

APPENDIX 1 TESTIMONY A. LIPMAN

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APPENDIX 1 TESTIMONY A. LIPMAN

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**PROPOSITIONS REGARDING THE COMPETITIVE AND REGULATORY
SITUATION IN THE GERMAN TELECOMMUNICATIONS MARKET**
(ENGLISH TRANSLATION)

**CONDITIONS FOR FAIR COMPETITION NO LONGER EXIST –
REGULATION OF THE GERMAN TELECOMMUNICATIONS MARKET
THREATENS TO FAIL**

1. **Deutsche Telekom (“DTAG”) increasingly determines the rules of the game.**

The Regulator (“RegTP”) is threatening to lose control.

A clear policy favoring competition is required.

DTAG’s strategy ranges from massively influencing political and regulatory decisions to systematically delaying and obstructing the development of competition.

(The following merely outlines some of the more important instances out of an extensive repertoire of competition-obstructing practices by DTAG. Due to their complexity only their highlights are presented in the following.)

DTAG Consistently Abuses Its Market Power

Various services which are of substantial significance to competition in telecommunications are being offered solely to DTAG subsidiaries or its retail customers, but not to its competitors. One example of a technical service not being offered to competitors is automatic quality assurance measures in cases of network overload or switch failure (overflow and emergency rerouting services). Certain services and pricing terms, too, local flat rate calling for example, are being exclusively offered to DTAG’s IP subsidiary T-Online, consequently harming the development of the Internet market. DTAG responds to innovative service offerings by competitors, as for example xDSL, with massive predatory pricing campaigns.

APPENDIX 2 TESTIMONY A. LIPMAN

DTAG Prevents The Implementation Of RegTP's Regulatory Decisions

Even where DTAG has been forced to compete fairly, DTAG is openly obstructing the implementation of regulatory decisions, or is circumventing such decisions in practice through new obstructive behaviors. In response to DTAG's complete refusal to offer billing and collection services to competitors, the regulator more than one year later ordered DTAG to submit a new draft contract addressing such service. Instead of a full contract and much later than required, DTAG merely submitted a set of general terms and conditions which would prevent the offering of dial-around ("Call-by-Call") services. Not only does this offer substantially raise prices, it also requires the submission by the competitive carrier for each end customer wishing to take advantage of dial-around services while having these charges appear on his regular phone bill, of a prior written authorization for withdrawals from his account. It is in the *ad-hoc* nature of the dial-around offering that the carrier does not know who his customers will be.

DTAG Prevents The Implementation Of Court Orders

Even court orders, including threatened fines, are being ignored by DTAG. A court order threatening to impose fines of approximately \$ 22,000 upon DTAG for the continuing refusal to offer a service vital to competition (billing for competitive value-added services) showed no effect. In March of this year, DTAG for the first time was fined for contempt. In several cases it took temporary injunctions to force DTAG to compete fairly.

DTAG Prevents Customer Acquisition By Dial-around Service Providers

The principal inroad into the residential market has been through dial-around, rather than through pre-subscribed carrier choice. Central to the viability of dial-around services is the ability to offer simple usage and billing options without prior written agreements. As some 60% of the population to date has never utilized a competitive provider to make even a single phone call, DTAG is doing all it can to make the use and billing of dial-around arrangements as difficult, or at least as expensive, as possible. The complete refusal to offer billing services to dial-around providers would mean for the customers to receive and pay a multitude of bills, at least some of which will be for pennies only. Even as competitive carriers will be obliged to establish and operate their own customer care and collection services, DTAG is now trying to raise the price of its remaining billing services (billing and initial payment acceptance) by up to 600%.

APPENDIX 2 TESTIMONY A. LIPMAN

DTAG Prevents Customer Acquisition By Preselection Of Long-distance Providers

Since more and more customers are opting for preselection, instead of dial-around, DTAG is increasingly delaying the switching over of such customers to competitors, wrongly or never informing customers and carriers about impending transfers, with over 10% of transfers being switched to the wrong carrier or not switched at all. Customers interested in switching over are subjected to unfair win-back marketing strategies including rebates. New tariffed offerings by DTAG (for example the new XXL Flat Rate) include terms and conditions, which preclude subscribers from pre-selecting a competitor, thus leveraging DTAG's 97% market share in local exchange to additionally impair the newly emerged competition in long-distance telephony. Through these so-called "bundled offerings", DTAG is able to use its overwhelming market dominance to once again monopolize markets which were believed to be safely on the road to competition.

