico Panel Report”).

Fixed-to-Mobile Termination Rates. Fixed-to-mobile termination rates are a form of interconnection under Section 2.1 of the Reference Paper.² Therefore, according to Section 2.2, major suppliers must provide that form of interconnection under “non-discriminatory terms, conditions . . . and rates” and at “cost-oriented rates that are transparent, reasonable, having regard to economic feasibility” Arguably, the majority of mobile operators are “major suppliers” with respect to their network and customers because no other carrier can access that customer. Even if the market is defined more broadly, most of the major offenders cited in these comments are the former monopoly which qualifies as a major supplier under a broader market definition.

In most countries across Europe rates are far from “cost-oriented”. As a matter of fact, average European termination rates are about 200% higher than available cost estimates. WTO Members failing to take action to lower those rates are in clear violation of the obligations provided in the standard Reference Paper .

In some cases, the fixed-to-mobile rates are also discriminatory; they are higher than rates charged to “on-net” customers, for example. This also is a clear violation of the interconnection obligations.

For those WTO members who have agreed to provide market access for cross-border services, high rates for terminating international calls on the mobile network violates Section 5(a) of the GATS Telecom Annex. The U.S.-Mexico Panel Report made it absolutely clear that the GATS Telecom Annex obligations apply to any scheduled service, including telecommunications services. Further the Panel concluded that the requirement that access to and use of the public telecommunications network be supplied on “reasonable” terms and conditions includes the price of access. So pricing for access to the mobile network must be “reasonable.” While “reasonable” does not mean “cost-oriented,” according to the Panel, it noted that rates that exceed cost by a substantial margin may not be reasonable. This clarification of Article 5(a) of the GATS Telecom Annex shows that the WTO members cited in these comments are violating their WTO commitments by continuing to permit excessive fixed-to-mobile rates. In addition, Art. 5(b) requires that access be on “non-discriminatory” terms and conditions. As noted above, this is not the case in some of the WTO members cited in these comments.

Excessive Pricing And Discriminatory Provisioning Of Local Access Lines. Local access leased lines are the primary way for competitive carriers to reach a broad market. It is essential for the delivery of broadband services that competitive carriers have access to these local access leased lines, including bitstream access.

WTO members which have scheduled voice or data services on a facilities or resale basis have an obligation to ensure that carriers from other WTO members have access to and use of the public telecommunications transport network on “reasonable and non-discriminatory terms and conditions” under Section 5(a) of the GATS Telecom Annex. In addition, Section 5(b) requires that

² Section 2.1 of the Reference Paper defines interconnection as a “linking of suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken.”

these WTO members ensure that service suppliers of other WTO members have access to private leased circuits for the supply of a scheduled service.

Together, the Section 5 obligations impose a requirement for access to and use of local access leased lines on reasonable and non-discriminatory terms and conditions, including price. The scope of this obligation, as interpreted by the WTO Panel Report, has already been described. As noted in these comments, many WTO members have failed to meet this obligation.

FRANCE WTO VIOLATIONS – Reference Paper, GATS Telecom Annex and GATS Commitments

Excessive Fixed-to-Mobile Termination Rates: Regulation of the mobile sector in France has improved significantly in 2004. On December 10, 2004, the French regulator, L’Autorité de Régulation des Télécommunications (“ART”) ordered Orange France, SFR and Bouygues Télécom to lower fixed-to-mobile interconnection rates by 36% over two years beginning January 1, 2005. This decision will bring France much closer to complying with its Reference Paper obligation that major suppliers provide cost-oriented interconnection to their networks. Unfortunately, it is not clear from the decision whether the new pricing applies to interconnection of international incoming calls. Until this point is clarified, we believe that USTR should continue to urge France to fully comply with its interconnection obligations.

