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Both Germany and the United States are in the process of substantially
revamping the legal frameworks of their telecommunications industries. On
February 1, 1996, the U.S. Congress passed the Telecommunications Act
of 1996 (1996 Act).\(^1\) Striving to meet a European Union (EU) deadline,\(^2\)
the German Parliament passed its new telecommunications law, the
Telekommunikationsgesetz (TKG), on July 25, 1996.\(^3\) Each statute
establishes significant changes in the makeup of the respective industries,
setting the stage for market competition in virtually all sectors of these
telecommunications industries.

Such changes are occurring throughout the world and represent the

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\(^1\) Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in

\(^2\) See German Government Tries to Keep Telecoms Legislation on Track, TELECOM

\(^3\) Telekommunikationsgesetz (TKG), v. 1.8.1996 (BGBl. I S.1120) (F.R.G.). The TKG,
in German and in English, is posted on the World Wide Web at the German Federal
Ministry for Posts and Telecommunications' web site: <http://www.bundesregierung.de/.bin/
lay/inland/ministerien/post/tkg.html>. Unless otherwise noted, English quotations of the TKG
are taken from the "Telecommunications Act Translation" by the German Federal Ministry
of Posts and Telecommunications. Comparisons of wording between drafts are to the
following: the "June Draft" (Draft from June 5, 1996), contained in BT-Drucksache 13/3609;
the "January Draft" (Draft from Jan. 30, 1996), available on the Internet at <http://userpage
.fu-berlin.de/-stem89/politik/tkg_1.html> ; and the "Original Draft" that the Chancellor sent
to the Parliament on Feb. 9, 1996, which is contained in Bundesrat, Entwurf eines Telekom-
munikationsgesetz (TKG), Gesetzentwurf der Bundesregierung, Drucksache 80/96, [Draft of
a Telecommunications Act, Bill of the Federal Government, Circular 80/96] (09.02.96) also
available on the Internet at <http://www.fu-berlin.de/POLWISS/mdb-projekt/tauss/
dokumente/telekom.html>. A Legislative Report [Begründung] was published along with the
Original Draft of the TKG [hereinafter TKG Legislative Report].
culmination of what began in the late seventies with the liberalization of the U.S. equipment market and proceeded with the breakup of AT&T and the privatization of British Telecom in 1984. The provision of local and long-distance telecommunications services had previously been viewed as a natural monopoly. However, based on tremendous leaps in technological capabilities and changes in thinking regarding national security, telecommunications markets have, over the past twenty years, come to be viewed as amenable to competition. Commentators have argued that, rather than protecting domestic telecommunications industries, national monopolies have hindered growth and development in nationalized markets. Accordingly, nations are striving to improve the competitiveness of their telecommunications-sector monopolies and designated dominant providers—whether private like AT&T, public like British Telecom, or state-owned like the former Deutsche Bundespost (DBP), the German Federal Postal Service—as they are converted from public-sector utilities to private operators.


5. See, e.g., Günther Knieps, Die Telekommunikation als Gegenstand der Industriepolitik in Europa, den USA und Japan aus wirtschaftswissenschaftlicher Sicht [Telecommunications as a Subject of Industrial Policy in Europe, the USA, and Japan from an Economic View], in KOMMUNIKATION OHNE MONOPOLE II [COMMUNICATIONS WITHOUT MONOPOLIES] 239, 252 (Ernst-Joachim Mestmäker ed., 1995) (arguing that European monopolies that are protected from competition will not be efficient, leading to a poor competitive position that disadvantages national equipment manufacturers); Bernard Amory, Telecommunications in the European Communities, EUROPAISCHES ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EUZW HEFT) [EUROPEAN JOURNAL OF ECONOMIC LAW], Feb. 1992, at 75 (arguing that threat of rapidly developing United States and Japanese telecommunications industries, resulting from liberalization, spurred the EC to act); 2 ALFRED EIDENMÜLLER, KOMMENTAR, POST- UND FERNMELDEWESEN [MAIL AND TELECOMMUNICATIONS] 26 (1991) (liberalization in other western countries pushed Germany’s deregulation); Teleconglomeration: Why Governments Should let Foreign Telecoms Giants into their own Backyards, ECONOMIST, Apr. 6, 1996, at 18; EU Telecom Ministers Take Steps Toward European Telecom Deregulation, Reuters Textline, Agence Europe (German Language Full Text), Mar. 22, 1996, available in LEXIS, Legeon Library, Curnews File (reporting EU Commission spokesman’s observation that countries with more liberalized telecom sectors have seen tremendous growth in private-sector telecom jobs and overall benefits to consumers).

6. EIDENMÜLLER, supra note 5, at 26. For discussion of the effects of deregulation and liberalization in the telecommunications markets, see, for example, JILL HILLS, Deregulating Telecoms 203–06 (1986) (arguing that deregulation has worked to the benefit of big business and to the detriment of consumers).
The size of telecommunications markets worldwide and expected continued growth rates demand liberalization. For example, it is estimated that the telecommunications market in Germany will grow to Deutsche Mark (DM) 120 billion by the year 2000. The EU estimates that the telecommunications sector will account for 7 percent of the EU’s gross national product by the year 2000, up from 2 percent in 1984. Moreover, telecommunications costs are estimated to account for 10 percent of Fortune 1000 company budgets. Accordingly, it is not surprising that countries want to ensure that their telecommunications infrastructures and legal systems are able to support this enormous industry.

The TKG, also referred to as Post Reform III, represents the culmination of a radical overhaul of Germany’s telecommunications market, setting Germany on a course toward the opening of virtually all aspects of the telecommunications market to competition on January 1, 1998. The transition in the United States from state-supervised private monopoly to competition has been piecemeal—beginning with equipment in the 1970s, moving to long-distance in the 1980s, and finally, with the Telecommunications Act of 1996, to local exchange markets in the late 1990s. Germany had earlier opened up its equipment manufacturing and retail markets to competition, but it is now set to liberalize both long-distance and local service in one fell swoop. Accordingly, while both are intended to create similar competitive environments, the particular issues upon which the two laws focus are different, representing different levels of market development.

This Article describes and analyzes five primary subject areas contained in the TKG. The TKG covers a variety of issues relating to liberalization of the telecommunications market, but five areas in particular stand out as primary focal points: licensing, universal service, market-dominance regulation, interconnection, and rights-of-way. Each area’s treatment in the TKG will be contrasted both with prior German law and with the current state of U.S. law. However, because of the differences in the structures and focuses of the respective legal systems and regulatory priorities, the broad categories do not always lend themselves to simple

comparisons. Because this Article focuses on the TKG, the contents of the 1996 Act will be analyzed only to the extent that it corresponds with the five identified TKG areas under consideration. European Union telecommunications law is also discussed as it relates to Germany.

Although important, several specific issues that the TKG deals with or are otherwise relevant as points of comparison with major themes in U.S. regulation are not addressed. These include the relationship between telephone service and cable television, technical standards, manufacturing and sale of equipment, mobile telecommunications, satellite issues, and rates. World Trade Organization activity in the telecommunications area is also not discussed.

II. THE STATE OF THE GERMAN AND U.S. TELECOMMUNICATIONS INDUSTRIES LEADING UP TO 1996

A. Overview

In contrast to the situation in the United States where telecommunications began with competition and only later became a service of a state-sanctioned monopoly, in Germany and throughout Europe, telecommunications service was traditionally supplied by the state—typically, by a state's Ministry for Post, Telegraph and Telephone (PTT). This provided a variety of structural impediments to privatization and liberalization. For example, the German Constitution itself provided a duty on the part of the federal state to ensure availability of essential telephone services for the general population. This constitutional provision prevented privatization and had to be amended in order to allow privatization to go forward. Also different is that the German telephone system has functioned as both provider and regulator. By contrast, provider and regulator functions have always been legally separate in the United States, though the relationship between regulators and the regulated was sometimes less than distant.

10. This in particular is a major issue in the United States, as can be seen from its significant treatment in the 1996 Act. See 47 U.S.C.A. §§ 250–60 (West Supp. 1996). The legal status of cable television in Germany and its relationship to the telephone service market remains extremely murky and the subject of considerable debate at this time.

11. See infra Part II.B.2.

12. For example, because of issues such as how to treat civil servants who work for the postal service, there was considerable debate over whether to modernize the telecommunications system on a British private or French public model. Martin Bullinger, Organisationsformen und Staatsaufsicht in der Telekommunikation [Forms of Organization and State Control In Telecommunications], in KOMMUNIKATION OHNE MONOPOLE II, supra note 5, at 349, 353.

13. GRUNDGESETZ [Constitution] [GG] art. 87(f) (superseded version) (F.R.G.); Bullinger, supra note 12, at 349, 350.
B. The History and Structure of the Industries

1. Germany

Presently, the legal framework for Germany's telecommunications industry is to a large degree founded upon EU requirements.¹⁴

a. EC Telecommunications Legislation—Toward Open Networks in Europe

Article 90(2) of the European Economic Community Treaty requires that "[u]ndertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to those rules governing competition"¹⁵ The European Commission (Commission) considers PTTs to fall within the scope of this section.¹⁶ Article 90 therefore serves as the primary EU legal foundation for the push toward the break-up of national telecommunications monopolies and the opening of markets to competition. Secondarily, however, two EU competition law provisions are also applicable. Article 85 prohibits agreements between enterprises or associated groups which are intended to or have the effect of preventing, inhibiting, or distorting competition within the EU.¹⁷ This is viewed as a potential problem, particularly in European telecommunications markets because of the tight relationship between the previous state monopolies and the state governments.¹⁸ Article 86 prohibits the misuse of a market dominant position that affects trade within the EU. This is an


¹⁶. NICHOLAS HIGHAM & LEONIE GORDON, EC TELECOMMUNICATIONS LAW § 1.21 (1994). See Towards a Dynamic European Economy: Green Paper on the development of the common market for telecommunications services and equipment, COM(87)290 final at A7.9(2) [hereinafter Green Paper] (Articles 85, 86, and 90 lead the list of Treaty provisions that are relevant for reform of telecommunications markets).

¹⁷. GG art. 85 § 1 (F.R.G.).

immediate danger in each European market given the automatic dominance of former state monopolies, and is similar to that present in the United States following the break-up of the Bell system. Because of the potential for conflicts in attempts to comply with both EU competition and telecommunications law, the Commission has issued guidelines stating that telecommunications legislation is to be interpreted and applied in a way consistent with EU competition law.

In the early 1980s, faced with increasing pressure from other countries like the United States and Japan to liberalize equipment and services markets, the Commission began focusing its attention on reforming European telecommunications markets. Commission policy to this end moved along two tracks: First, "liberalization," which refers to the breaking down of national monopolies and the opening of the telecommunications markets to competition. Second, "harmonization," which refers to the establishment of a level playing field in the industry that will allow firms to compete equally throughout the EU in telecommunications goods and services.

While the Commission's interest in reforming the telecommunications industries within the EC dates back to 1984, the impetus for reform accelerated in 1987 with the issuance of the 1987 "Green Paper" that proposed how liberalization and privatization of member state telecommunications monopolies could take place. It set forth ten proposed positions to accomplish:

- the development in the Community of a strong telecommunications infrastructure and of efficient services; providing the European user with a broad variety of telecommunications services at the most favorable terms, ensuring coherence of development between Member States, and creating an open competitive environment, taking full account of the dynamic technological developments under way.

The Council endorsed the Green Paper's objectives in its Resolution of June 30, 1988, inviting the relevant bodies of the Community to develop measures to achieve the goals.

The next significant steps came with the European Commission's Directives of June 28, 1990, on the liberalization of telecommunications...
services markets and achieving of harmonization via implementation of open network provisions. The former, the Services Directive,25 according to the Commission, "has come to be identified as a cornerstone of the EU framework for liberalizing the European telecommunications market." The latter, the Open Network Provision (ONP) Directive, laid the foundation for open access between all networks and carriers.26

The Services Directive required Member States to eliminate special and exclusive rights in the telecommunications services sector and to take the necessary steps to allow entrance to the market.28 The only exception was voice telephony services. Since 1990 the Commission has adopted a variety of directives which amend the Services Directive. The timetables in place for liberalization are: All exclusive and special rights for provision of telecommunications services, other than for voice telephony, were scheduled for elimination by July 1, 1996. Exclusive and special rights for provision of voice telephony must be eliminated by January 1, 1998.29

The Commission's ONP Directive was aimed at Community-wide harmonization. The Directive required the opening of existing public networks to competitors, allowing access to all newcomers on equal terms, including divisions within a network infrastructure provider's own

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Directives are issued by the Council and the Commission and are addressed to Member States who are themselves responsible for individually achieving the result intended. EEC TREATY art. 189(3). Accordingly, there is some flexibility in how each Member State may implement the Directive. D. LASOK & J.W. BRIDGE, LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 122 (6th ed. 1993). Each Directive sets out a deadline by which the Member States must implement its goals. Should a country fail to implement a Directive, in principal, the directive could automatically become law in the country upon expiration of the deadline. HIGHAM & GORDON, supra note 16, § 1.55.


28. See Commission Directive 90/388, art. 2. While article 2 has subsequently been completely rewritten, the basic purpose and general effect remains. See Commission Directive 96/19 of 13 March 1996 amending Directive 90/388 with regard to the implementation of full competition in telecommunications markets, 1996 O.J. (L 74) at 21–22.

29. Commission Directive 96/19 of 13 March 1996 amending Directive 90/388 with regard to the implementation of full competition in telecommunications markets, 1996 O.J. (L 74) at 21. This directive added new article 2(2). States with less developed networks (defined as Spain, Ireland, Greece, and Portugal) are allowed up to five additional years to comply. Small states (Luxembourg) may be allowed up to two additional years to comply. Communication by the Commission, 1995 O.J. (C 275) 2 n.6.
company.\textsuperscript{30} The goal was that all new entrants could compete on an equal basis with existing telecommunications networks, since the high capital investment requirements of laying a telecommunications network would otherwise block out new entrants. The Commission intended to limit both technical and other impediments, such as stalling, to competitor access.

Access restrictions to existing networks would only be allowed for public necessity purposes, so-called "essential requirements." Only "security of network operations, maintenance of network integrity, and, in justified cases, interoperability of services and data protection,"\textsuperscript{31} qualify as such.

With regard to conditions for access, the Directive spelled out three principles that all ONP access conditions must satisfy in order to be valid: "they must be based on objective criteria, they must be transparent and published in an appropriate manner, [and] they must guarantee equality of access and must be non-discriminatory, in accordance with Community law.\textsuperscript{32}

The EU was expected to pass the final version of its ONP directive in late 1996. However, the EU Telecommunications Ministers did not reach a common position on a proposed Directive until March 6, 1997.\textsuperscript{33}

\textbf{b. The Development of German Telecommunications Law}

Article 87 I.l of the German Constitution [Grundgesetz] had previously clearly delineated the providing of postal service, including mail, telecommunications, and banking functions, as a responsibility of the federal government.\textsuperscript{34} However, as of 1994, the Constitution was amended; now the federal government remains responsible for ensuring that adequate telecommunications services are available in Germany, but it is no longer responsible for actually providing those services.\textsuperscript{35}

Before 1989, German telecommunications law was founded primarily upon two laws: the Law on Telecommunications Equipment [Gesetz über Fernmeldeanlagen] which authorized the establishment and operation of the telecommunications network through the DBP, and the Telegraph Route

\textsuperscript{30} HIGHAM & GORDON, supra note 16, § 3.35.
\textsuperscript{31} Commission Directive 90/388, art. 2, cl. 6.
\textsuperscript{32} Commission Directive 90/388, art. 3, cl. 1.
\textsuperscript{34} GG art. 87 I.l (F.R.G.).
\textsuperscript{35} Klaus W. Richmer, \textit{Organisation und Regulierung der Telekommunikation in Deutschland [Organization and Regulation of Telecommunications in Germany]}, in \textbf{KOMMUNIKATION OHNE MONOPOLE II}, supra note 5, at 369, 374.
Law [Telegraphenwege-Gesetz] which granted the DBP rights-of-way to establish and operate its system.  

As in the United States, liberalization first came in the area of equipment manufacturing and sales. In 1989, DBP lost its monopoly in this area. Reform of the telecommunications laws has proceeded in primarily three phases: Post Reform I in 1989, Post Reform II in 1994, and finally, the TKG in 1996. While the impetus for reform existed independently within Germany as well, how reform has been effected to a degree has been dictated by the requirements of the EC Directives discussed above.

i. Post Reform I (1989)

Post Reform I in 1989 laid the legal groundwork for the creation of a private market for telecommunications goods and services. The drafters intended that the legal framework in the industry would be reversed, that monopoly would become the exception and competition the rule. The law effected several foundational changes in the structure of telecommunications in Germany. First, some areas of telecommunications services like mobile service and manufacture and sale of equipment were actually opened to private competition. Second, it split the DBP into three sections: the mail service, the post bank, and telecommunications (Deutsche Telekom), creating respective independent organizations. Third, it effected a vertical split between the actual provision of telecommunications services and oversight over the industry, leaving the former to Deutsche Telekom and creating a separate regulatory body, the Federal Ministry for Post and Telecommunications [Bundesministerium für Post und Telekommunikation, or BMPT] to perform the latter. Finally, it changed the legal relationship between Deutsche Telekom and consumers from the realm of public to private law.