DTAG Prevents Customer Acquisition by Change Of Local Exchange Network Operator

The greatest difficulties are those encountered in changing the local exchange network operators permanently. Here, DTAG has, and continues to, massively delay or prevent the necessary physical switch-over of the customer loop (claiming that no collocation space is available), a practice which at various times has been found to be an abuse of dominant market power by the RegTP. Since those regulatory rulings however, no measurable improvement has occurred; rather the situation is worsening. Now as before, competitive carriers are paying more for the unbundled customer loop than end customers of DTAG are paying for complete local exchange services. Before this background, and at prices which cannot be matched due to the high prices competitive carriers are being charged, DTAG is currently offering bundled Internet and broadband connections far below its own cost (offering such service for a mere approximately \$4 extra, despite initial deployment costs of about \$300 per customer).

DTAG Intentionally Constrains the Supply Of Resources Vital To Competition

The spectrum of such actions reaches from the firing of DTAG technical personnel and their replacement by qualitatively inferior subcontractors to the deficient or delayed provisioning of required network elements and collocation spaces. In doing so, DTAG is pointing fingers at the alleged difficulties of component suppliers, which these suppliers are usually unable to confirm. Increasingly, DTAG even argues that its own real estate subsidiary is unwilling to provide the necessary collocation spaces.

APPENDIX 2 TESTIMONY A. LIPMAN

DTAG is Firing Personnel Urgently Required for Competitive Carrier Provisioning

Increasingly, DTAG claims that personnel bottlenecks are to blame for massive delays in processing and provisioning orders. Nevertheless, personnel is being reduced in the very areas in which demand will, due to the network build-out activities of competitive carriers demanded by DTAG itself, continue to be high and increase further. This situation is leading to extreme overwork of individual DTAG employees who are, despite their own enthusiastic efforts, not able to make up for these personnel shortages.

DTAG Is Preventing The Economical Utilization Of Existing Resources

In spite of existing capacity constraints which are only going to increase on a going forward basis, for example with regard to available collocation spaces, DTAG is preventing the efficient use of such network capacities on a level which in other countries is routine and even according to DTAG technically unproblematic. With reference to the alleged lack of any legally binding obligation to do so, DTAG is refusing to divide existing collocation spaces among competitors, or even to simply permit the installation of air conditioning (of course, at the expense of the competitive carriers). To date, DTAG has not even bothered to respond to a request for a statement on that matter from RegTP dating back to January; nor has DTAG replied to concrete proposals for the better utilization of existing collocation capacities made by competitive carriers in March of this year.

DTAG Is Preventing Reasonable Network Planning By Competitors

Even where improved network planning on the part of the competitive carriers would help to prevent over-subscriptions and therefore at least some instances of capacity constraints, DTAG has refused to cooperate in such undertakings, by stating that it is under no legal obligation to provide existing network planning information to competitors, much less prior to their placing orders with DTAG for interconnection and collocation space.

DTAG Is Preventing Improvements In Internal Processes

Even the processing of applications for carrier preselection or switching over of individual customers is being consistently obstructed, and processing times are being massively exceeded in constantly changing locations (up to three times the agreed-

APPENDIX 2 TESTIMONY A. LIPMAN

upon time frames). Only 10% of applications are being processed in a timely manner. Many applications still have to be submitted by fax rather than via electronic interfaces. Many potentially cost-saving processing methods adopted, for instance in the British or U. S. context, are not being implemented to the detriment of competition in telecommunications.

DTAG Is Preventing The Implementation Of Higher Quality-Of-Service Standards By Competitors

Delivery of the highest quality service is a precondition for successful competition. The competitive carriers are dependent in many areas upon DTAG's quality-of-service standards. Requests for higher quality-of-service standards have not only been rejected, for example with respect to the availability of circuits, but even been met with attempts to reduce existing quality-of-service commitments. DTAG is even attempting to avoid making available to competitors its overflow and emergency re-routing services. Only the intervention of RegTP forced DTAG into, for example, offering restoration-of-circuit services on par with the terms available to DTAG's end customers.

DTAG Is Preventing Effective Network Build-Out By Competitors

DTAG had always claimed that the competitive carriers are attempting to run their businesses at the expense of DTAG and its legacy infrastructure, cherry-picking customers with minimal investment in technology and without investing in their own networks. Instead, the current structure of interconnection pricing has predictably lead to massive investment in the competitors' networks, which are carrying increasing loads. Even today, DTAG is neither able to timely provide competitors with the requested interconnection to the long-distance network, nor to comply with requests for interconnection at the local loop within the contractually specified time frames. The new structural cost model planned to be implemented in 2001 would, if one were to apply the assumptions being made by DTAG, not only worsen these existing problems, but will also result in substantially increased but useless investments in additional switching and transmission infrastructure.

