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Question 8/1: Establishment of an independent regulatory body

STUDY GROUP 1

SOURCE: GERMANY

TITLE: GUIDELINES FOR REGULATORY POLICY

- (1) As competition-based economic policy applied in a sector-specific manner, regulatory policy serves the consumer both directly and indirectly. Its most important task is to facilitate competition in sectors previously dominated by government monopolies and to ensure the establishment and sustained functioning of competition in the interest of telecommunications and postal service users. This goal extends beyond legislative elimination of (government) monopolies; it also entails shaping statutory framework conditions in the telecommunications and postal sectors. Within this context, it is the responsibility of the regulatory authority to foster and sustain a system of competition that is based on equal opportunity and is able to function in the long term.
- (2) In the course of the regulatory activities and in keeping with the provisions of the law, certain auxiliary conditions such as the offering of universal services are to be observed; these have generally been stipulated in the interest of consumers and other users. The regulatory parameters associated with the goal of universal services are to be competition-neutral and not obstruct market access for potential competitors.
- (3) Furthermore, the regulatory authority attends to various sector-specific sovereign responsibilities (e.g. in the field of awarding numbers and frequencies) which cannot be privatized at the present level of technological development. In connection with the awarding procedure, the regulatory authority must observe the principle of competition-neutrality. Awarding procedures are to be transparent and non-discriminatory.
- (4) In carrying out its work and as part of its task of regulating compensation and guaranteeing interconnection and open access to networks, the regulatory authority must consider the specific supply behavior of the former monopoly and of every company enjoying a dominant market position. In particular, it must also concern itself with the cost profile of former monopolies so that it can determine whether current costs meet the standard of "costs of the most efficient service provision." The determined current costs are in many cases not identical with the costs of the most efficient service provision. Owing to the difficulties in defining and identifying costs or determining a cost-efficient provision process, experience shows that, for

orientation purposes, resort must often be made to company-external information such as data from comparable markets (Section 3 of the German Telecommunications Rates Regulation Ordinance).

- (5) The regulatory authority's decisions on costs or prices of a market-dominating supplier that are taken for the purpose of guaranteeing competition are both required within the context of regulatory policy and legitimate in terms of constitutional law. They are not to be misunderstood as intervention into the internal structures of a given company; rather, they are the conditions for fostering efficient competition.
 - (6) Regulatory policy is not industrial policy for or against any given suppliers or groups of suppliers; rather, it is designed to be neutral in this regard and oriented only to the goal of offering equal opportunity for market access by suppliers and to the long-term interests of consumers.
 - (7) The regulatory authority is independent in its activities, above all vis-à-vis regulated market-dominating companies, but also vis-à-vis the influence of other companies and institutions that are primarily oriented to special interests above and beyond regulatory objectives. This independent position results from the dictates of international WTO and European law; it also corresponds to the conception of Article 87 ff of the German constitution. Among other things, independence means that the state must observe strict separation of ownership functions with regard to the regulated company and regulator functions in the sector to be opened up to competition. It is to be avoided that conflicts of interest between these two functions erupt to the extent that the regulatory authority is called on to act in favor of specific owner interests such as those of the state or of another group. The dictates of separation and independence are aimed at minimizing what experience shows to be the constant danger of a "capture" of regulatory agencies and regulatory policy by powerful government or private entities. This principle must be implemented in particular by the bylaws of the regulatory authority, by the quality of personnel in its management tiers and operative work units, by high-quality consulting, and by the action of the responsible ministry to shield the regulatory authority from political pressure exerted by third parties.
 - (8) Additional central principles of regulatory policy are transparency and appropriateness (subsidiarity). Appropriateness means that intervention remains restricted to what is absolutely necessary to achieve regulatory objectives (principle of minimalistic regulation). Individual regulatory measures should be preceded by an analysis of their effects, which systematically considers and assesses the various alternatives.
 - (9) In the interest of the public, the regulatory authority should report at regular intervals on progress made in creating a functioning system of competition. The more successful its policy is, the more dispensable will become its regulatory task, defined in a narrow sense. Experience shows that a lengthy period of time is needed for the transition from a monopoly market to a market characterized by competition in the telecommunications and postal sectors.
 - (10) Experience from regulatory policy must be evaluated on an ongoing basis. Government and the legislative bodies must be provided with a constant flow of information so that necessary changes to the sector-specific regulatory framework may be introduced if necessary.
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