Post Reform I created a dual legal framework, providing rules for

36. EIDENMÜLLER, supra note 5, at 5.
37. Id. at 29.
40. Id. at 287.
41. Riehmer, supra note 35, at 370.
42. PostStruktG § 65 (III); Postverfassungsgesetz (PostVerfG), § 9 I 1, v. 8.6.1989 (BGBl. I S.1026); Gesetz über Fernmeldeanlagen (FAG) [Law on Telecommunications Equipment] § 8 v. 3.7.1989 (BGBl. I S.1455); Riehmer, supra note 35, at 369, 381.
those telecommunications functions remaining in the monopoly realm and those which became competitive. The provision of telephone service and network functions remained exclusively the domain of Deutsche Telekom.43 Other telecommunications functions, like mobile telephones, corporate networks, manufacturing and sales of telephones, and satellite communications were opened to competition. Because Deutsche Telekom was required to operate in monopoly areas yet could also operate in competitive areas, it was critical that the profits from each area be kept separate. Otherwise, Deutsche Telekom could use profits from its monopoly activities to subsidize its competitive activities, thereby giving it an unfair advantage over its competitors.44 In order to prevent such subsidization, the law required that Deutsche Telekom's various enterprises and their earnings be kept separate.45

ii. Post Reform II (1994)

The basic purpose of Post Reform II46 was to make the three fledgling former DBP entities ready for competition.47 The first concrete step was to turn all three into private corporations; Deutsche Telekom became Deutsche Telekom AG (Telekom).48 Moreover, it amended the German Federal Constitution in order to allow private entities like the newly private Telekom to provide telecommunications services.49

Post Reform II also established a federal institution to supervise the privatization of Telekom. This institution, the Federal Institution for Post and Telecommunications [Bundesanstalt für Post und Telekommunikation], also has continued supervisory powers to ensure that the privatized

43. See HAAR, supra note 39, at 290.
44. See id. at 305.
45. Id. at 306; PostVerfG § 37, sentence 1.
47. HAAR, supra note 39, at 314. A former high official of the Bundespost is quoted as saying, "'You must be a lunatic to think that the German communications industry could successfully compete with American industry internationally.'" Ernst-Joachim Mestmäcker, Competing Goals of National Telecommunications Policies, in THE LAW AND ECONOMICS OF TRANSBORDER TELECOMMUNICATIONS, at 13, 23 (Mestmäcker ed., 1987).
49. Post Reform II amended article 87(f) sentence 1 of the German constitution. Now, rather than both guaranteeing and providing adequate service that is broadly available (flächendeckend angemessene und ausreichende Dienstleistungen), the federal government is merely required to guarantee that such are available. HAAR, supra note 39, at 314.
corporation functions properly. However, Post Reform II did not end Telekom's monopoly over basic telephone service. Accordingly, the law has been referred to as "Privatization without Liberalization."

iii. Telekommunikationsgesetz (1996) (Post Reform III)

The TKG, in compliance with the European Council's timetable, sets forth January 1, 1998 as the date for the complete opening of the telecommunications network and services market in Germany for private competition. Passage in summer of 1996 was aimed at allowing the first licenses to be granted in early 1997.

2. The United States

The United States telecommunications industry grew from a patchwork of independent operators dominated by the early Bell System, into a de facto monopoly as the Bell System squeezed out and/or acquired its competitors in the early twentieth century, and finally into a regulated, state-sanctioned monopoly. Until the 1970s, AT&T, through the ubiquitous Bell System, served as consumers' one-stop shopping provider, providing all equipment, repairs, local exchange, and long-distance services. Some specialized long-distance competition was introduced in the 1960s and equipment sales and manufacturing were opened to competition in 1976, but the major change in the industry occurred in 1982 with the court-ordered break-up of AT&T. This opened the long-distance market to competition and split off the local exchange carriers from long-distance service. The 1996 Act completes the process, opening local service to competition.

a. Structure of the U.S. Telecommunications Network

A telephone service customer's phone is connected to the Local

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50. Gesetz über das Postwesen (BAPostG) § 1 v. 3.7.1989 (BGBl. I S.1449).
52. The law will supersede the four earlier laws governing telecommunications in Germany, PTrRegG, FAG, PTrRegG, and TWG, which all expire on December 31, 1997, in accordance with the provisions of Post Reform II. TKG Legislative Report, supra note 3, at 33.
53. Hiltl & Großmann, supra note 7, at 169.
54. KELLOGG ET AL., supra note 9, § 1.16.
Exchange Carrier (LEC),\textsuperscript{55} usually a Bell Operating Company (BOC), which provides local telephone service and connects the customer’s long-distance calls with his or her designated interexchange carrier (IXC), a long-distance provider.\textsuperscript{56} The telephone call travels from the customer to the LEC’s local central office and then to the IXC.\textsuperscript{57} BOC and independent company territories are divided by the Modification of Final Judgment (MFJ) into Local Access and Transport Areas (LATA), each of which encompasses many LECs. The LATAs constitute boundaries; as a general rule, BOCs may not provide interLATA service, only intraLATA service.\textsuperscript{58}

\textbf{b. Purposes of the Telecommunications Act of 1996}

As stated in the introduction to the Conference Report, the 1996 Act is intended "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."\textsuperscript{59} Specifically, with regard to telecommunications markets, the centerpiece of the 1996 Act is its opening local exchange service to competition. The Act allows long-distance companies to enter this market and allows local telephone exchange providers to enter the long-distance market under specified conditions. Moreover, the Act provides rules for providing universal service, removing barriers to entry of new competitors, and interconnection.

\textbf{C. Regulators}

Regulation of the telecommunications industry has taken different forms in the two countries because of the industries’ differing structures. Until recently in Germany, the service provider was also the regulator—the DBP performed both functions. By contrast, in the United States, though AT&T was a state-approved monopoly, it remained a private organization, regulated by the Federal Communications Commission (FCC), the courts, and state regulators.

\textsuperscript{58} Id. at 55.
With the changes brought about over the past several years, the German system is becoming more like the U.S. system: the providers themselves are, or are to become, private, but subject to oversight by federal regulators. However, German telecommunications providers are also subject to the authority of EC regulation.

1. German Telecommunications Regulators

a. National Regulation

Prior to 1989, the service provider and the regulator were one and the same—the DBP performed both functions. It was a federal organization subject only to relatively loose federal control and headed by the federal cabinet level Minister of the Postal Service and Telecommunications. It was, on one hand, subject to the market in terms of generating revenue but on the other an administration subject to political and governmental bureaucratic control.

Post Reform I in 1989 effected a split between entrepreneurial and regulator functions, though the boundaries between the two areas remained murky because the exact line between sovereign oversight activities and private entrepreneurial functions remained unclear. However, with Post Reform II's changing DBP's telecommunications arm into a private corporation, Telekom, on January 1, 1995, the public-private split between it and the BMPT became clear. One substantial practical effect of this split was to free Telekom to contest BMPT decisions in court. Previously Telekom had no standing to sue the BMPT because it was not a freestanding legal entity.

The BMPT is a member of the federal government and carries primary responsibility for ensuring that Telekom is run according to law. Accordingly, it answers to the Federal Chancellor and has authority over ensuring application of and compliance with all telecommunications and

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63. Riehmer, supra note 35, at 371.
64. There will remain some overlap in that the BMPT will continue to approve Telekom rates for the foreseeable future. Id. at 372.
65. Id. at 375.
67. ELLGER & KLUTH, supra note 8, at 61.
other laws. It includes a regulatory council made up of representatives from each of the states which participates in decision making. Some of the BMPT’s decision making is carried out by decision making panels.

The Federal Cartel Office (Cartel Office) also has authority over telecommunications companies under section 44 of the Law Against Restraints of Competition (Competition Law). The Cartel Office applies both domestic and EU competition law to ensure proper competition within the market. Its control over the telephone company as a natural monopoly is weaker than it will be in the future when the industry is opened to competition.

b. The TKG

The TKG designates as the National Regulatory Agency (NRA) the Regulatory Authority for Telecommunications and Posts [Regulierungsbehörde für Telekommunikation und Post] which operates within the jurisdictional area of the Ministry of Economics. It will replace the BMPT, which will be dissolved. While it is intended that the NRA be politically independent from the Federal Government, debate continues in Bonn over whether the NRA’s oversight will be politically or substantively based.

The NRA’s seat is in Bonn and is presided over by a president who represents the NRA both in and out of court, and who regulates the NRA’s actions via rules of procedure that must be ratified by the Federal Ministry for Economics. The President and two Vice-Presidents are appointed by the Federal Government based on the suggestion of the Advisory Council.

68. Id. at 62.
70. Id. § 13, sentence (1).
71. Id. § 15, sentence (1).
72. Gesetz gegen Wettbewerbsbeschränkungen [Law on Restraints Against Competition] (GWB) v. 24.9.1980 (BGBl. I S.1761) [hereinafter Competition Law]; see also ELLGER & KLUTH, supra note 8, at 283.
74. NRA is the term used in EC Directives referring to state telecommunications regulators.
76. Stellungnahme des Bundesrats: Entwurf eines Telekommunikationsgesetzes, Bundesrat, Drucksache 80/96 (Beschluss) [Opinion of the Bundesrat: Draft of a Telecommunications Law, Circular 80/96 (resolution)] (22.03.96) § 72 [hereinafter Bundesrat Opinion].
78. TKG § 66(2).
While earlier drafts of the TKG set five-year terms of office and allowed for their removal from office by the Federal Government, the TKG is silent on these matters.\(^7\)

In accordance with the suggestion of the Bundesrat, the upper house of the German Parliament, the TKG establishes a regulatory structure that includes an Advisory Council [Beirat] made up of nine members each from the Bundestag, the lower house of the German Parliament, and the Bundesrat.\(^8\) Its duties include: nominating candidates for the positions of President and Vice-President of the NRA; taking part in making decisions concerning granting of licenses and making market dominance determinations; proposing measures for the implementation of regulatory goals generally and universal service in particular; providing advice and information to the NRA; and taking part in preparing regular reports to the Bundestag concerning the condition of the market and regulation.\(^8\)

The NRA is charged with preventing competition in monopoly areas and encouraging it in competitive areas. As envisioned in EU Directives and as recommended by commentators, the NRA is to be as independent as possible in its decision making because its purpose is not merely to guard against rule violations but also to foster a competitive environment.\(^8\) The NRA is empowered to form commissions to assist with decision making or to provide expert opinions.\(^9\)

In order to properly fulfill its oversight and regulatory functions, the NRA has the authority to demand relevant information and documentation from market participants,\(^8\) to enter and inspect telecommunications service providers' premises, and to seize relevant documentation.\(^8\) The NRA must provide its requests for information in writing, including the legal basis for

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79. Commentators had expressed concern with the original rules with regard to political control over the President and Vice-Presidents. The NRA is theoretically intended to be relatively independent of political forces, but some political control remains. See, e.g., Kammholz, supra note 51, at 20.

80. TKG § 67(1). In its opinion, the Bundesrat had recommended the addition of an oversight council made up of representatives of each of the states. Because the states also carry political responsibility for satisfaction of constitutional norms, including the existence of telecommunications services, the Bundesrat considered it appropriate that the states have some say in how the NRA fulfills its duties. Bundesrat Opinion, supra note 76, § 73.

The Bundesrat is made up of representatives of each state. GG art. 51 (F.R.G.).

81. TKG § 69.

82. TKG Legislative Report, supra note 3, § 67.

83. TKG § 70.

84. Id. § 69(1). The law refers to "enterprises and groups of enterprises" [Unternehmen und Vereinigungen von Unternehmen] as subject to reporting requirements. The Competition Law is to define these terms. TKG Legislative Report, supra note 3, § 69.

85. TKG § 69(4). Firms may seek reimbursement for all costs where an inspection is illegal. Id. § 69(9).
the request. It may only conduct searches after obtaining a court order from a local district court, absent extenuating circumstances.\(^8^6\) Information demanded under this section may not be used for other purposes—such as tax or securities investigations—unless a significant public interest is involved or false information was intentionally provided to the NRA.\(^8^7\)

The NRA may prohibit specific activities of license-holders where they are not adhering properly to their license terms and may issue administrative fines of up to DM 1,000,000.\(^8^8\) Violations such as improper compliance with reporting requirements are subject to fines of up to DM 20,000. Violations such as providing telecommunications services without a license and raising rates without approval are subject to fines of up to DM 1,000,000.\(^8^9\) The drafters of the Original Draft recommended the use of administrative fines over the other available remedies—prohibitions [Untersagung], bans [Verbot], and closing of an enterprise [Ausserbetriebnahme]—because their effect on consumers is too negative.\(^9^0\)

The NRA is to make some of its decisions through three-person adjudicatory panels referred to as "Ruling Chambers."\(^9^1\) These Chambers have jurisdiction over questions involving the distribution of licenses when applications exceed the number readily available, imposition of universal service, rates regulation, open network provision and interconnection, and assignment of frequencies where several applications are filed for the same frequency.\(^9^2\) The Chambers consist of three members, all of whom must be life-time government employees with appropriate backgrounds in telecommunications. The Chambers are judicial bodies that also have authority to function as arbitrators between private parties.

Proceedings are instituted before a Chamber either \textit{ex officio} or upon a motion. Participants in hearings are the petitioner, the provider of services against whom a claim is brought, and any other party that the Chamber

\begin{footnotes}
\item[86.] Id. § 69(5).
\item[87.] Id. § 69(8).
\item[88.] Id. § 68. The potentially high fines are based on the expectancy that turnover rates will be high in the industry. TKG Legislative Report, supra note 3, § 93.
\item[89.] TKG § 96(2).
\item[90.] TKG Legislative Report, supra note 3, § 68.
\item[91.] TKG § 73(1). There is some concern that the decision-making of such bodies, particularly where they make decisions implicating competition law questions, could result in contradictory and perhaps improper decisions. Kammholz, supra note 51, at 22.
\item[92.] TKG § 73(1). The final version of the TKG represents a reduction in the scope of the Chambers' authority: the prior version had delegated all decisionmaking apart from communications secrecy, data security and safeguards, to the Chambers. January Draft, supra note 3, § 70(1).
\end{footnotes}
believes is significantly interested in the outcome.93

Participating parties have the right to comment on the content of the proceeding. With approval from the Chamber, other parties who could be economically affected by the process may also offer comments. Normally, decisions are made based upon oral proceedings, but where the parties agree a decision may be made based upon written comments. Hearings are public unless the parties request closure to the public because public safety or private trade secrets would be threatened.94

A Chamber can order investigations and may collect evidence necessary to fulfill its functions. Civil process rules apply for evidence collection. Appeals regarding evidence collection are to be brought in the Higher Regional Court.95 A Chamber may seize such items as are necessary as evidence in a proceeding.96

Chamber decisions must be legally justified and within the realm of its authority.97 A Chamber may conduct investigation and gather necessary evidence as well as issue temporary orders pending a final decision.98 A Chamber communicates its decisions to the parties via their registered agents. Where a party appeals a Chamber decision or otherwise takes legal action against the NRA, there is no postponement of the effect of the decision or action pending the outcome of the appeal.100

While the NRA is relatively independent, it remains subject to parliamentary oversight. In order that the parliament may evaluate whether competition is functioning properly, the NRA is required to report to the federal government every two years regarding its activities and the condition of the telecommunications market.101 Along with this report it must also present the Monopoly Commission’s regular reports analyzing the competitiveness of the market. The report must also address whether the definition of universal service should be changed.102

Because of the overlapping jurisdictions of the NRA and the Cartel Office, the TKG mandates a degree of cooperation between the two in order

93. TKG § 75(2).
94. Id. § 75(3).
95. Id. § 76(2).
96. Id. § 77(1).
97. Id. § 79(1).
98. Id. § 76(1).
99. Id. § 78.
100. The NRA has a strong interest in the immediate enforceability of its decisions. This is particularly true in conflicts between competitors where, given heavy capital investments, delay could financially harm a party. Id. § 80(2). TKG Legislative Report, supra note 3, § 77.
101. TKG § 81(1).
102. Id. § 81.
to prevent contradictory decisions from the two bodies.\textsuperscript{103} For example, where the number of licenses in a given market is limited, the NRA "shall" work together with the Cartel Office in making its decisions concerning granting licenses.\textsuperscript{104} Where the NRA makes decisions concerning rate regulation and open network provision and interconnection, or where it attaches collateral clauses to licenses affecting these matters, the NRA must give the Federal Cartel Office an opportunity to comment.\textsuperscript{105} Similarly, where the Cartel Office is implementing procedures regarding market dominant enterprises in the telecommunications sector, it must give the NRA opportunity to comment prior to issuing decisions. Both agencies are directed to seek consistent interpretations of the \textit{TKG} in order to avoid conflict with the Competition Law and to keep each other informed of observations and determinations which may be significant to the other.\textsuperscript{106}

c. \textit{EC Regulation}

Both the European Council and the European Commission have authority to regulate state telecommunications markets.\textsuperscript{107} The Commission has authority under article 90 to enact legislation aimed at eliminating state-sponsored monopolies in telecommunications, to enact other legislation as specifically empowered by the Council, and to prevent anticompetitive behavior on an individual basis by enforcing articles 85 and 86. On the one hand, the Community has authority over the individual states through its requirements that they establish and maintain free markets in goods and services; on the other hand, it has authority over individual private enterprises through enforcement of competition laws.\textsuperscript{108}

The European Council has authority to enact legislation concerning anticompetitive behavior under articles 85 and 86 and under article 100a, which empowers it to adopt measures for the "establishing and functioning

\textsuperscript{103} The Cartel Office would be responsible for resolving matters concerning market dominant positions and Competition Law matters generally, while the state cartel offices would remain responsible for local and regional cartel law questions. \textit{Id.} \textsection 82. The \textit{Bundesrat} found the overlapping jurisdiction between the NRA and Cartel Office to be wasteful and pointless. \textit{Bundesrat Opinion, supra} note 76, \textsection 2. It sought to eliminate this problem by taking all market dominance questions out of the hands of the NRA and putting them in the hands of the appropriate federal or state cartel authorities.