DTAG Is Preventing Transparency In Cost Accounting

The data underlying DTAG's cost-basis models being submitted to the regulator is so restricted in nature as to make nearly impossible the appropriate review of these cost-models for infrastructure elements and services. Despite repeated requests by RegTP, DTAG has often failed to provide additional data, so that diverse regulations have had to be written on the basis solely of international comparative cost models. In the area of

APPENDIX 2 TESTIMONY A. LIPMAN

end-customer price controls, RegTP has been forced to work on the basis of dubious modeling assumptions because of this lack of actual data, such as a 20 to 25% minimum cost differential between wholesale and retail pricing. The increasing emergence of bundled pricing without any transparency of the underlying cost renders these simple assumption useless for reviewing DTAG's pricing.

DTAG Favors Obstruction Rather Than Cooperation

After more than a decade of competitive regulation, the former monopolists in the U.S. (AT&T) and the U.K. (BT) have developed completely different business philosophies in which their fellow carriers are treated as customers. Carrier service offerings have become profit centers, *i.e.* seek to sell to competitive carriers as comprehensive a service offering as possible, especially network capacity. Thus BT today has a significantly higher share of revenue attributable to the carrier services market than DTAG at significantly lower prices for leased lines and other services.

DTAG Seeks To Destabilize Rather Than To Shape The Market

DTAG systematically creates planning uncertainty for competitive carriers. Important information, for example about planned customer transfers, the making available of interconnection technologies, or simply the necessary planning materials are being provided by DTAG with the greatest possible delay. Issues agreed upon for planning purposes are never confirmed in writing even when explicitly requested. Commitments made by DTAG personnel in regional offices are being in part or entirely revoked by DTAG's headquarters. Agreed-upon provisioning dates are often repeatedly rescheduled at the last minute. Short contract terms and brief termination windows create constant insecurity from a legal and business perspective, hampering the development of new products and the development of business plans.

DTAG Selectively Discriminates Among Competitors

DTAG seeks to establish a contracting practice skewed in its favor by pushing one-sided agreements on specific carriers who share overlapping interests with DTAG, or by exploiting inexperienced small carriers who are under considerable pressure to get a foothold in the market. The jurisprudence of RegTP institutionalizes the bias created by this practice, in that larger or more experienced competitive carriers in anti-trust proceedings will find themselves faced with the argument that these very same practices and rules have become the "market standard."

APPENDIX 2 TESTIMONY A. LIPMAN

DTAG Is Waging An All-out Lobbying And Public Relations Campaign To Relax The Regulatory Framework In Spite of Increasing Competitive Obstacles

DTAG has framed the debate by portraying itself as the last enterprise of national pride worth protecting. A campaign on this level, in combination with the fact that DTAG remains majority-owned by the public, makes for a solid emotional appeal to the public. This campaign seeks to make the public forget the significant impact that the billions in foreign investment have had on the economy, in addition to the millions of jobs, which have been created by the competitive carriers and their suppliers in the German telecommunications market. This year, the order volume for network equipment placed by competitive carriers will overtake for the first time the volume of orders placed by DTAG, for instance with Siemens. Meanwhile, DTAG is even trying to blame the domestic regulatory framework for its repeated failures in international ventures. Its campaign for relaxed regulation culminates in its application to be considered non-dominant on the Berlin route even as DTAG still holds 97% of all end-user connections to the fixed network nationwide.

RegTP is under significant political pressure to relax the regulatory framework in favor of DTAG, despite of DTAG's massive obstruction of competition.

In addition, RegTP does not use its authority to counter the subtle obstructionism being practiced by DTAG .

The flood of technically and economically complex proceedings are overwhelming the limited staff and budget of the regulator.

RegTP Is Not Preventing DTAG's Abuse Of Its Market Dominance:

Even as DTAG has to this day never offered to competitive carriers "all essential network services" as demanded by the Telecommunications Act, RegTP is avoiding defining this core criterion, prevents decisions from being taken or delays making them. In contrast to the regulatory practice in the U.S. which can look back to ten years of competitive regulation, the RegTP occasionally lacks an understanding of the economic significance of seemingly minor irritations, like the refusal of DTAG to offer fast circuit restoration, the ability to switch business customers outside of business hours, automatic traffic rerouting and overflow routing in emergencies and other services which DTAG is providing only to itself and its subsidiaries. DTAG itself, according to its

APPENDIX 2 TESTIMONY A. LIPMAN

internal strategy memoranda, increasingly seeks to push competitors out of the market through predatory pricing of its products.

