

Germany



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ELECTRONIC COMMUNICATIONS

1. Please give a brief overview of the regulatory framework and authorities for electronic communications (including fixed-line and mobile telephony, voice over internet protocol (VoIP) and satellite services) in your jurisdiction.

Legislative framework

Germany has implemented the 2003 EU regulatory framework. Certain details of Germany's implementation concerning the market analysis required under the framework and the regulation of next-generation networks are subject to European court challenges (see *Question 22*).

Telecommunications services, including fixed line, mobile telephony, VoIP and satellite services are subject to the Telecoms Act (*Telekommunikationsgesetz (TKG)*). The TKG regulates the technical transmission of communications signals.

Several ordinances have been enacted under the TKG, including ordinances concerning:

- Allocation of numbers.
- Technical interceptions.
- Emergency calls.
- Spectrum allocation.

The content of communications signals is regulated by:

- The Telemedia Act (*Telemediengesetz (TMG)*).
- The States Treaty on Broadcasting (*Rundfunkstaatsvertrag (RfStV)*).
- Various media laws of the 16 states (*Bundesländer*).
- The States Treaty on Youth Protection in Media (*Jugendmedienschutz-Staatsvertrag*).

These laws and treaties contain provisions regarding:

- Responsibility and liability for content.
- Requirements for the service provider to provide information about itself.
- Advertisements.

In addition, content delivered over electronic communications networks is subject to the general law in areas such as:

- The protection of minors.
- Competition law.
- Criminal law.

Regulatory authorities

The regulatory authority for telecommunications under the TKG is the Federal Network Agency (*Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (BNetzA)*).

The authorities that regulate the content of communications signals are:

- The state media authorities (*Landesmedienanstalten*), in relation to the States Treaty on Youth Protection, the RfStV and the state media laws.
- Authorities nominated by the states in relation to telemedia services (for example, regional government authorities). Telemedia services are all "non-linear" services (see *Question 28*).

See box, *The regulatory authorities*.

2. Are there any restrictions on foreign companies operating or owning interests in the electronic communications market in your jurisdiction? If so, please briefly explain what these are.

There are no restrictions on direct or indirect foreign ownership in companies operating or owning interests in the electronic communications market.

Ownership restrictions apply to cross-ownership between media and telecommunications entities (see *Question 31*). However, these restrictions do not specifically concern foreign companies.

3. What authorisations are required to operate an electronic communications network or service?

Fixed line

No authorisations are required to operate an electronic communications network, whether fixed line, mobile or satellite. Licences

were abolished in 2004 in accordance with Directive 2002/20/EC on the authorisation of electronic communication networks and services (Authorisation Directive).

Notification to the BNetzA's office in Chemnitz on its form is required before operating a public telecommunications network and providing publicly available telecommunications services for cost. No conditions are attached to notification.

Authorisations are only required for use of:

- The use of radio frequency spectrum (see Question 18).
- Access to public property for installing communications infrastructure (see Question 15).

In general, the BNetzA must decide on an application for authorisation within six weeks of receipt.

Mobile

See above, *Fixed line*.

Other

See above, *Fixed line*.

4. What measures are in place requiring network providers to give other communications providers access to their network infrastructure?

The BNetzA can impose access obligations on operators that the BNetzA has identified as having significant market power (SMP). These access obligations can include the granting of:

- Fully unbundled access to the local loop.
- Interconnection (see Question 7).
- Open access to technical interfaces.
- Key technologies.
- Colocation and other forms of facility sharing.

The BNetzA requires the SMP operator to publish a reference offer which sets out the details of the access granted. Currently, only Deutsche Telekom is required to comply with conditions providing access to its network infrastructure. Under a decision dated 22 April 2009, the obligations on Deutsche Telekom were relaxed, and it is no longer required to interconnect for transit services, although it must still offer interconnection to permit call termination in its own and third party networks (see Question 9). There is a dispute between Germany and the European Commission concerning the extent to which Deutsche Telekom must give its competitors access to its very high bitrate digital subscriber line (VDSL) next-generation network (see Question 21).

In exceptional cases, the BNetzA could impose access obligations on non-SMP operators to secure user communication and end-to-end connectivity. This is provided these operators control access to end-users.

5. Are electronic communications operators:

- Subject to pricing controls?
 - Required to disclose their prices?
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The BNetzA can order SMP operators to be subject to *ex ante* price regulation if this is deemed necessary to foster competition (that is, the prices are assessed before they can be imposed). However, the BNetzA has over the past few years been reducing the number of operators and services for which *ex ante* price regulation is required.

Different rules apply to retail prices and wholesale prices.

Retail prices

The BNetzA does not currently impose *ex ante* price regulations on retail prices. However, it would only be able to do so where it has factual cause to believe that imposing obligations on access, carrier selection or carrier pre-selection are insufficient to maintain a competitive market.