\textsuperscript{104} \textit{TKG} \textsection 82.

\textsuperscript{105} \textit{Id.} \textsection 82.

\textsuperscript{106} \textit{Id.} \textsection 82.

\textsuperscript{107} For more thorough treatment of EC powers in this area, see, for example, HIGHAM & GORDON, \textit{supra} note 16, \textsection 1.1; JOACHIM SCHERER, \textit{TELECOMMUNICATIONS LAWS IN EUROPE} 1-5 (1993).

\textsuperscript{108} ELLGER & KLUTH, \textit{supra} note 8, at 283.
of the internal market." Within this rubric comes prohibiting cartels and restraining market dominant behavior. Under this authority, the Council adopts measures the individual state legislative bodies are to enact so as to become binding in the particular state. The Commission has authority to enforce EU competition laws against individual private enterprises. In particular, it is empowered to review mergers that have European Union-wide dimensions, primarily defined as satisfying a high turnover threshold.

2. U.S. Regulators

   a. Federal and State Regulation

   Telecommunications law in the United States is primarily comprised of the Communications Act of 1934 (1934 Act), the antitrust laws, state regulatory laws, FCC orders and regulations, the actions of the public utilities commissions of the states, and now, the 1996 Act which amends the 1934 Act. Not surprisingly, this myriad of authority has often led to conflicts between the various bodies of law. In general, the FCC has primary jurisdiction when conflicts arise between regulatory and antitrust standards, and when federal regulation preempts state regulation. The lines between state and federal regulatory authority and their primacy are at times uncertain. The National Association of Regulatory Utility Commissioners provides some degree of coordination between the federal and state regulatory organizations.

   The 1934 Act established a dual regulatory structure: The FCC has jurisdiction over interstate and foreign wire and radio communications, and the states have jurisdiction over intrastate communications. Where a telephone plant is used for both intrastate and interstate service, both the FCC and state regulators have concurrent jurisdiction. Because this

109. EEC Treaty art. 100a(1).
111. Id.
112. KENNEDY, supra note 57, at xv.
114. See, e.g., KELLOGG ET AL., supra note 9, § 2.7 (discussing difficulties of dividing federal versus state jurisdiction based on the 1934 Act).
distinction is often artificial, in practice, the line between intrastate on the one hand, and interstate or foreign communications on the other are extremely blurry. Accordingly, often the various components of a service are either divided between the two realms—and thereby the two regulators—or the FCC simply preempts the state regulator.\footnote{See Kennedy, supra note 57, at 43.}

The FCC is an independent agency, comprised of five commissioners appointed by the President. No more than three may be members of the same political party. The commissioners serve for five-year terms and may only be dismissed for cause. The FCC holds a mixture of legislative powers (through its authority to adopt regulations), executive authority (through its power to enforce its rules), and judicial power (exercised via adjudication of cases).\footnote{47 U.S.C. § 151 (1995). For further discussion of the FCC's authority and activities, see Barnett et al., supra note 56, at 19.}

From virtually the beginning of the industry, antitrust law decisions have played an enormous role in shaping the industry's structure.\footnote{See, e.g., Kellogg et al., supra note 9, §§ 1.1–1.7 (describing development of the industry).} The primary example, and the suit which is most responsible for the current shape of the industry, is United States v. AT&T.\footnote{552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).} Filed in 1974 and presided over by Federal District Court Judge Harold Greene, the suit ended in 1982 with a consent decree known as the Modification of Final Judgment (MFJ).\footnote{The 1996 Act refers to the MFJ as the "AT&T Consent Decree." H.R. Conf. Rep. 104-458, at 198.} The suit originally concerned an alleged unlawful combination between the various Bell entities that resulted in their monopolization of both long-distance service and telecommunications equipment manufacturing.\footnote{Kellogg et al., supra note 9, § 4.4.} However, the suit took many twists and turns, based upon changing priorities within the Justice Department, legislative proposals, and industry activity.

The MFJ had four primary components. First, it broke up the Bell system into various parts, forcing AT&T to divest itself of its twenty-two LECs. The LECs, also referred to as Bell Operating Companies (BOC), were then distributed among seven Regional Bell Holding Companies (RBOC).\footnote{Kennedy, supra note 57, at 50–51. See id. at 52–54, for a practical explanation of the specific decree restrictions that apply to BOC operations.} The BOCs, in turn, were subdivided into 163 Local Access and Transport Areas (LATA), which served as the boundaries for the
definition of local service. Second, it required the BOCs to provide interconnection to all long-distance carriers and information services providers in a nondiscriminatory manner. Third, it barred the BOCs from various lines of business, including providing long-distance and information services and manufacturing of equipment. Fourth, the MFJ liberated AT&T from a 1956 consent decree's restrictions.125

On the state level, telecommunications enterprises are typically regulated through state public service commissions. Their activities typically resemble FCC regulation, but wide variety exists between each of the fifty states. Both states and municipalities often exercise further authority over telecommunications providers by way of right-of-way regulation, building codes, and other local regulation.126

b. The Telecommunications Act of 1996 and Regulators

The 1996 Act does not make significant alterations to the existing regulatory structure, other than in explicitly repealing the FCC's authority to grant exemptions from antitrust oversight of mergers within the industry. This is discussed in greater detail below in Section III.C.2.b.

3. Comparison and Conclusions

As a general matter, telecommunications in both countries are subject to the primary jurisdiction of the federal governments. Potential conflicts with state regulators remain in both systems. In the United States, the separation between interstate and intrastate authority is somewhat artificial and leads to blurriness between the two jurisdictions. The German system under the TKG should avoid this problem by retaining substantial federal control over the industry.

Another area of potential tension exists between different federal regulators. Professors Wernhard Möschel and Ernst-Joachim Mestmäcker have expressed concern regarding potential conflict between Cartel Office and NRA decision making given the risk of inconsistent decisions, particularly in the area of competition law, since both have jurisdiction over the industry.127 Both professors and Telekom have argued that leaving competition law matters to the Cartel Office, rather than creating a whole new agency, would have been a better solution.128 The President of the

125. KELLOGG ET AL., supra note 9, § 4.6 (citations omitted).
126. SAPRONOV, supra note 117, at 21.
128. Id.
Cartel Office is concerned that a special competition law could develop in the area of telecommunications and that this could constitute a disadvantage to the economy as a whole.\(^{129}\) If this develops as a substantial issue in the future, Germany could remedy the problem by taking an approach like the 1996 Act, which explicitly takes antitrust control out of the hands of the FCC and places it with the antitrust division of the Department of Justice.

### III. The Primary Focus Areas of the Telekommunikationsgesetz and U.S. Law

Broadly speaking, the goal of the TKG is to open the telecommunications market in Germany to competition and to position Telekom to be able to succeed in the approaching competitive market. To this end, it sets forth the basic structures of a competition-based market and delineates the terms under which Telekom competes.

The TKG sets forth as its purpose the establishment of regulation that both promotes competition in the telecommunications industry and guarantees broad availability of appropriate and sufficient telecommunications services.\(^{130}\) The regulatory goals are to protect consumer interests, establish a competitive market, ensure universal service, ensure proper use of frequency spectrum, and protect the public interest.\(^{131}\)

The TKG contains five subject areas of primary importance for voice telecommunications services: licenses \([\text{Lizensen}]\), universal service \([\text{Universaldienst}]\), regulation of market dominant providers \([\text{Regulierung marktbeherrschender Anbieter}]\),\(^{132}\) access to public networks and interconnection \([\text{Öffener Netzzugang und Zusammenschaltung}]\), and use of rights-of-way \([\text{Benutzung der Verkehrswege}]\).

By contrast, the primary focus of 1996 Act is to open local service to competition. It is expected that cable television companies will be among the first of the major competitors in local markets since most homes are already wired for cable television. Thus, the law aims to facilitate such competition, placing much emphasis upon cable television enterprise entry into telecommunications markets.

\(^{129}\) Id.

\(^{130}\) Telekommunikationsgesetz (TKG) § 1, v. 1.8.1996 (BGBI.I S.1120).

\(^{131}\) Id. § 2(2).

\(^{132}\) Part III of the Original Draft was entitled Regulation of Market Dominant Providers, although individual rules concerning market dominance were also scattered throughout. With the June Draft this section was retitled as "Regulation of Remuneration" \([\text{Entgeltregulierung}]\). See June Draft § 22, supra note 3.
A. Licensing

A licensing system is necessary to ensure that various state goals and requirements are established and maintained in a telecommunications system, including ensuring universal service, preventing abuse of a market dominant position, and ensuring interconnection.

1. Germany

a. The Law Leading to the TKG

While private enterprises could obtain licenses for some private, closed telecommunications networks (such as in banking and airline reservations), essentially there was no free market in telecommunications services in Germany, so licensing was not an issue as far as monopoly-provided basic local or long-distance service was concerned. However, since 1989, the BMPT has approved licenses in competitive markets such as providing mobile telephone service and the sale of satellite transmission devices.

b. The TKG

The goal of the TKG is to establish a successful competitive environment in Germany in the telecommunications industry. Because the TKG imposes no domestic ownership requirement for entry into the telecommunications market, this competition will be fully international. The competition goal is based in the belief that a monopoly telecommunications service provider is inadequate to keep up with and properly exploit the myriad of technological advances in telecommunications related fields. This goal is also based on the requirement of the European Commission that speech telephony and other telecommunications services be open to competition by January 1, 1998 in Member States. Because Telekom will remain the sole provider of telecommunications services until January 1, 1998, the government is establishing a regulatory structure to give new entrants an opportunity to compete against the monopoly at that time.

In the wake of the termination of Telekom's monopoly over telecommunications, the TKG drafters believed that market forces alone would be

133. PFEIFFER & WIELAND, supra note 61, at 22–23.
134. Riehmer, supra note 35, at 385.
135. See Hilti & Großmann, supra note 7, at 172. See also, Germany to U.S.: Join the Telecom Party in 1998, TELECOMM. NEWS, Apr. 10, 1995 (on file with author) (reporting German Federal Minister of Posts and Telecommunications Wolfgang Boetsch's challenge to the U.S. to open its telecommunications markets to foreign companies to the same degree that Germany is opening its markets).
136. TKG Legislative Report, supra note 3, at 33.
insufficient to guarantee the establishment of telecommunications service provision that would be in the interests of consumers and of all market participants.\textsuperscript{137} According to the Federal Government, a licensing scheme is necessary because many requirements for market participants, such as provision of universal service elements, must be set forth on an individual basis.\textsuperscript{138} A licensing system will enable the NRA to identify individually the specific duties each market participant must fulfill. Basic requirements or duties include ensuring network security, establishing disaster and crisis provisions and precautions, ensuring data security, protecting long-distance secrecy, and blanket basic telecommunications service coverage.\textsuperscript{139}

The TKG specifically directs that the overall goals of the law be observed in the granting of licenses.\textsuperscript{140} Among these goals are ensuring “equal-opportunity and workable competition” in both rural and urban areas and the availability of affordable universal service.\textsuperscript{141} Licenses may be individually tailored to ensure achieving those goals. Toward this end, licenses may be amended even after their granting.\textsuperscript{142}

The TKG mandates the securing of a license for the offering of voice and data transmission services over one’s own telecommunications net and for the operation of transmission paths that cross real property and are used for providing telecommunications services for the general public.\textsuperscript{143} Operating transmission lines used by third parties is presumed to constitute the provision of telecommunications services for the general public.\textsuperscript{144} However, licenses are not required where one merely resells services over another’s network.\textsuperscript{145}

Licenses are available in four classes: mobile radio telecommunications (Class 1), satellite radio communications service (Class 2), other telecommunications services that do not fall into Classes 1 or 2 (Class 3), and wire telephony service (Class 4).\textsuperscript{146} All license holders for speech telecommunications are required to provide access to cost-free emergency services

\begin{itemize}
\item 137. Hiltl & Großmann, \textit{supra} note 7, at 170.
\item 138. \textit{TKG} Legislative Report, \textit{supra} note 3, at 34.
\item 139. \textit{id}
\item 140. Telekommunikationsgesetz (TKG) § 8(2), v. 1.8.1996 (BGBl. I S.1120) (referring to section 2(2)). This specific direction was added in the final version of the law. \textit{Compare id.} § 8(2) with June Draft, \textit{supra} note 3, § 8(2).
\item 141. TKG § 2(2).
\item 142. \textit{id.} § 8(2).
\item 143. \textit{id.} § 6(1).
\item 144. \textit{id.} § 6(3).
\item 145. \textit{TKG} Legislative Report, \textit{supra} note 3, § 6.
\item 146. TKG § 6(2). It is assumed that the operation of a transmission path that is used by third parties is a public telecommunications service. \textit{id.} § 6(3).
\end{itemize}
calls.\textsuperscript{147}

The NRA distributes licenses on the basis of written applications.\textsuperscript{148} Licenses are normally granted where the application requirements are satisfied and no reason for denial exists.\textsuperscript{149} Ideally, as many licenses will be granted as there are applications to provide a given telecommunications service. However, this may not always be possible. Because the number of frequencies available is limited, and "to ensure effective, interference-free use of frequencies," the NRA shall develop a frequency allocation table and usage plan.\textsuperscript{150} The frequency usage plan is to be drafted based upon the table of frequency allocations,\textsuperscript{151} the overall aims of the \textit{TKG}, and "European harmonisation, technical developments and the compatibility of frequency usages in the transmission media."\textsuperscript{152} The plan is also to be drafted with public participation.\textsuperscript{153} Based upon this frequency-usage plan, the NRA may limit the number of licenses for telecommunications markets if frequencies are unavailable to satisfy all requests for licenses.\textsuperscript{154}

Where the number of licenses are so limited, the NRA, following a hearing from concerned parties, may distribute licenses either by auction or competitive bidding.\textsuperscript{155} Auction is preferable to competitive bidding unless auction is for some reason not suitable.\textsuperscript{156} In either case, the NRA may exclude some companies from the process where it believes that their participation will prejudice equal opportunity competition in that market.\textsuperscript{157} In considering such an exclusion, the NRA must consider companies' legitimate interests in developing new technologies.\textsuperscript{158}

The intent of an auction is to identify the bidders able to make most efficient use of the radio frequencies so distributed.\textsuperscript{159} Prior to holding an auction, the NRA must first identify:

\textsuperscript{147} \textit{Id.} § 13(1).
\textsuperscript{148} \textit{Id.} § 8(1).
\textsuperscript{149} \textit{TKG} Legislative Report, \textit{supra} note 3, § 8. The Bundesrat sought to provide that the granting of Class 4 licenses (voice telephony) be made explicitly with broad-based coverage in mind—in other words, to avoid cherry picking. Bundesrat Opinion, \textit{supra} note 76, § 16. The TKG directs that licenses be granted with the explicit overall goal of providing affordable universal service to both rural and urban customers. \textit{See supra} note 140 (discussing section 8(2)).
\textsuperscript{150} \textit{TKG} § 44(1).
\textsuperscript{151} \textit{Id.} § 45.
\textsuperscript{152} \textit{Id.} § 46(1).
\textsuperscript{153} \textit{Id.} § 46(3).
\textsuperscript{154} \textit{Id.} § 10.
\textsuperscript{155} \textit{Id.} § 11(1).
\textsuperscript{156} \textit{Id.} §§ 11(2), 11(5).
\textsuperscript{157} \textit{Id.} § 11(3).
\textsuperscript{158} \textit{Id.} § 11(3).
\textsuperscript{159} \textit{Id.} § 11(4).
1. the minimum requirements in terms of specialised skills and qualifications bidders shall evidence in order to be admitted to the auction,
2. the relevant product and geographical market for which the radio frequencies bought at auction may be used in observance of the frequency usage plan,
3. the license conditions, including the degree of coverage in respect of frequency usage and the time required to achieve such degree, as well as the frequency usage conditions of the future license that must be observed, [and]
4. the basic number of radio frequencies which the bidder must buy at auction for the startup of the telecommunications service, provided such basic number is necessary.¹⁶⁰

The auction may begin with an identified minimum bid.¹⁶¹

In cases where an auction is unsuitable, licenses shall be distributed by a competitive bidding process.¹⁶² As are auctions, competitive bidding is intended to establish the best provider. Prior to initiating the competitive bidding process, the NRA must first identify:

1. the minimum requirements in terms of specialised qualifications bidders shall evidence in order to be admitted to competitive bidding,
2. the relevant product and geographical market for which the licenses are to be granted,
3. the license conditions, including the degree of coverage in respect of frequency usage and the time required to achieve such degree, as well as the frequency usage conditions of the future license that must be observed, [and]
4. the criteria according to which bidders' eligibility is assessed.¹⁶³

The criteria "shall be the specialised knowledge and efficiency of the bidders, the suitability of plans to be submitted for the provision of the telecommunication service subject to competitive bidding and the promotion of workable competition in the relevant market."¹⁶⁴ Preference will be shown for bidders that can ensure broad coverage of service.¹⁶⁵ Where multiple bidders are equally suitable, licenses shall be granted by drawing lots.¹⁶⁶

As a prerequisite to granting licenses, the NRA will also charge a fee.¹⁶⁷ Under section 16(1), the fee is to be set in agreement with the

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160. Id. § 11(4).
161. Id.
162. Id. § 11(5).
163. Id. § 11(6).
164. Id.
165. Id.
166. Id.
167. Id. § 16(1).
Ministries of the Interior, Finance, Justice and Economics and in accordance with the requirements of the Administrative Expenses Act. The fee is to be set at a level that represents a reasonable relationship between the economic value of the license and the administrative costs involved.