RegTP Does Not Prevent Predatory Pricing:

RegTP usually refuses to allow competitive carriers to join as parties the tariff review proceedings of DTAG, since their interests are allegedly not at stake -- even as this is in fact the heart of their matter. Predatory tariff structures are often not even noticeable to the regulator, due to the limited knowledge and experience of RegTP (for example, the Internet access tariffs). Evermore complex tariff structures are being classified as not requiring approval and are approved up-front without sufficient review and lacking any factual basis for such classification (DTAG's digital subscriber line tariff or "T-DSL"), sometimes even being allowed to go into effect for several month on a "trial basis" without geographic limitation (e.g. DTAG'S "XXL" tariff). RegTP clearly does not have in hand any useful instruments to prevent predatory pricing.

RegTP Is Totally Overwhelmed Due To The Multitude And Increasing Complexity Of Violations:

The number of proceedings before the RegTP dealing with detailed technical matters has steadily increased since the beginning of liberalization. All agreements which DTAG had initially voluntarily negotiated with competitive carriers have been terminated unilaterally by it. Following the initial struggle to force DTAG to provide basic services to competitors, RegTP is now tasked with deciding upon details of service offerings and network elements without which effective competition is doomed to fail. DTAG's bundled tariff filings are growing ever more complex, strategically mixing different services. They can no longer be effectively reviewed for predatory pricing due to the decision-making principles thus far established (for example, the minimum 25% span assumed to exist between the price for some offering charged the end customer and the corresponding wholesale price of such offering for competitors). The provision of incomplete and redacted data by DTAG, which cannot be challenged by competitors, renders the situation even more difficult.

RegTP Is Not Consistently Using Its Existing Authority To Enforce Its Decisions

In several instances, RegTP has failed to ensure that its decisions with respect to DTAG are in fact being complied with. For instance, DTAG initially ignored the timeframes of the regulator's decision ordering the incumbent to continue to offer billing services to

APPENDIX 2 TESTIMONY A. LIPMAN

competitors and submit a corresponding offer for this service; substantively the revisions ordered to be made on DTAG's part are being ignored to this day. Similarly, RegTP determined that the significant delays in transferring local service customers from DTAG to be a clear abuse of market power; yet the regulator has failed over the past three months to enforce its order in the face of still-increasing delays in processing customer transfers. With respect to retail price tariffs, RegTP has failed to enforce the legal requirement that DTAG present evidence of cost-based pricing. Rather than to reject tariff submissions by DTAG lacking such required proof, the regulator is aiding and abetting DTAG's behavior by institutionalizing the recourse to makeshift approval processes (tariff approvals based on benchmarking or rule-of-thumb measures like wholesale price-plus-25-percent) rather than to insist on regularizing such approvals as envisioned by the law.

RegTP Is Not Using Its Authority To Actively Shape The Telecommunications Market

Even as many competitively problematic issues have long since been visible (and RegTP has in fact been informed numerous times of these issues) the regulator has to date continued to rely exclusively on reactive, quasi-judicial processes for each individual dispute. To date, no coherent, overall regulatory plan or rule making for the market is evident which would avoid the regulator having to make *ad hoc* decisions under time pressure, and to allow for more predictable planning by competitors. Additionally, the decisions made by RegTP limit themselves to the bare minimum and do not even begin to address future problem-solving approaches. Suggestions made by competitors, such as for example with regard to the proposal for more economical utilization of limited existing collocation spaces or the provision of automatic emergency overflow and rerouting services, were being rejected by the regulator as late as December of 1999 as unnecessary. The competitors had pointed RegTP to these emerging problems as much as one year previous to that date.

APPENDIX 2 TESTIMONY A. LIPMAN

Demands for a Future Pro-Competitive Regulatory Policy:

1. **Competition must be the driving force of:**
 - lower prices,
 - innovative services,
 - rapid infrastructure deployment,
 - more jobs,
 - large-scale foreign investment**in the telecommunications market.**

2. **The regulation of the still absolutely dominant incumbent is only in its infancy and must be recognized as the necessary precondition for fair competition.**

3. **Predatory market behavior with the aim of eliminating competition as a deliberate strategy by DTAG, based on centralized monopolistic structures, must be met by stronger regulatory efforts and responses.**

4. **Only a reliably stable regulatory framework can create:**
 - future investment,
 - innovative technology,
 - new jobs with carriers and suppliers,
and
 - an efficient and consequently cheaper communications infrastructure.