SMP operators cannot impose abusive retail rates. The BNetzA can declare retail rates that it deems abusive void and either request the operator to adjust these rates or provide the appropriate rates itself.

Wholesale prices

The BNetzA imposes *ex ante* control on rates that an SMP operator charges for access services and/or facilities. It can decide not to impose this requirement if:

- The SMP operator does not have SMP in the corresponding retail market, under the double dominance test.
- It deems control after the event (*ex post* control) is sufficient to achieve the regulatory aims.

Other rates that an SMP operator imposes are subject to *ex post* control unless the BNetzA explicitly orders *ex ante* control.

Ex ante price control currently applies to the following markets, set out in the old Recommendation on relevant product and service markets within the electronic communications sector (OJ 2003 L114/45) (now revised):

- Eight to ten (including interconnection and unbundled access to the local loop).
- 16 (voice call termination on individual mobile networks).

However, the BNetzA revoked *ex ante* control on Deutsche Telekom in relation to transit services, which form part of markets 8 and 9, as it considers competition in these parts of the market as being sufficient. Transit services are services where Deutsche Telekom either:

- Does not directly receive calls for termination from the originating network.
- Does not directly terminate calls into the partner's network.

Where the BNetzA has imposed access obligations on a non-SMP operator these rates are subject to *ex post* control. In that case, they must be submitted to the BNetzA two months before their planned date of implementation to allow the BNetzA to review them.

Prices which are subject to *ex ante* price control are published in the BNetzA's gazette and disclosed to the public. All other prices are kept confidential.

6. Please summarise the regulation of mobile roaming in your jurisdiction.

End-user (retail) charges for mobile roaming are subject to Regulation (EC) No. 544/2009 amending Regulation (EC) No. 717/2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (Mobile Roaming Regulation).

The Mobile Roaming Regulation provides for maximum end-user charges for:

- Originating calls.
- Calls received.
- Short message service (SMS) sent.
- Data services.

These end-user charges will be further lowered in 2010 and 2011.

The wholesale market for international roaming is not regulated, as international roaming is not a market subject to the Recommendation on relevant product and service markets within the electronic communications sector (*OJ 2007 L344/65*) (Revised Electronic Communications Product Market Recommendation) or its predecessor (*see Question 5*). Therefore, the BNetzA has not conducted any market analysis in regard to this market and not imposed any remedies in relation to this market. However, there is now a per-megabyte regulation of wholesale rates for SMS and data services (*Article 4a, Mobile Roaming Regulation*).

INTERCONNECTION

7. On what basis is a new entrant entitled to interconnection?

New entrants, like all other network operators, are entitled to interconnection with operators which have been identified as SMP operators and on which the BNetzA has imposed an interconnection obligation. Currently, this is only Deutsche Telekom. In regard to other SMP operators (in particular, other providers offering customer access lines), a new entrant is only entitled to non-discriminatory rates.

All carriers are required to negotiate interconnection agreements, although only Deutsche Telekom is required to actually conclude those agreements. The conditions of those agreements are subject to negotiations between the parties.

8. To whom are applications for interconnection made?

In general, interconnection agreements are negotiated between the parties.

If the conclusion of an access agreement (including an interconnection agreement) fails and one of the parties is an SMP operator required to grant access, both parties can apply to the BNetzA. The BNetzA can order access to be granted, under certain conditions, within ten weeks. The BNetzA can also start proceedings of its own volition.

9. Are the terms of interconnection agreements regulated and how are interconnection charges calculated?

The BNetzA must approve the terms of interconnection agreements with Deutsche Telekom before the agreements are entered into. Deutsche Telekom has submitted an interconnection reference offer which the BNetzA has approved. Before this offer, the BNetzA mainly modified or amended interconnection agreements that were negotiated between the parties. The BNetzA will now refer to this reference offer as a template when making its decisions.

Deutsche Telekom must provide interconnection at the exchange level (as a minimum). Deutsche Telekom's network consists of (*BNetzA*):

- 23 exchanges at the trunk network level.
- 474 exchanges at the local network level.

Currently, the fee scheme is based on the principle of element-based charging. This means that the charges that competitors of Deutsche Telekom pay for interconnection rise according to the number of network elements that are used. For example, the fees range between EURO.0038 (about US\$0.005) (off-peak, local area) to EURO.0134 (about US\$0.02) (peak rate double transit).

NUMBERING

10. Who manages the national numbering scheme and how does it operate? Does it apply to both fixed-line and mobile telephone numbers?

General rules

The TKG and the Telecommunications Numbering Ordinance provides the numbering plan. Network operators or service providers must apply to the BNetzA for allocation of telephone numbers of all number ranges (with the exception of mobile short codes (*see below, Mobile short codes*)).

Different rules apply depending on the numbers sought:

- Network identifying codes (that is, carrier codes). These are available to network operators if they demonstrate that they operate a telecommunications network.