Where licenses are distributed by auction according to section 11(4), if the price arrived at by auction is less than the license fee as set according to the above requirements, then the auction amount may be raised to the fee level arrived at under section 16(1).

Although the NRA can supply auxiliary clauses to a license in order to further satisfy the goals of the TKG in general—particularly where market dominant providers are concerned—the contents of a license are determined by the applicant. However, any such additional clauses' contents should be proportional to the regulatory goals involved. Licenses with conditions may be withdrawn where the conditions are not fulfilled and the auxiliary clauses are to be eliminated where changed market circumstances make them no longer necessary.

The NRA may refuse to grant a license: if the NRA is unable to grant a useable frequency to satisfy the applicant's desired service requirements; if the NRA determines that the applicant has insufficient reliability, efficiency, and specialized knowledge to utilize the license over the long term; or where the applicant otherwise would pose a risk to public security or stability. For example, speculation in licenses is to be discouraged. Accordingly, the NRA may refuse to grant a license to a party where it sees a risk that the party seeks to acquire a license for the purpose of resale rather than long-term use. The NRA must approve in writing any license transfers, utilizing the same criteria as for granting a license in the first place. Licenses may be revoked entirely or in part where the licensee fails to satisfy the license's specific requirements or the TKG's general requirements.

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168. TKG § 16(1).
169. TKG Legislative Report, supra note 3, § 15.
170. TKG § 15(2).
171. TKG Legislative Report, supra note 3, § 8(1).
172. Id. § 8(2).
173. TKG §§ 8(2), 15.
174. Id. § 8(3). The legal requirements referred to in connection with reliability include the demands of European law, German telecommunications secrecy law, and data protection law. TKG Legislative Report, supra note 3, § 8(3).
175. Hiltl & Großmann, supra note 7, at 171.
176. TKG § 9(1) (referring to grounds for denial of license application in sections 8(3) and 11(3)).
177. Id. § 15.
2. The United States

a. The Law Leading to the Telecommunications Act of 1996

In the local exchange market, the market has been stable for decades, with no new entrants because of the local service monopoly. Accordingly, a licensing system for new entrants was not necessary. By contrast, for long-distance, since the first opening of long-distance to competition in 1969, carriers have had to obtain licenses from the FCC in order to construct lines or provide service. Section 214 of the 1934 Act allows the FCC to place conditions on licenses that it grants.

In granting licenses, the FCC is guided by the 1934 Act’s requirement that “[i]n choosing among applicants, the Commission [is] to be guided by the ‘public interest, convenience, or necessity.’” Public interest is defined as the interests of the public at large, not of competitors. Congress granted the FCC, therefore, wide discretion in approving license applications. However, this is not unbridled: appeal is available. The U.S. Supreme Court has described its responsibility in this area as being “to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest.” Factors to be considered in granting licenses for establishing new lines, for example, include whether more or additional competition in the area is in the public interest and how much added service is desirable or necessary.

State licensing procedures vary among the fifty states. A brief discussion of California law will be used as an example of state licensing regulation. The California State Constitution deems telephone companies to be public utilities subject to state legislature control. As public utilities, they are subject to regulation by the Public Utilities Commission. A provider of telephone services must first obtain a franchise which is, “a special privilege conferred upon a corporation or individual by a govern-

179. The Commission must approve construction of new lines and will only do so where it concludes they will serve the “public convenience and necessity.” 47 U.S.C. § 214. See KELLOGG ET AL., supra note 9, § 12.3.
182. RCA Comm., Inc., 346 U.S. at 91.
183. Hawaiian Tel. Co., 498 F.2d at 776. See also KELLOGG ET AL., supra note 9, § 12.4.
184. CAL. CONST. art. XII, § 3.
ment duly empowered legally to grant it.” The word franchise is usually used when referring to matters of vital public interest like gas, electricity or telephone services. The grant of a federal franchise entitles a grantee to exercise the franchise without interference by the state.

b. The Telecommunications Act of 1996

The 1996 Act does not change the basic licensing rules described above except that section 214 rules are revoked for open video systems.

3. Comparisons and Conclusions

Both pre-existing U.S. law and the TKG take very flexible, open-ended approaches to the granting of licenses. In distributing licenses, the FCC is to consider “the public interest, convenience, and necessity” while the NRA is to fulfill the overall purposes of the TKG, including safeguarding user interests, and ensuring competition and the availability of affordable service.

As discussed below in section III.B.3 in more detail, licensing issues are closely linked to universal service issues. As discussed in that section, the critical issue for the TKG is the scope of the licenses. Local governments are concerned that without sufficient attention to the size and scope of areas covered by licenses, a two-tiered telecommunications system could develop if firms are allowed to carve out the most profitable areas and to neglect less profitable areas. Again, the United States avoids this problem because of the pre-existing, MFJ-imposed LATA system that already covers the Nation.

Another substantial issue for the new German system may be access to the licenses themselves. Early analysis of proposed licensing regulations criticizes them for setting high licensing costs that could serve to exclude or disadvantage all but the most well-financed ventures, particularly those with pre-existing networks.

B. Universal Service

Generally speaking, “universal service” refers to the availability to all or nearly all consumers basic telephone service at a reasonable price and with reasonable service quality. This has been a goal of regulators in all systems since telephone service began. The emphasis has been on

185. 59 CAL. JUR. 3D Telephones and Telegraphs § 3 (1980).
186. Id.
187. Id.
188. Bundesrat Opinion, supra note 76, at 1.
inexpensive local telephone service. There has been consistent policy in many, if not all, nations of artificially inflating long-distance rates so as to provide subsidies for local service in order to keep the latter’s cost low.\textsuperscript{190} However, with increased deregulation and increased competition in the long-distance market, market forces pushed toward lower long-distance rates, since those cross-subsidies from long-distance to local service had distorted the market. For example, in the United States large consumers of telecommunications services, such as big corporations, had bypassed local exchanges in order to avoid paying larger fees by connecting their internal systems directly with long-distance providers.\textsuperscript{191}

1. Germany

a. The Law Leading to the TKG

The German Constitution requires universal service; until 1995 the State was required to provide it, since 1995 it must merely guarantee that it is provided.\textsuperscript{192} All property owners may demand connection to the local telecommunications network.\textsuperscript{193}

The provision of universal service in basic telephony was a major DBP policy goal following World War II. By the mid-1980s, saturation had virtually been attained, so the focus shifted to broadening access to new services such as video text, teletex, cable TV, electronic mail, and ISDN services.\textsuperscript{194} The Law Regulating Telecommunications and the Post Office\textsuperscript{195} states that telecommunications industry regulation is intended to establish and maintain broadly available, modern, and reasonably priced telephone service that is equally available in rural and urban areas, that users have discrimination free access to the system, and that there be effective management of limited resources, attention to social concerns, and guaranteed, effective consumer and data protection.\textsuperscript{196} To this end, Germany must also heed the demands of EU Directives in this area.

\textsuperscript{190} Germany explicitly wanted to exempt Deutsche Telekom from EC efforts to eliminate national restrictions in telecommunication services because of the desire that the phone system be able to use its long-distance revenues to expand the national network and to cross-subsidize local services. Globerman, supra note 4, at 22.

\textsuperscript{191} Sondhof & Theurer, supra note 4, at 181.

\textsuperscript{192} GG art. 87(f) (F.R.G.).

\textsuperscript{193} Gesetz über Fernmeldeanlagen [Law on Telecommunications Equipment] (FAG) § 8 v. 3.7.1989 (BGBl. I S.1455).

\textsuperscript{194} Haid & Müller, supra note 60, § 6.1.


\textsuperscript{196} Id. § 2(2).
The EU continues to wrestle with its own definition of universal service. This has implications for the TKG and other European telecommunications laws which must be drafted in line with the EU's directives. European Union Industry Commissioner Martin Bangemann stated that universal service should mean that all EU citizens have access to an equal quality of service at a reasonable price.\(^{197}\)

Equally important is the question of who must pay to provide universal service. The European Commission approved a requirement that all network and service providers who have greater than 25 percent market share must contribute to financing universal service within the Community.\(^{198}\)

\section*{b. The TKG}

The TKG provides authority for the federal government to assure universal service.\(^{199}\) Universal service is defined as a minimum level of telecommunications service, available to persons and businesses at any location, and at an affordable price.\(^{200}\) The federal government is to determine, subject to the consents of the Bundesrat and Bundestag, what constitutes universal service, the minimum level of quality of service that must be provided to satisfy the requirement, and a reasonable price.\(^{201}\) Both social and technical developments are to be considered in defining and determining universal services.\(^{202}\) The NRA is then empowered to determine whether universal service is actually being provided.\(^{203}\)

The Legislative Report to the Original Draft states that the basic operating definition of universal service includes basic voice telephony and the necessary connection to the system that the public has come to expect as available.\(^{204}\) Further, the market penetration rate (the number of

\(^{197}\) European Parliament Draft Directive Moves EU Closer to Open Telecom Networks, Daily Report for Executives (BNA) at 3 (Feb. 15, 1996) (Minister Bangemann stated that universal service did not "necessarily mean a public service, but rather that all EU citizens, wherever they may be, should have the same quality of service at an affordable price. It's a civil right to participate in the services offered by the information network—and a public service is not necessarily the best way of achieving that objective.").

\(^{198}\) EU Telecom Ministers Take Steps Toward European Telecom Deregulation, supra note 5, at 2.

\(^{199}\) Telekommunikationsgesetz (TKG) § 17(2), v. 1.8.1996 (BGBl. I S.1120).

\(^{200}\) \textit{Id.} § 17(1). The Bundesrat sought to remove "minimum" from the description and to keep the definition as broad as possible. Bundesrat Opinion, \textit{supra} note 76, § 32.

\(^{201}\) TKG § 17(2).

\(^{202}\) \textit{Id.} § 17(2). This sentence was added in the final version of the TKG. \textit{Compare} TKG § 17(2) with June Draft, \textit{supra} note 3, § 16(2).

\(^{203}\) TKG § 17(2).

\(^{204}\) TKG Legislative Report, \textit{supra} note 3, at 34-35.
telephone hookups) in 1996 constitutes the baseline for universal service. However, the law takes into account that the industry is everchanging and that technological advances regularly continue. Accordingly, what will satisfy the universal service requirement shall vary depending upon what services are prevalent in the market and come to be considered indispensable.\textsuperscript{205}

The \textit{TKG} also begins with the operating assumption that the market will fulfill universal service requirements.\textsuperscript{206} However the \textit{TKG} also grants the NRA authority to intervene to ensure that universal service requirements are satisfied should the market fail.

If universal service is not being provided, or where it appears likely that universal service will not be provided, all licensees operating in the applicable licensed market and who have at least a 4 percent market share in the relevant market as defined by the Competition Law, are obliged to contribute to ensuring that the universal service is provided.\textsuperscript{207} This obligation extends to other companies constituting a single company together with the licensee operating in the market.\textsuperscript{208}

Where the NRA determines that satisfactory universal service is not being provided in a particular market, it must first publish this determination in its official gazette. If within one month following publication no market provider declares its intent to provide service that will satisfy universal service requirements, the NRA may require a licensee holding a market dominant position in the relevant product and geographical market to provide the service.\textsuperscript{209} Where several licensees hold dominant positions in the relevant market, and after hearing concerned parties, the NRA may choose to obligate one or more licensees to provide part or all of the universal service in question. However, any licensee obligated in this way may not be unduly prejudiced in relation to other licensees.\textsuperscript{210} This potential obligation to provide also extends to other companies constituting a single company together with the licensee(s).\textsuperscript{211}

\textsuperscript{205} TKG § 17(1).
\textsuperscript{206} \textit{TKG} Legislative Report, \textit{supra} note 3, § 17.
\textsuperscript{207} TKG § 18(1). The January Draft required participation of providers with 5% or greater market participation. January Draft, \textit{supra} note 3, § 17(1). The Bundesrat had suggested considering a figure lower than 5% in order to broaden participation. Bundesrat Opinion, \textit{supra} note 76, § 37.
\textsuperscript{208} TKG § 18(2). \textit{See infra} note 254 and accompanying text (discussing definition of a single company).
\textsuperscript{209} TKG § 19(2).
\textsuperscript{210} \textit{Id.} § 19(3).
\textsuperscript{211} \textit{Id.} § 19(4) (referring to the creation of a single company through linkage of companies within section 23 of the Competition Law).
Licensees obligated to provide universal service are entitled to receive compensation for actual long-term costs incurred in providing that service.\(^{212}\) Such costs are computed following a complete calendar year in which the licensee experiences a deficit based upon providing the universal service.\(^{213}\)

In cases where the NRA selects a licensee to provide universal service as described above, the licensee may provide evidence that it will be able to claim compensation for providing the service.\(^{214}\) If a licensee furnishes \textit{prima facie} evidence that it will be entitled to compensation, the NRA may, in lieu of obligating one or more companies to provide service as described above, solicit bids for the provision of the service.\(^{215}\) In that case, the NRA will select the bidder showing sufficient qualification to provide universal service and requiring the "least financial compensation therefor."\(^{216}\) This solicitation process may also be used where the primary selection process is not possible.\(^{217}\)

All licensees operating in the relevant product market for the licensed telecommunications service in question and that account for at least 4 percent of the total sales in that market, must together provide compensation to a licensee entitled to compensation.\(^{218}\) The amount that each licensee must pay is determined pro rata based upon the licensee’s share of sales.\(^{219}\) Annually, each licensee must report its revenues in that market to the NRA.\(^{220}\)

2. The United States

\textit{a. The Law Leading to the Telecommunications Act of 1996}

The United States inherited from English common law the principle of the "common carrier," defined as entities that provided essential services in a non-discriminatory manner. In exchange for providing such services—the operation of a ferry boat or wharf, for example—the carrier received a limitation on its liabilities, as befitting for an entity which could

\(^{212}\) \textit{Id.} § 20(1).
\(^{213}\) \textit{Id.} § 20(2). This could lead to a great deal of accounting problems as market participants may try to shift competitive costs into this area in order to get reimbursement. Raimund Schütz & Michael Esser-Wellié, \textit{Wettbewerb in der Telekommunikation? [Competition in Telecommunications?]}, AFP, Mar. 1995, at 580, 584.
\(^{214}\) TKG § 19(5).
\(^{215}\) \textit{Id.} § 19(5).
\(^{216}\) \textit{Id.} § 19(5).
\(^{217}\) \textit{Id.} § 21(5).
\(^{218}\) \textit{Id.} § 21(1).
\(^{219}\) \textit{Id.} § 21(2).
\(^{220}\) \textit{Id.} § 22(1).
not discriminate among its customers.\textsuperscript{221} By contrast, non-common (private) carriers then provided niche services for private parties.

Difficulties result where there is intermingling of the two types of services—an increasingly common occurrence.\textsuperscript{222} For example, non-common carriers are not burdened by universal service requirements, providing an advantage where there is competition between common and noncommon carriers. Courts, regulators, and Congress have typically attempted to equalize such situations.\textsuperscript{223}

The provision of universal service is one of the basic tenets of the common carriage system. As networks are increasingly privatized and particularly where networks can be divided into different market segments, the danger of loss of service in less profitable areas increases. Accordingly, some substitute for the government-imposed universal service previously provided by national telecommunications networks was considered necessary.

The FCC has as a central goal that the telecommunications system provide universal service at reasonable prices. Section 151 of the 1934 Act established the FCC "\textit{[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . .}."\textsuperscript{224}

While achieving universal service is a primary goal of the FCC, no law actually requires universal service. Rather, the 1934 Act disallows the withdrawal of service without FCC or state approval. This effectively creates universal service availability because of the unfavorable political response at the state level that a petition to withdraw service would generate. The federal standard for approval of withdrawal is: "\textit{[N]o carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby.}"\textsuperscript{225} As a practical matter, no one files applications to withdraw service except for the

\textsuperscript{221} KELLOGG ET AL., \textit{supra} note 9, § 1.3.1.