Lack of Independence of the ART: ECTA continues to be concerned over the lack of independence of ART. It effectively shares oversight with the Finance Ministry, which also is the majority owner of the major supplier, France Telecom. Section 5 of the Reference Paper requires that the regulatory body be separate from, and not accountable to, any supplier of basic telecommunications services. The arrangements between ART and the Finance Ministry call into question ART’s independence. This conclusion is supported by a recent review by the Organization for Economic Co-Operation and Development, which noted an “insufficient distance between the government as owner of the incumbent and policy maker in the telecommunications sector.”³

Local Access Leased Lines – Lack of Cost-Oriented Pricing, Lack of Reasonable Access and Discriminatory Provisioning: ART has taken a number of actions to make FT’s prices for local access leased lines more reasonable so that competitors can offer viable local access. These decisions have not been sufficient and access to FT’s leased lines is still not available on reasonable terms and conditions, including price, as required by the GATS Telecom Annex. In addition, FT has blocked the implementation of the ART’s RIO decisions by refusing to implement LRIC pricing, providing critical data months late, imposing unreasonable penalties in its interconnection offer, and setting up a price squeeze situation vis-a-vis cheaper retail digital subscriber line (“DSL”) access lines. FT has not provided a wholesale price for DSL bitstream interconnection DSL, although it does offer an excellent retail package (both in terms of price and quality of service) for both asymmetric digital subscriber line (“ADSL”) and symmetric digital subscriber line (“SDSL”) variants.

FT unilaterally has degraded the quality of service commitments contained in its local access leased line contracts with new entrants, and substantially stiffened the terms of such contracts. FT provides better treatment to its retail arm in the “premium” service that it offers to its

³ Report on Regulatory Reform in Telecommunications – France, Organization for Economic Co-Operation and Development, 6 July 2004, available at <http://www.oecd.org/dataoecd/36/35/32482712.pdf>, at Box 6.

own clients covering repair times and guarantees on downtime. These terms are not available to its competitors. FT's failure to implement cost-oriented pricing, failure to provide information in a timely manner, offer a wholesale price for advanced services and discriminatory provisioning practices are clear violations of France's obligations under Section 2.2 of the Reference Paper and Article 5 of the GATS Telecom Annex.

Discriminatory Mobile Termination Rates and Anti-Competitive Conduct: The French market has been characterized by discriminatory and anti-competitive access to the mobile networks on the part of Orange France and SFR and the discriminatory termination charges levied by all mobile operators in favor of calls from other mobile networks. Orange France and SFR are both vertically-integrated carriers and, as such, are able to employ a price squeeze strategy by discounting retail prices on fixed-to-mobile termination but charging fixed operators high termination rates on mobile networks. Such discrimination in the terms and conditions for access to and use of the public mobile telecommunications network in France violates the GATS Telecom Annex.

The French Government for recognizing the anti-competitive nature of the actions by Orange France and SFR. It has adopted a test to determine whether a price squeeze strategy is being employed which takes account not only of termination rates but also commercial costs, such as bad debt and cost of sales. ECTA will continue to monitor the market to determine whether the French Government action is sufficient to correct the discriminatory and anti-competitive conduct.

GERMANY WTO OBLIGATIONS *Reference Paper and GATS Telecom Annex*

The situation in Germany has deteriorated, largely as a result of the enactment of the new German Telecommunications Act ("TKG") in June 2004. The intermingling of interests between the German Federal Government, its telecommunications regulator ("RegTP"), and Deutsche Telekom ("DTAG") is a serious problem.

The entry into force of the TKG at the end of June 2004 has exacerbated the difficulties for DTAG's competitors. As described in more detail below, it threatens to further undermine the existence of an independent regulator and to prevent action on Germany's excessive and discriminatory mobile termination rates. More troubling, the TKG appears to eliminate the possibility for *ex ante* regulation even where significant market power exists, because of the "double-dominance" clause. This clause states that the regulatory authority can only regulate access services on an *ex post* basis if the carrier has significant market power on both the retail and wholesale level.⁴

⁴ TKG, Section 30(1) states: "Subject to the following subsections, rates of an operator of a public telecommunication network, which possesses significant market power for access services imposed according to Section 21 shall be subject to approval by the Regulatory Authority according to Section 31. Deviating from sentence 1, the Regulatory Authority shall make those rates subject to an *ex post* regulation according to Section 38 (2) and (4) if (1) the operator does not also have at the same time significant market power in the market for end user services in which the operator acts, (2) for the first time after the Act comes into force, significant market power has been found without the operator having been found to hold a market dominant position by the Regulatory Authority before the Act came into force in the relevant market and (3) this measure is sufficient to achieve the regulatory objectives according to Section 2(2).