5. **Not the interests of only *one* company, but functioning competition as a whole must be the key for the future competitiveness of Germany as a business location.**

Annex B:

English Translation of VATM's Market Analysis (in concert with Dialog Consult)¹³ – late summer 2000.

¹³ The original German version of the market data is available at http://www.vatm.de/inter/Frames/fr_presse.htm (at Presse, Pressemitteilungen 2000, Presseinfo-25. Oktober 2000, Anlage).

Chart 1: Total German Telecommunications Market - Fixed and Mobile

(Revenue without terminal equipment or broadband)

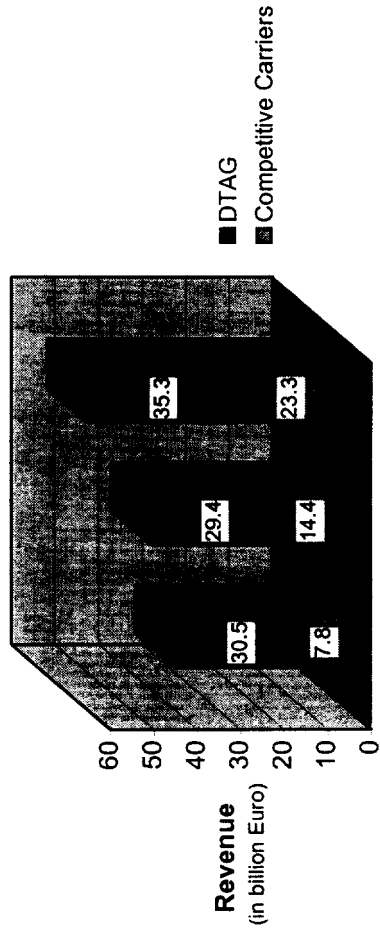


Chart 1a: Competitive Carrier Services

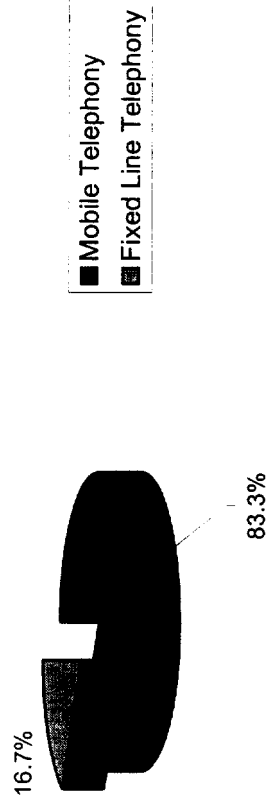


Chart 2: The German Fixed Telephony Market by Volume

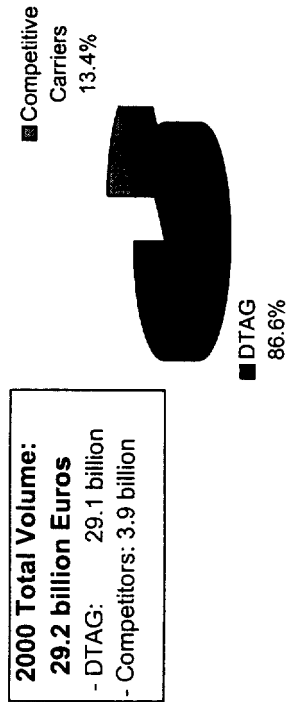
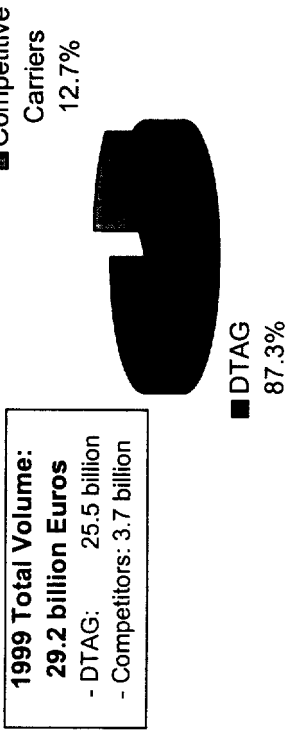


Chart 3: The German Fixed Telephony Market by Usage Volume

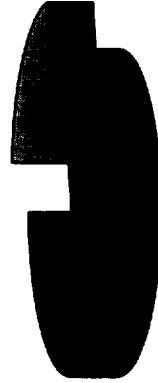
(includes Internet Access)