\textsuperscript{222} Rob Frieden, \textit{Contamination of the Common Carrier Concept in Telecommunications}, TELECOMM. POL'Y 685 (1996). Attempts by the FCC to establish "bright line" distinctions between basic common carrier functions and enhanced service functions which are not regulated failed. Instead, the FCC opted for safeguards involving accounting standards and a complaint process in place of structural separation and safeguards. \textit{Id.} n.10.

\textsuperscript{223} \textit{Id.} at 686.


most esoteric and ancient of services: wire telegraphy services and maritime common carrier operations that often predate the Federal Radio Act of 1926.

However, beyond merely ensuring that service lines remained actually in place, regulators believed that a key to achieving the goal of universal service, or at least near universal, was keeping the cost of local service low. To this end, local service rates were subsidized in three ways. First, higher long-distance rates were intended to offset lower local rates. Second, rural rates were subsidized by higher urban rates through rate averaging. And third, business customers subsidized residential customers. The fear has always been that to increase local rates to bring them in line with actual cost of service would end up causing significant numbers of individuals to give up service. However, a recent study has shown that setting local rates at levels closer to actual cost does not significantly change rates of connection.

b. The Telecommunications Act of 1996

The 1996 Act establishes a Federal-State Joint Board on Universal Service made up of federal and state-appointed representatives and a State-appointed utility consumer advocate. The Joint Board is to issue recommendations to the FCC concerning: preserving and advancing universal service. It is to focus on availability of quality services at “just, reasonable and affordable rates”; access to advanced service; access in rural and high cost areas; equitable and nondiscriminatory contributions by all

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227. For example, a study showed that Pacific Bell charged $8.35 per month for basic service, while its marginal costs were estimated to be $22 per month for that service. The subsidization was provided by inflated interLATA toll charges, access charges, and yellow pages rates. Bhaskar Chakravorti & Yossef Spiegel, The Political Economy of Entry Into Local Exchange Markets, in QUALITY AND RELIABILITY IN TELECOMMUNICATIONS INFRASTRUCTURE 43, at 44 (William Lehr ed., 1995).

228. See Peter K. Pitsch & David P. Teolis, Price Reform & Universal Service: Not Mutually Exclusive, PUB. UTIL. REP., Mar. 15, 1996, at 29 (reporting that where rate restructuring took place in Illinois no statistically significant drop in household penetration rates took place).

However, adding competition in the local market reverses the business to residential subsidy. Because a small number of large business customers provide a LEC’s greatest revenues, the LEC must offer significant cost savings as incentives to prevent the large customers from utilizing a bypass and thereby depriving the LEC of these revenues. Eli M. Noam, supra note 56, at 221.

229. Chakravorti & Spiegel, supra note 227, at 44.

telecommunications service providers; specific and predictable support mechanisms for the provision of universal service; access to advanced telecommunications services for schools, health care facilities, and libraries; and such additional principles as the Board and FCC consider "necessary and appropriate for the protection of the public interest, convenience and necessity, and are consistent with [the 1996 Act]." Universal service is to be made available to consumers "at rates that are just, reasonable, and affordable." The 1996 Act declares universal service to be an "evolving level of telecommunications services." The definition must take into account advances in telecommunications and information technology. Moreover, its decisions:

shall consider the extent to which such telecommunications services—
(A) are essential to education, public health, or public safety;
(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
(C) are being deployed in public telecommunications networks by telecommunications carriers; and
(D) are consistent with the public interest, convenience, and necessity.

All telecommunications carriers that provide interstate telecommunications are obligated to contribute "on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." Where a carrier's activities are so small that its contribution would be *de minimus* (that is, where collection costs would exceed the amount the carrier contributed), then the carrier may be exempted. Conversely, other interstate telecommunications providers may also be required to contribute where the FCC finds it in the public interest.

Where universal service is not provided in a community, the FCC or the state may select a particular common carrier to provide such service. Such carriers are referred to as "eligible telecommunications carriers."

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231. Id. § 254(b).
232. Id. § 254(i).
233. Id. § 254(c)(1). Apparently, too much flexibility may not be a good thing: House Telecommunications and Finance Subcommittee Chairman Jack Fields (R-Tex.) questioned FCC Chairman Reed Hundt regarding alleged FCC consideration of a plan to provide pagers to the homeless as a part of the FCC's implementation of the 1996 Act's universal service provisions. Chris McConnell, *FCC Grilled on New Role*, BRDCST. & CABLE, Apr. 1, 1996, at 18 (reporting congressional interest in overhauling FCC).
235. Id. § 254(d).
236. Id. § 214(e)(2).
Incumbent LECs are required to make their public switched-network infrastructure, technology, information, and telecommunications facilities and functions available to requesting small universal services providers in its area.\textsuperscript{237} An eligible carrier may only relinquish this designation where at least one other carrier serves the area and where the state approves the request.\textsuperscript{238}

Eligible carriers may then receive support payments to preserve and advance universal service under section 254(e).\textsuperscript{239} However, cross-subsidization between competitive and non-competitive services is not allowed; the FCC and the states may establish accounting rules to ensure that costs allocated to facilities used to provide universal service are reasonable.\textsuperscript{240}

The 1996 Act also incorporates the pre-existing practice that rates be subject to geographic averaging and rate integration for long-distance telecommunications in order to ensure that rates for rural and urban customers be comparable. Moreover, long-distance service rates may not vary between states.\textsuperscript{241}

The 1996 Act also includes provisions requiring that telecommunications carriers provide affordable access to their services to health care providers in rural areas, elementary and secondary schools, and public libraries. Rural health care providers are to receive services at rates no higher than those afforded urban providers, and schools and public libraries are to receive discounted rates set by the FCC.\textsuperscript{242}

3. Comparison and Conclusions

Both the TKG and the 1996 Act have adopted extremely broad definitions of universal service. The goal is that both systems remain flexible for responding to ever advancing technology: Today's exotic features may well become tomorrow's most common services. This broad definition provides regulators with more flexibility in setting regulations in this area.

Essentially, both the TKG and the 1996 Act take the same basic approach to ensuring that universal service is provided. Wherever the NRA or FCC determines that universal service is lacking, it may select one or more carriers in the area to provide the required service, thereby making the

\begin{itemize}
  \item \textsuperscript{237} Id. § 259(a).
  \item \textsuperscript{238} Id. § 214(e)(4).
  \item \textsuperscript{239} Id. § 214(e)(1).
  \item \textsuperscript{240} Id. § 254(k).
  \item \textsuperscript{241} Id. § 254(g).
  \item \textsuperscript{242} Id. § 254(h).
\end{itemize}
burdened carrier eligible to receive funds from the universal service fund. However, differences exist between those that may be required to provide such services. The TKG limits carriers that may be required to provide service to those with 4 percent or greater market share while the 1996 Act makes any market participant potentially available to provide service.

The TKG's approach to paying for provision of universal service appears to trade breadth of contribution for simplicity. Its requirement that carriers with at least four percent of the market contribute to the common fund may be relatively simple to calculate—in contrast to the U.S. system where all carriers must contribute unless administration costs would be greater than the contribution—but may well exclude a substantial number of market participants, particularly in the early period of growing competition. Although the U.S. system appears more analysis intensive, in practice it will probably be relatively simple to perform basic calculations concerning administration costs, and thereby easy to compare each market participant's required contribution against the pre-calculated costs. Accordingly, the U.S. system probably provides a fairer method of distributing costs. Perhaps once a more competitive environment has been established, Germany may want to set a lower threshold in order to provide for a fairer distribution of universal service burden throughout the industry.

However, the interesting difference between the two systems results from their different starting points. Although the German system has always explicitly required the provision of universal service, until passage of the 1996 Act, the U.S. system had only indirectly required universal service—in that service was already in place in all regions, and that approval was required in order to withdraw services. Conceivably, absent some sort of service provision requirement, upon complete privatization in 1998, Telekom could simply stop providing service in unprofitable areas. Although extremely unpopular politically, it could be highly advantageous economically, given varying degrees of profitability between areas and the requirement that service be provided at an affordable price—a requirement that automatically calls for some degree of rate averaging. Here, the provision of universal service becomes linked to licensing. Under a completely unfettered licensing scheme, firms could engage in cherry-picking in order to provide service only to the most cost-effective areas, leaving out those areas where provision of service would be most expensive.  

The U.S. system should be able to avoid this problem because the United States is already divided into 161 LATAs, each encompassing an

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243. See, e.g., Bundesrat Opinion, supra note 76, § 1.
average of 1.2 million persons and 600,000 telephone connections.\textsuperscript{244} These LATAs are already serviced by the various BOCs, which are subject to the section 214(a) requirement of the 1934 Act that service not be withdrawn from an area absent FCC consent. Accordingly, local universal service will remain in place, particularly given that the 1934 Act provides authority for universal service providers to be appointed where service is lacking.

Perhaps establishing some sort of similar framework in Germany could resolve some universal service provision problems. If service regions are established such that more and less expensive regions are linked together in such a way that most service regions had roughly equivalent overall profitability potential, the risk that less densely populated areas would be provided less favorable services would be lessened.

Alternatively, the NRA may invoke its authority under section 18 of the \textit{TKG} to designate carriers in certain areas where universal service is not being provided. On the one hand, this seems to represent a more piece-meal approach than setting up a pre-existing structure. However, on the other hand, it could well be that a regional system devised by a governmental body would not represent economic realities as well as would a market-based system derived from license applications themselves.

\textbf{C. Market Dominance Regulation}

Because it takes some time before alternate networks are established to compete with those of former monopolies, competitors must initially utilize a former monopoly's networks and services. Accordingly, protection against abuse of a market dominant position is necessary in newly liberalized telecommunications industries.\textsuperscript{245}

1. Germany

\textit{a. The Law Leading to the TKG}

As discussed above in respect to interconnection, historically the market consisted only of the state-run telephone system. Accordingly, whether the state enterprise abused its market position was more a political than a legal question—as the controversy over the telephone rate structure

\textsuperscript{244} Sondhof & Theurer, \textit{supra} note 4, at 180.
\textsuperscript{245} Both AT&T and British Telecom have maintained their status as primary providers despite the passage of more than eleven years since the end of their monopolies. Kammholz, \textit{supra} note 51, at 29.
that went into effect on January 1, 1996 showed.246

EU law applies for purposes of ensuring that the state-run telephone system does not violate article 90 or article 30 of the EC Treaty.247 Moreover, EU ministers continue to discuss the definition of a market dominant enterprise within the context of the telecommunications market. To date, the EU Council of Ministers for Telecommunications has apparently agreed in principle that its draft directive will define an enterprise with greater than 25 percent market share as market dominant, but with some flexibility built into the system for individual state implementation.248 The European Commission will continue to exercise authority over the telecommunications market in Germany and throughout the EU, providing another layer of regulatory oversight beyond the NRA and Cartel Office.249

b. The TKG

While competition is set to begin on January 1, 1998, it will, in all

246. Imposition of new telephone rates resulted in a major public uproar because of questions concerning the new rates. Telekom advertised the new rates as a substantial rate reduction because it reduced the basic cost of a basic telephone calling “unit” [einheit]. Controversy arose over whether or not, in combination with other changes in the rate calculation system, the overall result was a net increase or decrease in calling prices for consumers. See, e.g., Postminister verlangt Überprüfung neuer Ortsgesprächsgebühren [Minister for Postal Service Demands Review of New Local Call Rates], AP WORLDSTREAM-GERMAN, Jan. 4, 1996, available in LEXIS, News Library, APGRMN File.

All telephone calls in Germany are billed on the basis of how many units [einheiten] the customer uses. All calls use at least one unit—there is no flat rate for unlimited local calling. Customers pay DM 0,12 (approximately 8 cents) for each unit. Depending upon the time of day, each unit is of a different length. For example, one unit lasts four minutes if a customer calls the store across the street between 12:00 midnight and 5:00 a.m. (the least expensive calling period). By contrast, a unit would last only 45 seconds if the same call is placed between 9:00 a.m. and 12:00 noon (the most expensive calling period). The customer receives a bill indicating the number of units used during the month and pays DM 0,12 per unit. In contrast to U.S. telephone company bills, there is no list of telephone numbers called. Most German telephones have a unit counter that indicates the units as they are used during a telephone call and keeps a running total.

247. For discussion of EU law application, see Haar, supra note 18, 550–56.


249. See, e.g., Schuster, supra note 77 (reporting the European Commission’s involvement following competitor complaints that Telekom was abusing its market dominant position in offering customer rebates in 1996).
likelihood, be some time before Telekom is dislodged from its position as the sole market dominant provider.\textsuperscript{250} As the incumbent carrier, Telekom begins with many advantages over its fledgling competitors, including its existing network and name recognition.\textsuperscript{251}

The TKG is particularly concerned with protecting the market from the control of a market dominant enterprise—meaning Telekom.\textsuperscript{252} Telekom has criticized its special status, arguing that looming competitors like the big energy concerns that have existing networks and have entered into alliances with large international enterprises do not need regulatory protection. However, many observers consider the special regulation necessary to nurture and protect competition in the developing market.\textsuperscript{253}

The TKG pays special attention to market dominant providers and affirms the applicability of antitrust law to telecommunications providers.\textsuperscript{254} The TKG refrains from establishing a unique definition for market dominant position in the telecommunications industry. Rather, it defers to section 22(1) of the Competition Law for the determination of whether an entity is market dominant:\textsuperscript{255}

\begin{quote}
(1) An enterprise is market dominating within the meaning of this Act if it, either as one offering or calling for a specific kind of goods or commercial services,
\end{quote}

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\textsuperscript{250} One estimate expects Telekom to maintain a 77.5\% domestic market share in the year 2000. Kammholz, \textit{supra} note 51, at 29.

\textsuperscript{251} However, it has the drawback of having to cope with pre-existing enormous debts and pension obligations and how to rid itself of its vastly excessive force of state workers who are entitled to keep their jobs. Haar, \textit{supra} note 39, at 320.


\textsuperscript{253} Telekom befürchtet Oberregulierung auf dem Weg in den Wettbewerb, \textit{supra} note 127, at 19.

\textsuperscript{254} See Haar, \textit{supra} note 18, at 528 (arguing that the U.S. experience shows that a functioning competitive market requires effective antitrust law regulating the structure of the market, and that mere individual legal protections are insufficient).

\textsuperscript{255} See Telekommunikationsgesetz (TKG) §§ 14, 19, 24, 25, 32, 33, 34, 35 v. 1.8.1996 (BGBI. I S.1120). Earlier drafts considered using 25\% market share as a trigger for market-dominant position, but the utility of such a bright-line definition was questionable. Alternatively, a definition that considered whether a market-participant controlled a choke-point for other users’ access to networks might have been useful. Hiltl & Großmann, \textit{supra} note 7, at 173, n.36.

1. is without competitors or is subject to no substantial competition; or
2. has a superior market position in relation to its competitors; in this connection, in addition to its market share, regard shall be given in particular to its financial strength, its access to the supply and sales markets, its inter-relationships with other enterprises as well as to legal or factual barriers to the entry of other enterprises into the market, the ability to direct its supply or demand to other goods or commercial services, as well as the possibility of the opposite market side to change to other enterprises.\footnote{256}

Part III of the Original Draft was entitled "Regulation of Market Dominant Providers" but was renamed as "Rates Regulation" in the law as passed.\footnote{257} A comparison of the changes to Part III, however, shows relatively little difference between the January Draft and June Draft beyond the title change. As evidenced by the Bundesrat's proposals, some objected to the part's limitation in scope merely to dominant providers.\footnote{258} Accordingly, the rules in this section, while to a large extent focused upon large market participants, do not always apply exclusively to market dominators. For example, all terms and conditions for licensed telecommunications services and for universal service are subject to NRA scrutiny to ensure that

\footnote{256. \textit{I Business Transactions in Germany}, \textit{supra} note 110, at app. 3-16 to -17. The section continues:

(2) Furthermore, two or more enterprises shall be deemed to be market dominating insofar as, for factual reasons, substantial competition between them for a specific kind of goods or commercial services does not exist, either generally or in specific markets, and insofar as they in their entirety fulfill the conditions of subsection (1).

(3) It shall be presumed that

1. an enterprise is market dominating within the meaning of subsection (1) if it has a market share of at least one-third for a specific kind of goods or commercial services; this presumption shall not apply if the turnover proceeds of the enterprise during the last preceding business year amounted to less than 250 million Deutsche Marks;

2. the conditions specified in subsection (2) are fulfilled if, with respect to a specific kind of goods or commercial services,
   a) three or fewer enterprises together have a market share of 50 percent or more; or
   b) five or fewer enterprises together have a market share of two-thirds or more;

this presumption shall not apply insofar as enterprises are concerned whose turnover proceeds during the last preceding business year amounted to less than 100 million Deutsche Marks. § 23(1), sentences 2–10, shall apply analogously to the computation of market shares and turnover proceeds. \textit{Id.} at app. 3-17.