RegTP will probably not finalize the market definition and analysis process that are a prerequisite for the application of the new regulatory framework until the end of 2005. At the same time, DTAG has challenged the ability of RegTP to continue to apply the old rules and remedies during this review period. As a result, competitors in Germany face a limbo situation – they have neither the old remedies nor any new remedies. This creates a lot of uncertainty for the competitors and favors DTAG

Moreover, the Administrative Court of Cologne issued a preliminary injunction in a September 2004 holding regarding retail price controls that only the rules under the TKG apply (although, as noted above, RegTP will not be able to impose most new rules until it finishes its market review) and therefore *ex ante* regulation is not permitted. Based on this preliminary ruling and without any formal rulemaking, RegTP has shifted its general policy on retail price control and stated that it will no longer review DTAG's prices *ex ante*, but only *ex post* (which would be too late to help DTAG's competitors). The European Commission has noted in its recent 10th Implementation Report⁵ that it needs "to be verified" whether this approach is in compliance with the EU Framework Directive. Again without formal rulemaking, RegTP recently expanded the Court's ruling so that it applies to proceedings on DTAG's wholesale prices. As a result, there is no more *ex ante* price control on wholesale prices as well.

RegTP's policy shift, without any public input, from *ex ante* to *ex post* regulation, goes along with a reluctance or unwillingness to apply the new regulatory tools that the new Act provide and that do not depend on a market analysis. For instance, RegTP could order DTAG to offer wholesale products at the same time as it offers its end user products and can prevent DTAG from tying products unfairly and/or offering products below costs. RegTP has failed to take these actions.

Lack of Independent Regulator and Transparency: There seems to be increased political pressure on RegTP in 2004. This development is hardly coincidental, given that the German Government still holds a direct and indirect ownership interest of 43% in DTAG. Section 117 of TKG makes political pressure even more likely by giving the Economics Ministry the power to require all guiding regulatory decisions to be made by the "Presidential Chamber" of RegTP. This renders decision-making subject to political control and calls into question the impartiality of RegTP.

There has also been a lack of transparency in the operation of RegTP. The EU 10th Implementation Report⁶ states that neither RegTP's Official Journal nor its regulatory decisions have been fully published on the Internet up to now.

Transparency is also a problem in another respect. DTAG has never revealed the cost-modeling basis underlying its cost documentation in rate regulatory proceedings. Although constantly criticized for permitting this omission, RegTP has not required DTAG to make this cost model transparent. While this is not the type of transparency particularly required by WTO obligations, it demonstrates the lack of impartiality of RegTP and its failure to take actions to make sure that DTAG is not acting in an anti-competitive manner.

⁵ **European Electronic Communications Regulation and Market 2004 (10th Report)**, ("10th Implementation Report"), available at http://europa.eu.int/information_society/topics/ecom/all_about/implementation_enforcement/annualreports/10threport/text_en.htm at 95.

⁶ *Id.* at 99.

Provision of Local Access Leased Lines on Discriminatory Conditions and at Unreasonable Costs: DTAG has been treating its competitors less favorably than its affiliates and itself in the provisioning of local access leased lines. Unbelievably, regulatory efforts to enforce non-discriminatory provisioning are still unresolved. The court review of the 2002 RegTP decision on non-discriminatory access to leased lines has not yet been decided by the relevant court and therefore no action has been taken.

The quality of and tariffs for local access leased lines are both problems. In 2004, there have been an increasing number of leased line outages during working hours, likely due to DTAG's maintenance work outside of the agreed times for leased line maintenance. The prices for leased lines are among the highest in Europe. According to the 10th Implementation Report, the monthly charges for high speed leased lines in Germany are Euro 141.10 for a 5 km 64 Kbit/s part circuit line, compared to an EU average of Euro 98.82.⁷ The costs in Germany cannot be that much higher than the European average and the DTAG rates are unreasonable.