Competitive Carriers
18.3%



DTAG
81.7%

Competitive Carriers
21.4%



DTAG
78.6%

**Chart 4: The German Market for Local Fixed Line
Telephony by Usage Volume**
(local calling only)

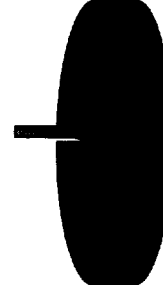
DTAG 99.4%
Competitive Carriers 0.6%

1999



DTAG 98.9%
Competitive Carriers 1.1%

2000



**Chart 5: The German Market for Fixed Line
Telephony (excluding local calling)**

- including Internet Access -

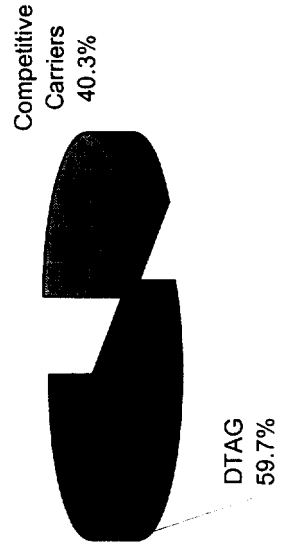
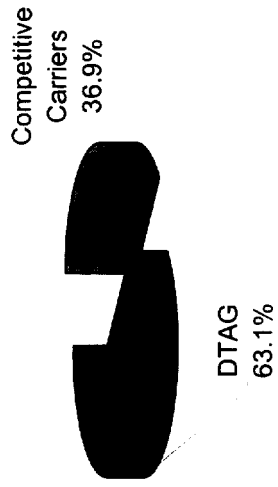