257. \textit{See supra} note 132.

258. Bundesrat Opinion, \textit{supra} note 76.}
they comply with EU requirements, regardless of an enterprise's size.\textsuperscript{259}

The \textit{TKG} provides corporate structuring rules for market dominant providers in general and special rules and obligations for market dominant providers, variously defined, in the areas of provision of universal services, rates regulation, and open network provision and interconnection. These sector-specific market position abuse regulations, however, create a potentially cumbersome and conflict-creating situation for an enterprise. In some situations, a telecommunications enterprise operating in a nonlicensed area is governed merely by Competition Law requirements and is subject to Federal Cartel Office oversight. However, where it is operating in licensed areas it is subject to NRA oversight and possibly to Cartel Office oversight as well.\textsuperscript{260}

Turning now to specific sections of the \textit{TKG}, section 14(1) provides that companies enjoying a market dominant position in markets other than telecommunications must establish legally independent companies for the carrying of telecommunications services. Market dominance is again defined according to section 22 of the Competition Law.\textsuperscript{261} Moreover, section 14(2) provides that companies dominating a telecommunications market segregate their accounting for services provided in a licensed sector from those provided in nonlicensed sectors. The NRA may dictate the structure of accounting practices for services subject to license. The goal is to avoid cross-subsidization particularly where proceeds from licensed, monopoly services could be used to subsidize services in nonlicensed, competitive sectors.\textsuperscript{262}

As discussed above,\textsuperscript{263} section 18(1) provides that where an element of universal service is not provided as required under section 17(1), every licensee that is active in the relevant area of the telecommunications market and either (1) holds at least 4 percent of the market that falls within the \textit{TKG}'s scope of coverage or (2) holds a market dominant position in the relevant geographical market as defined under section 22 of the Competition Law, is obligated to assist with assuring that the element of universal service is provided in that market. This section applies not only to a telecommunications provider itself but also to any other entity which is

\textsuperscript{259} TKG § 23(1).
\textsuperscript{260} Kammholz, \textit{supra} note 51, at 21.
\textsuperscript{261} See \textit{supra} note 256 and accompanying text.
\textsuperscript{262} But ef. Alexander C. Larson, \textit{Reforming Telecommunications Policy in Response to Entry into Local Exchange Markets}, 18 HASTINGS COMM. & ENT. L.J. 1, 21 (1995) (arguing that "leverage theory," whereby dominance in one market is used to assist in another market, is relatively discredited in antitrust theory).
\textsuperscript{263} See \textit{supra} Part III.B.1.b.
connected to the telecommunications provider so as to constitute a single entity within the meaning of section 23 of the Competition Law.264

By contrast, section 19(2) narrows the pool of companies potentially obligated to provide service under section 18(1); section 19(2) provides that companies holding a dominant position under section 22 of the Competition Law in "the relevant product and geographical market" may be obligated to provide a universal service that is lacking. Section 21(1) provides that licensees operating in the relevant product market and who hold at least 4 percent of that market must contribute to the compensation of eligible companies based on their provision of a universal service.

Part III also imposes rate regulation upon those holding a market dominant position in the relevant market.265 Proposed rates will be evaluated based upon either the costs of efficiently providing the individual service in question or upon a prescribed average change in rates for a basket of combined services.266 Moreover, as an overall matter, all rates, not just those of market dominant providers, must not be based upon abuse of a market dominant position, contain discounts that unfairly prejudice some market participants, or create advantages for some market participants in relation to identically situated market participants.267

Finally, Part III prohibits certain mergers among market dominant providers. Where the number of licenses granted has been limited pursuant to section 10, section 23 authorizes the NRA to condition a license granted to a market dominant provider upon the provider's refraining from merging with another service provider.268 Combination is defined in terms of

264. Telekommunikationsgesetz (TKG) § 18(2), v. 1.8.1996 (BGBl. I S.1120). Section 18(2) refers to sections 23(1) sentence 2 and (2) and (3) of the Competition Law for the definition of a "linkage of companies." Section 23 of the Competition Law, entitled "Report of Mergers" contains definitions of combinations of companies and mergers. BUSINESS TRANSACTIONS IN GERMANY, supra note 110, at app. 3-18 to -22.

265. TKG § 25(1). The qualification "in the relevant market" was added to the June 5, 1996 Draft. Under the earlier draft, rate regulation under this section was to be applied to those holding a market dominant position in any market. Compare January Draft, supra note 3, § 24(1)-(2) with June Draft, supra note 3, § 24. Old section 24 is renumbered as section 25 in the TKG.

266. TKG § 27(1). Consistent with its goal of establishing greater authority over the regulation process, the Bundesrat sought to have the NRA's regulations concerning remuneration be subject to its approval. Bundesrat Opinion, supra note 76, § 43. The TKG explicitly states that regulations in this area that are promulgated by the German federal government do not require the approval of the Bundesrat. TKG § 27(4).

267. TKG § 24.

268. Again, the Bundesrat unsuccessfully sought to have this authority apply to all providers, not merely market dominant enterprises. Bundesrat Opinion, supra note 76, § 46. The Bundesrat also unsuccessfully proposed that regulations in this area be subject to Bundesrat approval. Id. § 48.
section 23 of the Competition Law.  

Part IV, Open Network Provision and Interconnection, focuses special attention on providers that hold a market dominant position in telecommunications markets. Section 33(1) requires that such providers allow competitors non-discriminatory access to essential services that the provider itself uses. Access may only be restricted to the extent allowed under EU requirements. Abuse of a market dominant position will be presumed where a provider holding a dominant position in the relevant market fails to provide such access. Moreover, a provider of telecommunications services to the public that is dominant in such market must allow other users access to its network or to parts thereof. This requirement is extended to other companies that together constitute a single company with the provider as defined by section 23 of the Competition Law. All agreements granting access under this section are also subject to this restriction—that they may not be likely to prejudice the “competitive opportunities” of other companies unless there is an objective justification for such prejudicial effect.

2. The United States

a. The Law Leading to the Telecommunications Act of 1996

Section 2 of the Sherman Act prohibits monopolistic behavior, and abuse of a market dominant position is regulated under this category. Dominant carriers were considered those with “market power,” defined as the ability to set prices independently. While antitrust laws were not inapplicable to the Bell system, it received special treatment vis-à-vis antitrust law requirements because it was a state-sanctioned monopoly. Nonetheless, throughout its history, the Bell System was subject to antitrust suits, threats of suits, and consent decree requirements based on its dominance in the telecommunications market. Many of these suits concerned mergers and potential mergers in various market segments.

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269. See supra note 264 and accompanying text.
270. TKG § 33(1).
271. Id. § 33(2). The June Draft added some flexibility to this presumption, allowing such a provider to show objective justification for the less favorable conditions. See June Draft, supra note 3, at 25. This flexibility remains in the TKG as passed.
272. TKG § 35(1).
273. Id. § 38(1).
276. Herbert E. Marks, Two Decades of Telecommunications Regulation: An Historical Perspective, in TELECOMMUNICATIONS AND THE LAW, supra note 117, at 111, 120.
Regulation of market dominant carriers had been simple to categorize until recently: The BOCs and the independents were monopoly LECs in their regions, and AT&T was the dominant international and domestic long-distance carrier. As such, they have been subject to a complex set of antitrust rules based on the fact that telephone service was traditionally treated as a public utility. This resulted in a mixture of special legal rules which provided both advantages and disadvantages for these market dominators.

One of these special rules was FCC authority to grant immunity from antitrust laws for some mergers and consolidations within the telecommunications industry. In deciding whether to grant antitrust immunity, "[i]n general, the public interest is to be considered in light of the overall purpose of the Communications Act 'to make available, so far as possible, to all people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . .'" Where the FCC found that a "proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply." The 1996 Act repealed this section.

One important aspect of regulating market dominant actors has been cross-subsidization rules aimed at preventing dominant carriers from using revenues from basic regulated services to subsidize provision of non-regulated services (in other words, enhanced services). Accordingly, dominant carriers have been required to adopt FCC-approved accounting rules to allow for adequate oversight over this potential problem.

277. FCC regulation divides IXCs into two groups: dominant and nondominant carriers. Until recently, AT&T was the dominant carrier and all others were nondominant. KENNEDY, supra note 57, at 85. Today, AT&T is only considered dominant for purposes of international communications. In re Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd. 3271, 1 Comm. Reg. (P & F) 63 (1995).

278. For example, while AT&T enjoyed certain benefits in being the designated monopoly in certain areas, it became increasingly interested in the potential benefits of a competitive environment because it could gain access to markets from which it was denied access based on its special status. Marks, supra note 272, at 119–20.

For explanation and analysis of U.S. antitrust law generally and its specific application to the telecommunications industry, see, for example, HAAR, supra note 39, at 96–105.

279. Mid-Texas Comm. v. AT&T, 615 F.2d 1372, 1379 (5th Cir. 1980).


281. KENNEDY, supra note 57, at 68.
b. The Telecommunications Act of 1996

The 1996 Act focuses on the BOCs with regard to regulating market dominance. It seeks to ensure a workable transition from the present situation where the BOCs are the sole LECs to a competitive future since a major purpose of the 1996 Act is to open local exchange service to competition. Correspondingly, the BOCs are now able to enter the interLATA market. However, given the dominance of the BOCs in the local exchange market, special rules require that actual competition exist in a BOC's region before the BOC would be allowed to offer interLATA service that originates in its local exchange service area.\(^{282}\)

Specifically, a BOC must obtain FCC authorization prior to offering interLATA services within its region. In order to obtain authorization, the BOC must satisfy interconnection requirements and the "in-region" test.

Section 271(c) first requires that either the BOC has entered into one or more binding agreements concerning access and interconnection with a "facilities-based competitor" that exists in the BOC's region, or that no competitor has requested access and interconnection within the region.\(^{283}\) A facilities-based competitor is one that offers either telephone exchange service exclusively over its own facilities or predominately over its own with some resale of another carrier's services. The competitor must be operational, actually offering competitive services and not merely having entered into agreements with the BOC.\(^{284}\) Congress sought to ensure that an unaffiliated competing provider exists in the region; not just a reseller of the BOC's services.\(^{285}\) Alternatively, the section is satisfied where, despite the BOC's offering interconnection and access to its network, no other carrier applies to enter the region within ten months of the 1996 Act's enactment.\(^{286}\) In addition, the actual access and interconnection either provided or offered must include reasonable and nondiscriminatory terms for interconnection, unbundled service access, and nondiscriminatory access to ducts, poles, conduits and rights-of-way of the BOC.\(^{287}\)

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282. InterLATA services that originate outside its in-region state and incidental interLATA services are not included in this requirement. 47 U.S.C.A. § 271(6)(2)(B) (West Supp. 1996).

283. Id. § 271(c)(1)(A).


285. Id.


287. Id. § 271(c)(2)(B). Section 271(c) also prohibits a BOC from offering interLATA services jointly with another telecommunications carrier that has more than 5% of the nation's presubscribed access lines for three years after the date of enactment, or until the BOC receives permission to offer interLATA services within its state.
However, a sufficiently separate affiliate of a BOC which is an incumbent LEC may provide interLATA services, even where the above interconnection and in-region requirements are not met. Section 272 allows provision of such services, and other BOC-prohibited services such as manufacturing and interLATA information services, where they are carried out through an affiliate and all transactions are at arm's length and without any special preference for the affiliate's services.\footnote{288}

Significantly, the 1996 Act also repealed section 221(a) of the 1934 Act, which gave the FCC the power to provide antitrust exceptions to mergers within the industry, to avoid circumvention of the antitrust laws. This was done largely in anticipation of anticipated mergers between telephone and cable television companies. Congress was concerned that distinctions between the two industries will become less clear and it wanted to preserve adequate antitrust supervision where increasing industry consolidation could raise concerns about potential remonopolization.\footnote{289}

Mergers between [cable and telephone] companies should not be allowed to go through without a thorough antitrust review under the normal Hart-Scott-Rodino process . . . By returning review of mergers in a competitive industry to the DOJ, this repeal would be consistent with one of the underlying themes of the bill—to get both agencies back to their proper roles and to end government by consent decree. The Commission should be carrying out the policies of the Communications Act, and the DOJ should be carrying out the policies of the antitrust laws.\footnote{290}

3. Comparison and Conclusions

The TKG and 1996 Act take similar approaches regarding general regulatory oversight and seeking to prevent cross-subsidization. Both the German and U.S. systems begin with readily identifiable market dominators: Telekom in Germany and AT&T in international long-distance service and the BOCs in local exchange service in the United States.\footnote{291} However, while the TKG needed to address virtually the entire telecommunications industry in Germany, because the U.S. long-distance market has been open to competition for more than a decade, the 1996 Act could focus its attention on local service.

In terms of defining a market dominant enterprise, like U.S. law, the TKG sometimes takes a more flexible approach than that of the EU. The

\footnote{288. \textit{Id.} § 272.}
\footnote{289. \textit{S. REP. No.} 104-230, at 200–01.}
\footnote{290. \textit{Id.} at 201.}
\footnote{291. See text accompanying \textit{supra} note 277 (discussing classification of AT&T as market dominant in long-distance markets).}
former looks to the size and power of the enterprise in relation to the market while the EU appears ready to set down 25 percent of market share as the base line. This 25 percent base line was proposed and rejected early in the TKG legislative process.\textsuperscript{292} However, as evidenced above in the discussion of the rules requiring market dominant companies to provide universal services, the TKG provides varying market dominance definitions for different aspects of the requirement to provide universal service. This seems like a recipe for confusion. While this series of definitions undoubtedly is intended to most appropriately distribute responsibilities among the players in various telecommunications markets, it may serve to create artificial, market-distorting distinctions among companies within the industry.

The 1996 Act resolves a potential problem that remains a part of the TKG, that of conflicts between cartel regulators and telecommunications regulators. The 1996 Act explicitly takes antitrust waiver authority away from the FCC and places antitrust regulation of the industry squarely in the hands of the Department of Justice. This is particularly important given that cable television, telecommunications, and other media companies will become increasingly intermixed, requiring antitrust oversight by one agency that is capable of such a broad task. By contrast, the TKG establishes a dual regulatory system that could lead to inconsistent decisions coming from the NRA and the Cartel Office. As the telecommunications market becomes more and more a “normal” private undertaking, and less a government-owned or oriented utility, special competition law treatment at the hands of a telecommunications regulatory body as opposed to regular competition law authorities makes less sense. A recent “White Book” commissioned by the NRA on the TKG criticizes this situation: It suggests that the Cartel Authority is better qualified to oversee the new telecommunications market than is the NRA.\textsuperscript{293} The German Monopoly Commission has also expressed its concern that this separation could lead to divergence between general and sector-specific competition law. It noted as well that the overarching application of European competition law further complicates the situation.\textsuperscript{294}

\textsuperscript{292} This could lead to a conflict between German and EU law since, at least theoretically, an enterprise could have greater than the 25% market share yet not qualify as a market dominant enterprise under the Competition Law.


\textsuperscript{294} \textit{MONOPOLKOMMISSION, DIE TELEKOMMUNIKATION IM WETTBEWERB, SONDERGUTACHTEN DER MONOPOLKOMMISSION [TELECOMMUNICATIONS IN COMPETITION, SPECIAL REPORT OF THE MONOPOLY COMMISSION]} 24, at 34 (1996).
The White Book also repeats the argument set forth earlier that the regulator overseeing competition in the telecommunications market must be politically independent. This is particularly important given the Federal Government's potentially conflicting goals of establishing and maintaining a successful competitive market on one hand and of maximizing the revenues it generates as it gradually sells shares of Telekom to the public over the next several years on the other. Enormous sums of money are at issue—Telekom's annual turnover was DM 66 billion in 1995 and its initial public offering in November of 1996 raised $11.4 billion. Competitors have already expressed criticism that the liberal telecommunications regime the TKG is supposed to establish is being undercut by the government's interest in Telekom's successful entry into the stock market and continued health for purposes of further share sales.

The split between local and long-distance service in the U.S. market has allowed the 1996 Act to take an incentive-based approach to diminishing the risk of continued market dominance in the local markets. The BOCs want to be able to enter the extremely lucrative long-distance service market, but to do so there must first exist substantial competition in the local market (or at least the opportunity for it). Accordingly, the BOCs have strong incentive to remove existing barriers to competitor entry in local service because the rewards of successful competition in long-distance are so great. There does not seem to be any comparable incentive system that could work in the German market since Telekom does not remain excluded from any segment of the market.

D. Interconnection

While the U.S. and German telecommunications markets are moving from state-run or sanctioned monopolies to competition, it will take considerable time and capital expenditures before competitors to the incumbent systems have complete, alternate networks in place. In the

295. Ranft, supra note 293.
296. Sondermann, supra note 252.
298. Schuster, supra note 77, at 16. Peter Bross, Mannesmann-Eurokom's chief, complained that regulatory decisions are not made without the agreement of the Finance Minister. Id.
299. See The Lure of Distance, ECONOMIST, Apr. 6, 1996, at 63.
300. It has been estimated that introducing competition in voice telephony will require investment of between $800 to $1100 per subscriber. Dingwall, supra note 224, at 119 (citing Cable Strategies for Competitive Telephony: Assessing the Sprint/Cable Alliance, YANKEEVISION CONSUMER COMM., Dec. 1994, at 1, 12.)
meantime, they will have to rely, to lesser or greater extents, upon interconnection of their equipment and services with those of the incumbent providers. Moreover, even with fully functioning alternative networks, interconnection is necessary in order that the customers of each provider will be able to communicate with the customers of other providers—something of particular importance in the multi-national EU telecommunications market. Accordingly, enacting effective, practical interconnection requirements and rules is critical to establishing real competition in telecommunications markets.