By allowing the quality of service to deteriorate and costs that are significantly higher than average European costs, Germany is violating the GATS Telecom Annex, which requires the provision of access to the public switched network on nondiscriminatory and reasonable terms and conditions, including price.

Excessive Fixed-to-Mobile Termination Rates and Anti-Competitive Pricing: Germain's mobile termination rates remain far in excess of cost in violation of Section 2.2 of the Reference Paper and Section 5 of the GATS Telecom Annex. Unlike France, RegTP has failed to designate either DTAG's as having significant market power with a legal obligation to provide cost-oriented, carrier grade interconnection (fixed-to-mobile termination) to fixed operators.

The retail price for fixed-to-mobile calls offered by DTAG's D1 and Vodafone's D2 are close to or in some cases below the "wholesale" interconnection rate. For example, D1 offers retail fixed-to-mobile minutes in the context of bundled offers to corporate closed user groups or large customers at rates below the interconnection rate. D1 and D2 can engage in these "tied" arrangements as a result of their vertical integration. These actions are anti-competitive on their face, forcing fixed operators either to lose those customers or sell at a loss.

RegTP has consistently refused to adopt the measures necessary to regulate this anti-competitive conduct, despite statements regarding the anti-competitive nature of these vertically integrated firms, voiced by the German Monopoly Commission and Federal Cartel Office, many carriers' groups, and the European Commission. The TKG will make it even harder to adopt the necessary measures by requiring a determination of "double dominance" before *ex ante* regulation can be imposed. The explanatory notes on this provision explicitly state that the double dominance test has the objective of justifying exclusion of mobile operators from *ex ante* rate regulation. Germany has other tools that it could use to prohibit this kind of anti-competitive tying arrangements but it has failed to act.

⁷ *Id.*, Annex 2 at 41 .

Provision of Broadband Services: The German Government is in breach of Sections 1.1 and 2.2 of the Reference Paper because it has failed to implement measures to prevent DTAG from engaging in anti-competitive conduct with respect to provision of broadband DSL service and also because it has not required DTAG to provide interconnection needed for its competitors to provide similar services. For example, unlike other EU member states, RegTP has never required DTAG to offer private partial circuits, which let competitors benefit from cost benefits generated by the bundling of bandwidth on the trunk segments of leased lines.

RegTP's lack of action regarding access to all parts of DTAG's network is of particular concern because DTAG can expand its market power in the broadband services market into the VoIP market without any interference or regulation by RegTP. DTAG holds a dominant market position in these market segments. As every leased-line and DSL customer is a potential VoIP customer, DTAG can fully draw on these market shares and use them for enhancing its VoIP activities.

RegTP does not require DTAG to offer bitstream access to its competitors on a wholesale basis. In fact, RegTP has not even begun the required market analysis proceeding regarding the market for "wholesale broadband access." Nor has it acted to identify and prohibit any anti-competitive use of DTAG's market power in the leased-line and DSL-markets in the VoIP sector even though the TKG gives RegTP that authority. The 10th Implementation Report⁸ notes with serious concern DTAG's margin squeeze strategy and its practice of tying various broadband offers to undermine competition

Furthermore, RegTP has not acted, as permitted by TKG, to require DTAG to offer IP-based and ATM-based network interconnection. Without this bitstream access, competitors cannot provide competitive broadband services.⁹ RegTP has the power but has refused to impose on DTAG the obligation to provide the necessary technical parameters for the interconnections (ATM and IP), quality parameters, delivery terms and commercial conditions for bitstream access products.

Conclusion: ECTA emphasizes the deterioration of the German markets. This is also the view of the German Monopoly Commission in its Annual Report. It lists various market sectors, such as "access to the local loop", where Germany is far from having sustainable competition and expresses serious concerns regarding the legal uncertainty in the telecommunications market. ECTA, therefore, requests that USTR strive for changes to ensure that independent regulation and market opening can finally be implemented in Germany.

⁸ *Id.* at 99-101.

⁹ *Id.* at 98.