Chart 6: Daily Minutes of Use of Competitive Carriers by Service

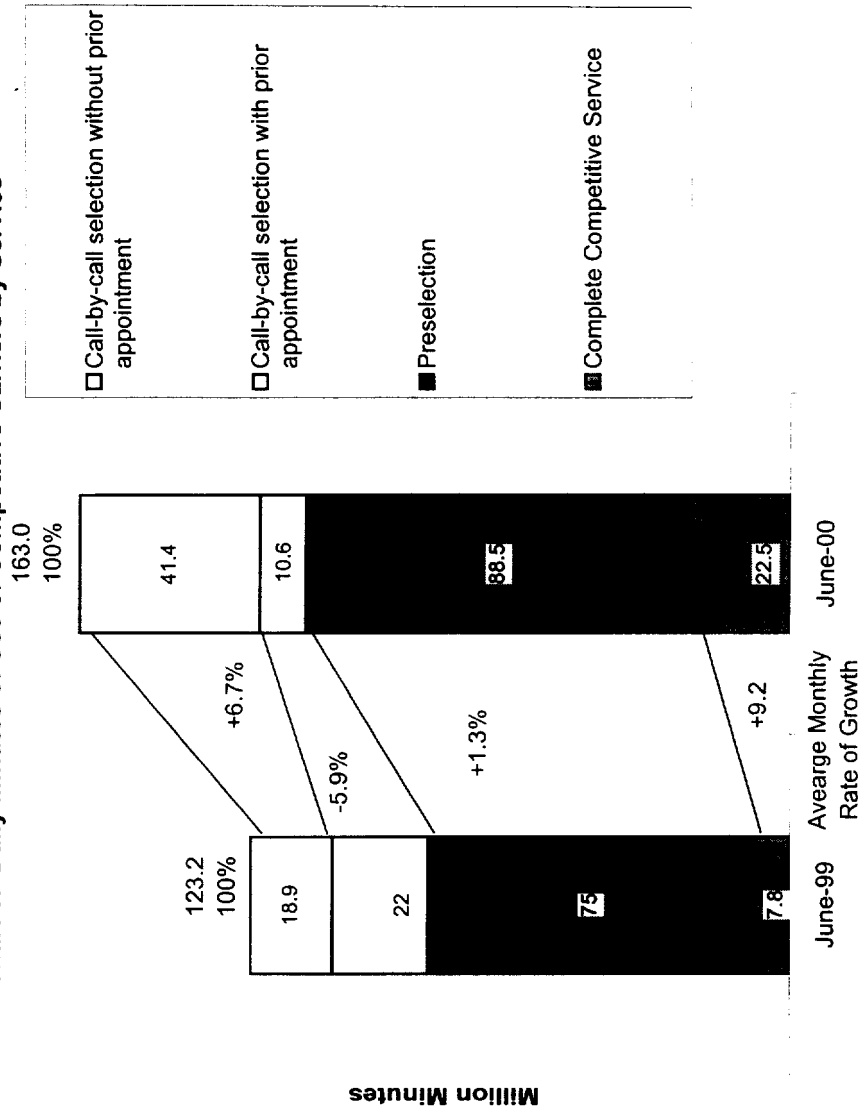


Chart 7: Usage of Competitive Carrier Services in June 2000

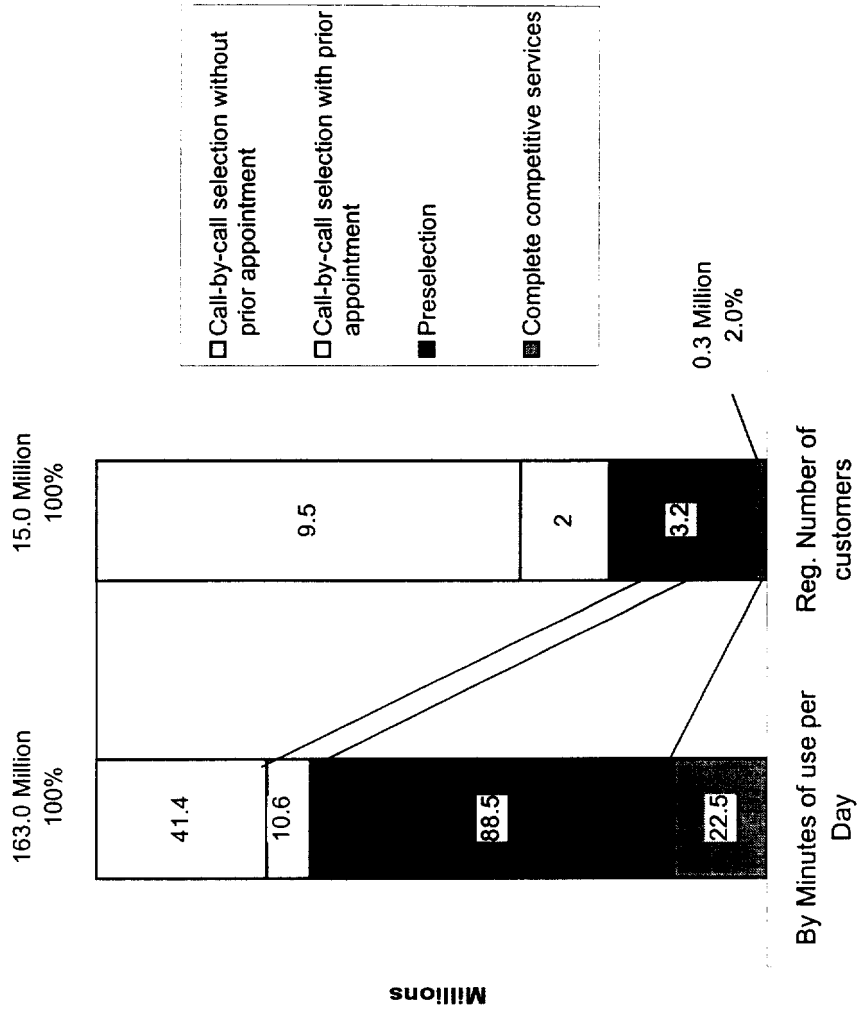


Chart 8: Steady Customer Base of Competitive Carriers in Germany

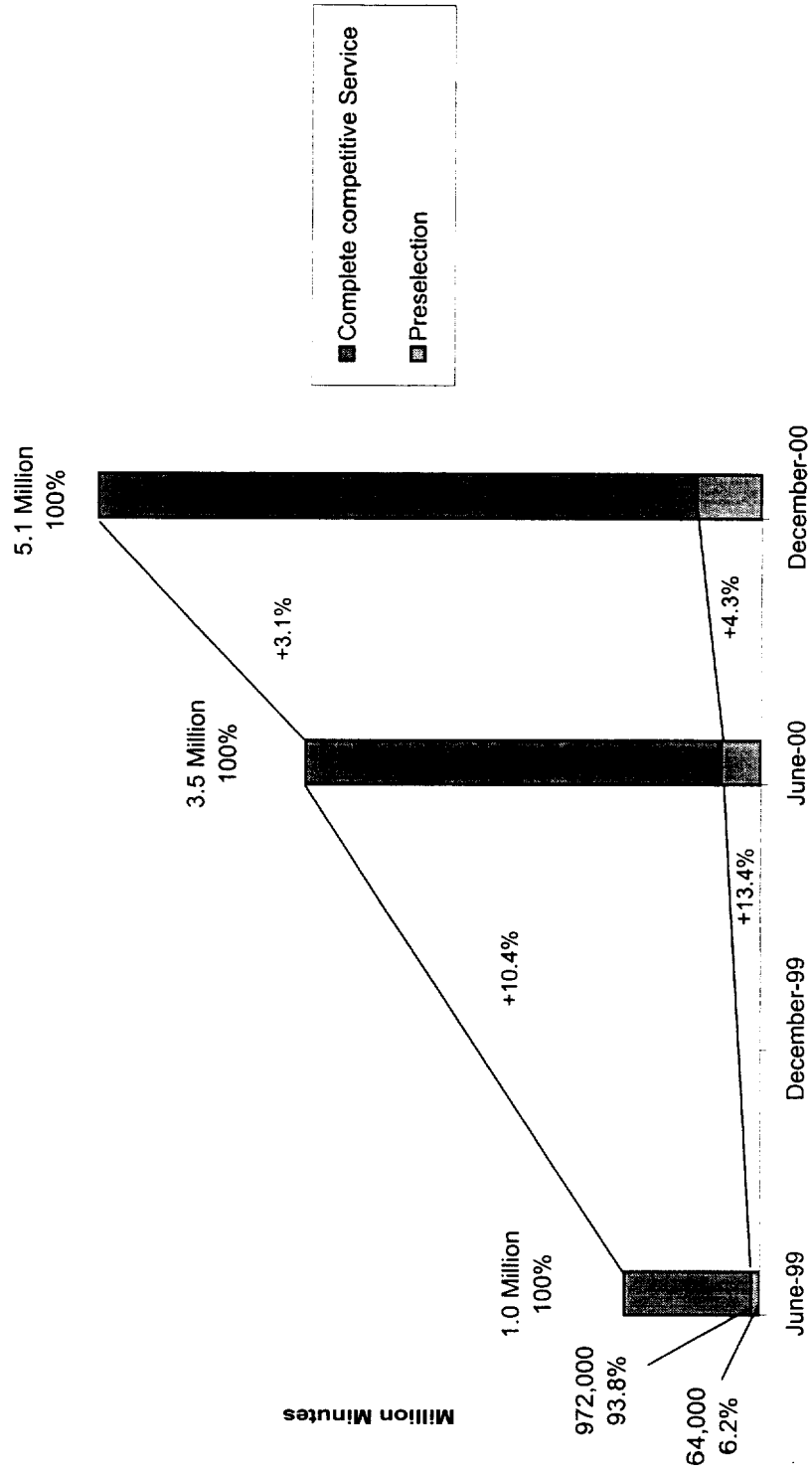
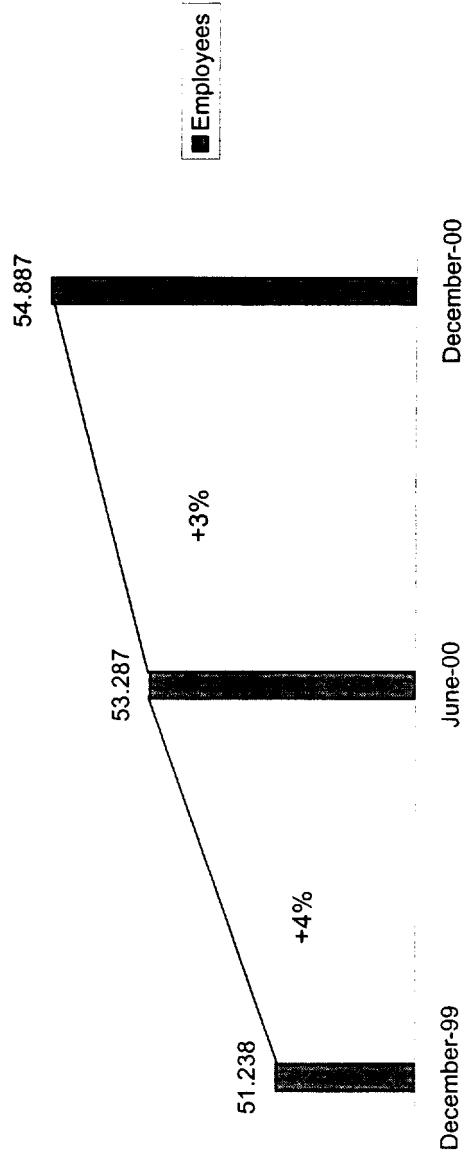


Chart 9: Employment Growth of Competitive Carriers



CERTIFICATE OF SERVICE

I, Axel Spies, hereby certify that copies of the foregoing "Comments of Novaxess B.V." were sent by hand-delivery and first-class mail, postage prepaid, on December 13, 2000 to the following:

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