1. Germany

a. The Law Leading to the TKG

Because of its status as a state-run monopoly, until recently, the German telecommunications system did not have to confront interconnection issues, other than connecting its network with international long-distance systems. With the advent of mobile systems, ISDN, and other newer technologies offered at least in part by competitors to Telekom, interconnection rules for those areas became necessary. However, local and long-distance service, which remained in the hands of the state system, had no interconnection requirements.

b. The TKG

In particular, the TKG is concerned that all networks interconnect. "Interconnection" is defined as "network access establishing the physical and logical connection of telecommunications networks to allow users connected to different telecommunications networks to communicate directly or indirectly." All operators of telecommunications networks who occupy a market dominant position in telecommunications markets are obligated to provide

301. See KELLOGG ET AL., supra note 9, § 1.5 (discussing how the problem of alternate telephone systems during the infancy of the industry in the United States coupled with no interconnection requirement led to the monopolization of the industry).

302. Sondhof & Theurer, supra note 4, at 186.

303. TKG § 3(24).

304. Id. § 3(9).
competitors the opportunity to connect with their network or with parts of the network. \(^{305}\) "Such access may be granted via connections provided for all users (general network access) or by special connections (special network access).\(^{306}\)

All agreements concerning this interconnection must be based on objective criteria, be understandable, and guarantee equal access to telecommunications nets. All conditions contained within such agreements must comply with the contents of the EC’s Open Network Provisions (ONP) Directive\(^{307}\) and may not be designed to restrict competition.\(^{308}\) Copies of interconnection agreements must be provided to the NRA which will publish them in its official gazette.\(^{309}\) Where parties cannot come to agreement on interconnection the NRA may set technical, operational, and economic terms for the agreement.\(^{310}\) The Federal Government shall set forth, with the consent of the Bundesrat, rules governing the granting of special network access.\(^{311}\)

A network operator may only limit interconnection to the extent allowed under EU directives.\(^{312}\) A provider of telecommunications services, which holds a market dominant position in the telecommunications services market, must provide competitors with connection to those services used internally and offered on the market and that are essential for the provider to offer telecommunications service. If a network operator gives itself better terms for connection to its own network than it does others,

\(^{305}\) Id. § 33(1). Earlier drafts contained broader language: All offerors of networks were to be obligated to provide interconnection to their networks. See January Draft, supra note 3, § 34(1).

\(^{306}\) TKG § 35(1). The TKG also imposes another "interconnection" requirement, with "Security Authorities." All commercial providers of telecommunications services must maintain data on all customers, including numbers, names and addresses. Such data must be maintained in such a manner that the NRA can retrieve data without the knowledge of the provider. The NRA will provide such information as necessary to courts, prosecutors, and other judicial authorities, to state and federal police for purposes of "averting danger", to customs officials for criminal proceedings, and to federal and state constitution protection authorities, the Federal Armed Forces Counter-Intelligence Office and the Federal Intelligence Service. Id. § 90.

\(^{307}\) Id. § 35(2).
\(^{308}\) Id. § 38(1).
\(^{309}\) Id. § 35(2).
\(^{310}\) Id. § 37.
\(^{311}\) Id. § 35(5). The rules shall include framework agreement provisions and instructions for obtaining approval from the NRA. Id. § 35(5).

Earlier drafts included broader language here, extending this rulemaking authority to all connections, not just "special" connections. These rules were not to require the consent of the Bundesrat. June Draft, supra note 3, at § 34(3). The Bundesrat had pressed for these rules to require its consent. Bundesrat Opinion, supra note 76, § 48.

\(^{312}\) ONP EG Nr. L 192, S.1 (art. 3, sentence 2).
abuse of a market dominant position is assumed unless the operator provides objectively justifiable reasons for the different treatment. 313 Where a user demands a special interconnection to a network, the NRA may investigate whether the user is sufficiently capable of making effective use of the connection. 314

Essentially, the basic rule regarding interconnection for market dominant enterprises is that internal treatment must equal external treatment. Otherwise, a market dominant provider that provides both licensed and nonlicensed services could offer its own nonlicensed services access to required services on better terms than it offers those required services to competing providers of the nonlicensed service. Exceptions to this requirement are only allowed where they are objectively justifiable. 315

Where an enterprise violates interconnection requirements the NRA must demand that the enterprise cease its objectionable conduct. The NRA may then enjoin or prohibit the conduct in question and may declare relevant contracts to be completely or in part invalid to the extent that the enterprise abuses a market dominant position. 316 This authority is roughly comparable to that provided in the Competition Law, 317 except that it allows enjoining of the conduct, rather than merely subjecting it to a condition (for example, selling off a subsidiary). 318

Where a market dominant provider is affiliated with other enterprises such that they form a single enterprise within the meaning of the Competition Law, the NRA may exercise its authority over the single enterprise and each of its parts. 319

If a market dominant provider does not comply with European Commission or Council ONP requirements, the NRA has authority to demand that the enterprise cease its objectionable conduct, and may then enjoin or prohibit the conduct, and may declare relevant contracts completely or in part to be invalid. 320 It is to be assumed that behavior complying with requirements published in the Official Journal satisfies basic

313. TKG § 33(2). This opportunity to provide objective justification was added in the June Draft. Abuse of a market dominant position was merely assumed in the earlier draft. See January Draft, supra note 3, § 32(2).

314. TKG § 35(3).

315. TKG Legislative Report, supra note 3, § 32(1).

316. TKG § 33(2).

317. Competition Law, supra note 72, § 22(5).

318. TKG Legislative Report, supra note 3, § 32(2).

319. TKG § 33(3). Single enterprises within the meaning of § 23, sentence 1, line 2, and sentences 2 & 3 of the Competition Law are covered here.

320. Id. § 34(1). The Bundesrat requested clarification in this area: The EU norms should be applicable to all market participants. Bundesrat Opinion, supra note 76, § 46.
interconnection requirements. Where the EC has not published in its Official Journal regulations concerning what constitutes compliance with interconnection requirements, the NRA may require telecommunications service providers to prove that they are in compliance with the law.

2. The United States

2. The Law Leading to the Telecommunications Act of 1996

From the infancy of the telephone industry, interconnection was a critical issue. Switching equipment was developed shortly after the telephone’s invention in 1876, when it immediately became clear that a switching exchange was necessary to connect phones to other phones in the same network. Moreover, small patchwork networks, even if each customer could talk with other customers within a network, were obviously much more effective if they allowed access to other networks.

With the expiration of the Bell Company’s major patents on the telephone in 1895, competition began to grow. By 1907, “independent” companies, those not affiliated with Bell, owned nearly the same number of telephone stations as Bell. However, because Bell owned the patents to superior long-distance service technology and refused to sell equipment or interconnection to anyone other than its affiliates, independents rapidly went bankrupt or were acquired; because there was no requirement that Bell provide interconnection to its superior long-distance network, a monopoly was born.

Federal court cases that differentiated between telegraph owners—who were required to provide interconnection to competitors—and telephone companies, and the silence of the Mann-Elkins Act of 1910, which defined telecommunications companies as common carriers, established that there was no interconnection requirement. The 1934 Act required interconnection between the Bell system and other carriers only where the FCC found “such necessary or desirable in the public interest.” However, given that the 1934 Act had as an underlying premise that the telephone system was a natural monopoly, interconnection was not found to be

321. TKG § 34(2).
322. Id. § 34(3).
323. KELLOGG ET AL., supra note 9, § 1.2.2.
324. Id. § 1.3.
325. Id.
326. See id. § 1.3.2 for detailed analysis.
328. KELLOGG ET AL., supra note 9, § 1.5. See AREEDA & TURNER, supra note 275, ¶ 621a (describing natural monopoly).
in the public interest until much later, when the FCC and the courts began
taking a greater interest in competition. A degree of interconnection
was required as of 1976 when the FCC required domestic common carriers
to allow competitors to resell private line transmission services, including
long-distance services.

Prior to the enactment of the 1996 Act, interconnection requirements
had been based on the FCC’s changed attitude regarding what constitute’s
the “public interest” per the 1934 Act and judicial decisions—most notably
the “essential facilities doctrine” and the AT&T and GTE consent
decrees. The MFJ required LECs to provide customers with access to
the IXCs of their choice and to provide equally efficient interconnections
between local customers and all IXCs. The MFJ called for functional rather
than technical equality in the interconnections. The ideal was that there
would be “equal access” to all IXCs; in other words, it would be as
easy—and involve dialing the same number of digits—to place a call
through AT&T as through any of its competitors. The intent was to
overcome the natural initial advantage AT&T possessed over its competitors
following divestiture since all the LECs were already connected to the
AT&T Long Lines system. Also, it was believed that by severing any
relationship between the LECs and AT&T, there would be no incentive for
the former to provide any more favorable connections to AT&T than to any
of its competitors.

Equal access was phased in over several years to allow LECs time to
upgrade their equipment to be able to accomplish this goal. Alternatively,
customers—usually large businesses—could contract with competitive
access providers (CAPS) that would connect the customer with the IXC of
their choice or could enter a “special access” arrangement with the LEC
whereby the customer is connected to the LEC’s central facility via
dedicated lines.

In order to enhance competitive opportunity, the FCC also imposed
collocation rules on Tier 1 LECs—those with annual revenues of $100
million or more from regulated telecommunications operations—that
required them to permit CAPs, IXCs, and others offering interstate service

329. See KELLOGG ET AL., supra note 9, § 3.4 (discussing development of interconnection
requirement).
330. Id. § 12.6; Marks, supra note 276, at 118.
331. KENNEDY, supra note 57, at 31.
332. KELLOGG ET AL., supra note 9, § 5.2.
333. KENNEDY, supra note 57, at 54.
334. Id. at 34.
335. Id. at 36.
336. Id. at 37.
to lease space in their facilities. This saved the interstate service providers from the necessity of running lines from each customer to their own premises.\footnote{Id.} The regulations required that collocation be either physical, where the interstate provider's equipment is located on the LEC's facilities, or virtual, where the provider's equipment is physically located adjacent to the LEC facility. Virtual collocation connections must be both technically and economically comparable to physical collocation connections.\footnote{Id. at 38.}

Because the BOCs and the few independents provided basic phone service on an exclusive basis and therefore controlled the lines, for other companies to be able to provide so-called "enhanced" services, like voicemail, information, on-line and other services, required access to the local phone lines. The Commission therefore set up the Open Network Architecture (ONA) framework whereby such enhanced service providers (ESP) could receive access to the basic telephone service necessary to provide their enhanced services, such as switching, signaling, and billing.\footnote{Id. at 65.} Accordingly, subject to FCC and state regulatory oversight, BOCs were to provide basic services to ESPs on an equal basis and for the same tariffs as they provided such services to their own enhanced services. Any basic service they provided to their own enhanced services had to be made available to other ESPs, and they were required to respond promptly to requests from ESPs for new or different basic services to match their needs.\footnote{Kennedy, supra note 57, at 66.} Moreover, accounting rules requiring separation of regulated from nonregulated services apply to prevent cross-subsidization.\footnote{Kennedy, supra note 57, at 68.}

\subsection*{b. The Telecommunications Act of 1996}

The 1996 Act inserts a new section 251 into the 1934 Act that imposes an interconnection requirement on all telecommunications carriers. Telecommunications carriers are defined broadly, as any provider of telecommunication services.\footnote{47 U.S.C.A. § 3(a)(49) (West Supp. 1996).} All such carriers are required to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers" and to refrain from installing any network
features and functions that fail to comply with the requirements of new sections 255 and 256.\textsuperscript{343}

The 1996 Act imposes special duties on LECs, both incumbents\textsuperscript{344} and new entrants: (1) LECs may not prohibit resale of their services, (2) they must provide telephone number portability, (3) they must provide dialing parity, (4) they must allow access to rights-of-way and other pathway points consistent with section 224 of the 1934 Act, and (5) they must set up reciprocal compensation arrangements with other carriers.\textsuperscript{345}

Incumbent LECs incur further duties that require them: to enter into agreements with other carriers in good faith, to provide interconnection to other carriers on the same terms and conditions they provide them internally,\textsuperscript{346} to offer access on an unbundled basis, to sell to telecommunications carriers at wholesale rates the telecommunications services provided at retail to subscribers, to provide reasonable public notice of network changes, and to provide physical collocation, or virtual collocation if the former is not practical.\textsuperscript{347} Exemptions are available from some duties for rural telephone companies and other small LECs.\textsuperscript{348}

Incumbent LECs are also required to make public switched-network infrastructure, technology, information, and telecommunications facilities and functions available to qualifying carriers such as are necessary for providing telecommunications services or access to information services.\textsuperscript{349} However, regulations implementing this requirement may not force LECs to take action that is economically unreasonable or that is contrary to the public interest.\textsuperscript{350} Moreover, the section permits but does not require joint ownership of public switched network infrastructure and services by or among LECs and qualifying telecommunications carriers.\textsuperscript{351}

Agreements for interconnection must be negotiated in good faith and must be submitted to the relevant state commission for approval.\textsuperscript{352} The state commission shall act as arbitrator for the resolution of differences in negotiations and for compulsory arbitration.\textsuperscript{353} The FCC may step in

\textsuperscript{343} Id. § 251(a).
\textsuperscript{344} Defined in 47 U.S.C.A. § 251(h).
\textsuperscript{345} Id. § 251(b).
\textsuperscript{346} Id. § 251(c)(2)(D).
\textsuperscript{347} Id. § 251(c).
\textsuperscript{348} Id. § 251(f).
\textsuperscript{349} Id. § 259(a).
\textsuperscript{350} Id. § 259(b)(1).
\textsuperscript{351} Id. § 259(b)(2).
\textsuperscript{352} Id. § 252(a), (e).
\textsuperscript{353} Id. § 252(a).
where the state commission fails to fulfill its obligations in this regard.\textsuperscript{354}

3. Comparison and Conclusions

Essentially, both the German and U.S. systems aim for the same goals: that all telecommunications equipment and services be interconnected and that incumbent monopolies provide competitors with access to their services on the same terms as they do to themselves. Not surprisingly, both the German and U.S. systems have very similar rules to these ends.

In the \textit{TKG}, while all providers must set up their systems to be able to interconnect with all others, the requirement that competitors be able to use an existing network applies to market dominant providers, in this case Telekom. Similarly, the pre-1996 Act system in the United States provided that all LECs were obliged to offer access on equal terms to all competitors who supplied telecommunications service other than basic local service, for which the LECs held a monopoly. Now, the 1996 Act provides the same requirement as the \textit{TKG}: that all telecommunications carriers interconnect with all others.

In the \textit{TKG}, "market dominant provider" basically refers to Telekom given the present state of the industry, but the concept is rather open, at least theoretically leaving open the possibility that another provider could take Telekom's place. By contrast, the 1996 Act's special rules concerning competition in the local markets refers to the "incumbent" LECs. Accordingly, the 1996 Act seems less concerned with the possibility of new entrants becoming dominant in the local exchange market.

E. Rights-of-Way

Utilities in general, like gas, water, and electricity providers, must supply their product to consumers. This involves a complex system of networks carrying each item across long distances to its final destination. Supply lines often must cross federal, state, municipal and private land. The rights to use of paths must be obtained in a fair manner that offers equal access for all market participants.

Establishing and maintaining a network's right of way system is an enormous undertaking. In the last 15 years in the United States, IXCs have spent many billions of dollars building, maintaining, and upgrading their networks, including building and upgrading networks, obtaining local zoning approvals and waivers, and obtaining access to rights-of-way.\textsuperscript{355}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} § 252(e)(5).
\item Dingwall, \textit{supra} note 226, at 129.
\end{enumerate}
\end{footnotesize}
1. Germany

a. The Law Leading to the TKG

*Telekom*'s access to public traffic paths for the purposes of laying its telecommunications lines is authorized in section 1 of the Telegraph Route Law. It may not be charged for its access and does not require further authorization from municipalities for its access. Private telecommunications providers—those setting up alternative infrastructures—must enter into individual contracts with municipalities and other public entities concerning access and charges. Accordingly, *Telekom* enjoys a substantial advantage at this time over other telecommunications enterprises, though, as discussed below, this will change once other enterprises obtain the right to establish networks.

Current law governing *Telekom* access to private property for purposes of laying and maintaining its network is governed by private law and consists of contractual relationships between the various parties. Here, both *Telekom* and fully private enterprises are on the same footing.

