

### **Telecommunication: regulation of the bitstream access market**

Bitstream access is an input product with which competitors are supplied by the market leader Deutsche Telekom in order to be able to offer their own digital broadband data transfer services to consumers. The Bundesnetzagentur (regulatory authority) was of the opinion that Deutsche Telekom did not offer its competitors a sufficient range of options to take consumers' desire into account for qualitative differences on the basis of the input products offered to date. In consequence, Bundesnetzagentur imposed the obligation on Deutsche Telekom to grant bitstream access to other companies on demand by relinquishing DSL connections and by making data transport possible over its concentrator network. It also stipulated that access charges were subject to prior approval and obliged the claimant to publish a standard catalogue.

The Bundesverwaltungsgericht (Federal Administrative Court) confirmed the fundamental need for regulation of the input market for bitstream access. However, the court found fault with the Bundesnetzagentur's imposition of a requirement for approval of charges on grounds that the authority had not considered whether a retroactive regulation of charges, which would have been less of a burden on Deutsche Telekom, would have been sufficient. On analogous grounds, the court also annulled the requirement for a standard catalogue.

The court ruled that the definition of an input market according to § 10 (1) TKG does not necessarily require the existence of real market conditions. The intention of the rule to create the conditions of competition may justify the definition of a "fictive" market on which market activity has not in point of fact yet taken place.

In addition, products may be allocated to different markets in the event that an input product is limitedly interchangeable with another input product offered on that market on a resale basis but which does not offer customers certain possibilities for quality differentiation. Finally, national legislature may not use the discretionary power to regulate allowed in Art. 16 (4) 2002/21/EC in conjunction with Art. 8 ff 2002/19/EC in order to exclude certain groups generally.