Similarly, both private users and *Telekom* must enter into individual contracts with the federal government, the states, and municipalities concerning concurrent use of pre-existing paths, such as tunnels and pipes, for telecommunications lines that are owned by the public entity.

b. The TKG

The TKG bestows on the federal government authorization to use public trafficways for telecommunications lines that are for public purposes. This authority is necessary to ensure the provision of full coverage of telecommunications services in accordance with the requirements of article 87(f) of the German Constitution. The government may not be charged for this use so long as it does not constitute a lasting encroachment on the normal use of the infrastructure. In order that all enterprises engaged

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358. Id. at 12.
359. TKG Legislative Report, supra note 3, at 33.
360. Telekommunikationsgesetz (TKG) § 50(1), v. 1.8.1996 (BGBl. I S.1120). The issue of charges for use of rights-of-way remained extremely contentious. See Anhörung zum neuen TK-Gesetz und Diskussion im Bundesrat, 3 (reporting continued debate over this question in Bundestag Committee hearings). Here, the Bundesrat recommended a substantial change: It would have eliminated the government’s right to cost-free use of traffic infrastructure. Rather, the entity who carries the burden of maintaining the infrastructure
in providing telecommunications networks may compete on an equal footing, the federal government transfers this right to all telecommunications license holders.\textsuperscript{361} Telecommunications lines, however, must be laid in such a manner that they comply with existing safety laws, public policy, and technical requirements. The laying of new lines or the alteration of pre-existing lines requires agreement of the authority responsible for constructing and maintaining public ways [\textit{Träger der Wegebauanst}].\textsuperscript{362} Approval of an application to lay or alter lines may only be withheld on technical grounds.\textsuperscript{363}

Where lines are laid above ground, the interests of the license holder, the infrastructure maintainer, and the city planning authorities must all be balanced.\textsuperscript{364} Some conflicts may arise between municipal authorities seeking to limit construction in their areas and those establishing telecommunications networks because the balancing of interests requirement does not apply to the laying of underground cables.\textsuperscript{365} Those seeking to lay

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\item would have a right to claim compensation for use. The Bundesrat argued that the interests of communities were not properly considered in the provisions of the TKG. Cost-free access, based on the Bundespost's prior cost-free access, is not appropriate because the DBP's access was based upon its special status as a state-run monopoly. Accordingly, after the full privatization of the telecommunications system after January 1, 1998, the status of telecommunications carriers should be viewed as comparable to that of energy providers who must pay for their use of traffic infrastructure in providing service. Bundesrat Opinion, \textit{supra} note 76, § 61. However, an executive from Telekom argued in response that the comparison with energy providers is inapt; telecommunications providers bear various universal service and interconnection burdens which benefit the public that energy providers do not, and cost-free use of the infrastructure is appropriate for provision of such service. Hans-Willi Hefekäuser, \textit{Telekom im Fairen Wettbewerb? [Telekom in Fair Competition?]}, \textit{Speech at the EUROFORUM Conference}, \textit{supra} note 51, at 7.

The Bundesrat also sought to strike the word "lasting" [\textit{dauernd}] from the Draft in order to emphasize that the use of traffic infrastructure is not to be encroached upon by telecommunications use per the TKG. Bundesrat Opinion, \textit{supra} note 76, § 60.

\begin{itemize}
\item 361. TKG § 50(2). See Schütz & Esser-Wellië, \textit{supra} note 213 at 587.
\item 362. TKG § 50(3). In its comments, the Bundesrat argues that this approval requirement is too vague given the multiple legitimate interests that would be implicated in such questions. Accordingly, the Bundesrat recommended that approval authority be placed explicitly in the hands of the relevant state authority because it has better experience and understanding of local needs than would a federal regulator. Bundesrat Opinion, \textit{supra} note 76, § 62. Moreover, the state authority would have a right to charge fees for its decision-making in this area. \textit{Id.} § 63.
\item 363. TKG § 50(3). The Bundesrat sought that this section provide that approval be granted where the entity bearing maintenance duties agrees; where legitimate public interests have been properly considered; and where the private rights of third parties do not stand in the way. Bundesrat Opinion, \textit{supra} note 76, § 62.
\item 364. TKG § 50(3).
\item 365. TKG Legislative Report, \textit{supra} note 3, § 49. Hiltl discusses a potential conflict between license holders and the federal government on one side, and local communities on the other, where the latter want to maintain significant limits on construction of and upgrades
\end{itemize}
telecommunications lines may be required to satisfy technical requirements, but such requirements must be applied in a nondiscriminatory manner.\textsuperscript{366}

In cases where a licenseholder is the entity responsible for maintaining the public way, or if one of the two holds an ownership stake of 25 percent or more of the other,\textsuperscript{367} then, for purposes of providing approval, the NRA stands in for the latter entity where another licenseholder seeks to make use of that pathway.\textsuperscript{368} In cases where an entity has a right under section 50 to utilize traffic infrastructure, but where added construction or alteration of existing networks are either impossible or prohibitively expensive, then the entity has a right to demand that the existing network tolerate concurrent use of its pathway. This is only possible where the concurrent use is reasonable and does not require the pathway owner to perform additional construction on the path. Reasonable charges for concurrent use may be demanded.\textsuperscript{369} The intent of this section is that decisions regarding establishing independent lines versus making use of pre-existing lines should be market driven; where additional construction is wastefully expensive, parties should reach agreements for concurrent use.\textsuperscript{370}

Those using traffic infrastructure must avoid interference with infrastructure maintenance and must minimize their encroachment on the primary purpose of the infrastructure. Where use increases maintenance costs, then the user must pay those additional costs. Moreover, a user performing construction work must return the infrastructure to proper working order as quickly as possible, unless the entity responsible for maintaining the infrastructure chooses to repair the path itself. The user must pay for any additional costs imposed on the path maintainer and must pay for any damages caused to an existing telecommunications line.\textsuperscript{371}

A telecommunications line must be altered or removed when it

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\item to networks as a means of avoiding having their streets torn up too regularly. Some communities have laws limiting excavation to every three or five years. Hiltl & Großmann, supra note 7, at 175.
\item TKG § 50(3).
\item As defined in § 23, sentence 2 or 3 of the Competition Law. TKG Legislative Report, supra note 3, § 49(4).
\item TKG § 50(4).
\item Id. § 51.
\item TKG Legislative Report, supra note 3, § 50. The Bundesrat sought that concurrent use be explicitly preferred over the laying of new lines. The goal was to limit burdens on existing infrastructure, i.e. to minimize the amount of excavation necessary. Bundesrat Opinion, supra note 76, § 65.
\item TKG § 52(3). Paragraphs 51–55 merely reflect pre-existing law. Paragraphs 51 through 55 correspond to §§ 2–6 TelWegG, respectively. TKG Legislative Report, supra note 3, §§ 51–55.
\end{itemize}
\end{footnotesize}
substantially encroaches upon the use of the traffic infrastructure, or when the path’s purposes are impaired. When traffic infrastructure is removed the authorization to use the path for telecommunications purposes expires.\textsuperscript{372}

One who constructs a telecommunications line must avoid creating difficulties for those who hold pre-existing special installations, those “serving to maintain public ways, canalisation, water and gas lines, tracks, electrical installations, and the like.”\textsuperscript{373} The telecommunications provider must pay any additional costs its line incurs upon pre-existing installation operators’ pathways. The license holder may only demand that a special installation operator make changes to existing lines where the telecommunications line otherwise could not be established and where the purposes of the original installation may still be fulfilled. However, where establishing the telecommunication lines would subject the special installation operator to unreasonably high costs, the line may not be established.\textsuperscript{374} Conversely, where special installations are established after a telecommunications line is put in, they must be established in such a way so as not to disturb the telecommunications line.\textsuperscript{375} However, where a telecommunications line precedes establishment of a special installation that is in the public interest, particularly for economic or traffic purposes, the telecommunications user must pay the costs for any necessary alterations to or removal of its own lines.\textsuperscript{376} The telecommunications line operator must also bear its own costs where the construction of a special installation requires protective upgrades to the telecommunications line.\textsuperscript{377} Where an existing telecommunication lines serve areas other than the local region, it may only be removed (based on special installation needs) when it can be moved to another location without incurring disproportionately high costs.\textsuperscript{378}

Where an entity holding the burden of maintaining traffic infrastructure transfers its rights to a third party that has no such burden, the transferring entity must reimburse a telecommunications user for the added costs involved, including changes to and added protection to the line.\textsuperscript{379} Where an existing telecommunications line is disturbed by the later addition of a special installation that is not designated as being in the public interest, the telecommunications provider is entitled to reimbursement for the costs

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\item \textsuperscript{372} TKG § 53(2).
\item \textsuperscript{373} Id. § 55(1).
\item \textsuperscript{374} Id. § 55(1).
\item \textsuperscript{375} Id. § 56(1).
\item \textsuperscript{376} Id. § 56(2).
\item \textsuperscript{377} Id. § 56(3).
\item \textsuperscript{378} Id. § 56(2).
\item \textsuperscript{379} Id. § 56(4).
\end{itemize}
An owner of property that is not a public trafficway may not block the use of, construction of, or improvements to telecommunications lines where the property is already used for telecommunications purposes or where the added use does not or only immaterially impedes the use of the property on a short-term basis. However, the landowner may demand pecuniary compensation for costs involved in the use of the property and loss of income derived therefrom, where such costs and losses exceed that which would normally be associated with the operation of the telecommunications line. Moreover, for ongoing use of the property for telecommunications purposes, where the property was not previously used for telecommunications purposes, non-recurring pecuniary compensation is available. This paragraph is intended to assist new private telecommunications enterprises in competing with public utilities who already possess rights-of-way upon which they could lay their own cable. It is believed that because public utilities had previously obtained cost-free rights to lay cable across private land, new entrants would be unfairly disadvantaged if they were required to pay market rates for the same privilege. Such an imbalance would inhibit competition. Claims arising concerning rights-of-way have a limitations period of two years, beginning at the end of the year in which the claim arises.

2. The United States

a. The Law Leading to the Telecommunications Act of 1996

While the federal government holds considerable authority under the 1934 Act, the states may also regulate and control telecommunications entities. Moreover, a state may delegate this power to cities and other political subdivisions and properly constituted boards or commissions.

The 1934 Act, as modified by the Pole Attachment Act, grants to the FCC power to regulate pole attachments by utilities. However, in practice, issues concerning rights are predominantly played out at the state and local

380. Id. § 56(5).
381. Id. § 57(1). The Bundesrat sought to change this section to strengthen the rights of private land owners. Under the Bundesrat proposal, a private land owner could only be required to provide access where his or her land was already being used for telecommunications-related purposes. Bundesrat Opinion, supra note 76, § 68. The Bundesrat also questioned whether these provisions concerning use of private land are constitutional. Id. § 69.
382. TKG § 57(2).
383. TKG Legislative Report, supra note 3, § 56.
384. TKG § 58.
level. The federal government may grant franchises, and a state may not interfere with such a franchise, though states and municipalities have the right to receive compensation for use.

State regulation of rights-of-way varies among the fifty states. By way of example, again, California law is examined. In California, the holder of a state franchise to operate a telephone company is entitled to construct its lines along and upon public roads and highways, along or across waters or land within the state, and to erect poles and other devices for supporting its lines as necessary, so long as such does not interfere with the use of the streets, waters, or land. The right to use public streets and other places entails a commensurate obligation to provide adequate service in the area served. This includes an obligation to extend service to newly developed areas in response to demand. Moreover, like all utilities, telephone service providers must provide services and maintain facilities so as to promote safety and the convenience of patrons, employees, and the public.

The holder of a state franchise to use streets and other public places for telephone services need not also obtain a franchise from local authorities. However, the holder may not exercise its franchise rights in such a way as to unreasonably encroach on the use of the streets or other public places. Moreover, a telephone company is subject to an implied obligation to bear the costs of relocating its facilities based upon a proper governmental use of the streets.

A telephone company right-of-way over private land is usually characterized as an easement appurtenant to the land, absent another agreement by the parties. Moreover, the company has the right to condemn any property necessary for construction and maintenance of telephone lines. With these rights comes the commensurate duties to repair and maintain the lines.

b. The Telecommunications Act of 1996

The 1996 Act's treatment of rights-of-way is sparse. It amends section 224 of the 1934 Act which regulates "pole attachments," defined as "any attachment by a cable television system or provider of telecommunications

387. 59 CAL. JUR. 3D Telephones and Telegraphs § 3 (1980).
388. 59 CAL. JUR. 3D Telephones and Telegraphs § 5.
389. Id. § 7.
390. Id. § 13.
391. Id. § 13.
392. Id. § 19
service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. Parties may negotiate rates, terms, and conditions for attachments to poles, ducts, conduits, and rights-of-way. For cases where the parties cannot reach agreement to ensure that utilities charge just, reasonable, and nondiscriminatory rates for pole attachments, the FCC is to prescribe regulations to govern charges for pole attachments necessary for the provision of telecommunications services.

3. Comparison and Conclusions

A fundamental issue underlying rights-of-way questions is who shall pay for the installation, maintenance, and related costs associated with laying telecommunications lines on public rights-of-way. Should all community members bear such costs, or only those actually using a particular line or service? Given universal service, interconnection, emergency services communications access, and other generalized requirements, it is not always possible to clearly distinguish between those who do and do not make use of available telecommunications services and networks.

To ensure a truly competitive market requires attention to the differences between those entities possessing pre-existing lines and those that would lay new lines. In Germany, Telekom has had the benefit of free access to public rights-of-way for its lines, as have the rail system and the energy providers who are emerging as primary competitors to Telekom. By contrast, new entrants do not have the benefit of pre-existing lines. Accordingly, the TKG provides to new entrants cost-free access to public traffic ways to the extent that the lines do not encroach upon normal use of the infrastructure. Moreover, both the TKG and the 1996 Act seek to avoid wasteful duplication by establishing mechanisms by which regulators may facilitate agreements between parties for concurrent use of existing pathways.

With regard to access to private land, the issue becomes more complex in both the United States and Germany as the telecommunications market moves from a publicly operated or sanctioned utility model to a private model. In both countries, the telephone companies have had access to private land, with or without compensation in different circumstances, for their operations. However, arguments for special treatment vis-à-vis private

393. 47 U.S.C. 224(a)(4) (as amended by section 703 of 1996 Act). The definition of "utility" is amended to include LECs. Id.
land have lost force: Why should a private, profit-driven telecommunications company have any more claim to the use of Mrs. Smith's or Herr Schmidt's land than, say, the neighboring supermarket that desires to expand its parking lot to attract more customers? The community's interest in benefits such as availability of universal service, interconnection of telecommunications networks, and emergency services communications access provide a basis for some degree of special treatment. And again, there is the need to provide new market entrants with similar opportunities as those possessed by pre-existing telecommunications entities.

The TKG approach seeks to balance between private property ownership interests and telecommunications enterprise access to land. The TKG provides telecommunications companies guaranteed access to private land only to the extent that use would have no substantial impact on the use of the private land, or where the land is already used for telecommunications purposes. However, this access to private land may meet constitutional challenges based on private property ownership rights and "substantial impact" has yet to be defined in practice.

At least in theory, there should be less of a need for laying of new lines for competition in the United States than in Germany because the prime competitors to incumbent LECs are expected to be the cable television companies: multiple long-distance networks have been in place for years and the vast majority of homes in the United States are already connected to cable TV lines. More modern cable connections laid in anticipation of eventual competition in local telephony should already be relatively ready to be used to provide alternate service by cable companies. However, given various technical difficulties, and the age of some existing cable lines, access to alternative local service providers will not come quickly or cheaply in all regions.

IV. CONCLUSION

The opening of local service to competition in the United States represents a major upheaval in the market—particularly with the entry of cable television companies into telecommunications service provision and vice-versa. However, the truly radical change is to take place in Germany, where virtually the entire system will be transformed at the stroke of midnight on December 31, 1997. With an estimated $80 billion at stake in

395. A similar rule appears to exist in older American law. See 74 AM. JUR. 2D Telephones and Telegraphs § 15 n.12 (citing Ft. Worth & Rio Grande Ry. Co. v. S.W. Tel. & Tel. Co., 71 S.W. 270 (Tex. 1903)).
396. See supra note 381 and accompanying text.
397. See Dingwall, supra note 276, at 111.
the German telecommunications market by the year 2000, and given the
dramatic liberalization taking place in that market, companies from around
the world have been positioning themselves to most effectively compete in
Germany in 1998 and on into the twenty-first century. Of course, the full
practical effects of this radical change will not be felt from one day to the
next. It will take considerable time for new networks to be established and,
as importantly, for consumers to become aware of and try these networks
and to enjoy the benefits of a competitive environment.

German regulators must also come to terms with a completely new
role: Overseeing a competitive market consisting of a broad array of
telecommunications service providers. This is in sharp contrast to its current
role of overseeing Telekom and a few other providers, and to its prior role
of both regulating and operating the entire system.

Both the TKG and the 1996 Act are responses to international and
domestic political and market pressures toward greater liberalization of
telecommunications markets. Accordingly, for all the differences between
the existing systems in each country, it is not surprising that the intended
results of each law are very similar. However, because of the substantial
differences between the existing systems, "full competition" in each market
will undoubtedly take different forms. The challenge facing both regulators
and market participants is to anticipate and to adapt to those different forms.