- Geographical numbers. These are allocated to a network operator. That operator activates them and makes them available for use by end-users.

Applications can be made to the BNetzA for direct allocation of other number ranges, such as numbers for premium rate, mass traffic, and inquiry services. In that case, the user will enter into an agreement with a network operator to ensure:

- The activation of the number.
- That it can be reached from third party networks on the basis of existing interconnection agreements.

VoIP service providers are entitled to obtain ranges of geographical numbers for allocation to their customers. This is provided that the customers demonstrate that they have their business location or residence within the area code for which they request a geographical number. Currently, these numbers are allocated on the basis of various provisional allocation rules issued by the BNetzA that set out the conditions for a number allocation and the permitted use of the various number ranges.

Mobile short codes

The mobile operators allocate mobile short codes on the basis of a memorandum of understanding concluded between them.

11. Does the numbering scheme allow for portability of numbers and, if so, who bears the cost of portability?

Portability is required for all undertakings that provide publicly available telecommunications services and assign telephone numbers to end users (*Telecoms Act*). This includes:

- All fixed and mobile network operators.
- All VoIP service providers that are not restricted to only providing services for closed user groups.

THIRD-GENERATION (3G) NETWORKS

12. Please summarise the extent to which third-generation (3G) networks have been rolled out in your jurisdiction.

Spectrum for 3G networks was auctioned in 2000 and allocated to six bidders for a total payment of about EUR50 billion (about US\$70.4 billion).

Of those bidders, Mobilcom has returned its 3G licence, and the licence allocated to Quam (a joint venture between Telefonica and Sonera) was revoked as Quam did not comply with the roll-out obligations stipulated in the licence. The competent court recently confirmed this revocation.

There are four remaining 3G providers:

- T-Mobile.
- Vodafone.

- E-Plus.
- O2 (now owned by Telefonica, at the time of the licence award named VIAG Interkom).

Under their licences they were required to provide 3G services to at least 50% of the German population by the end of 2005. The four providers have met these requirements.

Further spectrum in the 1.8 and 2.6 GHz spectrum for 3G services will be auctioned later in 2009 together with spectrum deriving from the switchover from analogue to digital television in the 790 to 862 MHz range (see *Question 20*). The 3G spectrum, according to the draft auction rules will be predominantly used to cover "white spots" identified by the German states with mobile broadband services (see *Question 25*). After 80% of the households in these white spots are covered by mobile internet broadband services, the spectrum can be used to provide services in other regions. The smaller German mobile operators (in particular E-Plus) are currently objecting to this provision. They argue that the auction rules are to the benefit of the leading mobile operators, T-Mobile and Vodafone.

UNIVERSAL SERVICE

13. Are there any obligations to provide a universal service? If so:

- On whom do the obligations fall?
- What services do the obligations cover (for example, fixed line telephony)?
- If the universal service obligations do not extend to broadband, are there any plans for them to do so?

The Telecoms Act provides a minimum set of publicly available services of specified quality to which every end-user must have access at an affordable price. These services include, among others, the provision of call waiting, directory enquiry services, the annual publication of telephone directories, the installation of public pay telephones and the ability to make emergency calls from public pay telephones (*section 78(2), Telecoms Act*).

If the BNetzA finds that universal services are not adequately or appropriately provided, it may require one or more telecommunication operators to provide those services. Other market participants must pay into a universal service fund which pays those operators compensation.

The BNetzA has not as yet imposed universal service obligations on any undertaking.

EQUIPMENT AND INFRASTRUCTURE

14. Are there any requirements for electronic communications equipment to comply with certain standards?

Electronic communications equipment must meet the standards set to avoid electromagnetic interferences (*Act on Radio Equipment and Telecommunications Devices (Gesetz über Funkanlagen und Telekommunikationsendeinrichtungen (FTEG))*). Of

particular relevance are the standards provided in the Act on Electromagnetic Compatibility of Devices (*Gesetz über die Elektromagnetische Verträglichkeit von Betriebsmitteln (EMVG)*).

The German authorities accept approvals granted by authorities of other EU member states, in accordance with the relevant EC directives (particularly Directive 2004/108/EC relating to electromagnetic compatibility (EMC Directive)).

15. Are there any restrictions on accessing land to install communications infrastructure?

Public telecommunications network operators can apply in writing to the BNetzA for a right to use public traffic ways (such as public ways, squares, bridges and public waters) for the purpose of a telecommunication line serving public services. The BNetzA must grant this right, free of charge. Where that use is impossible or only possible at disproportionately high expense, the operator can share use of other installations which already exist where:

- This shared use is economically reasonable.
- No major additional construction work is needed.

An owner of private property must accept the installation, operation or renewal of telecommunications lines on his property if either:

- The property is already used for existing telecommunications installations which are secured by a right and the usability of the property is not additionally restricted on a lasting basis.
- The property is not, or is not significantly, affected by this use.

The owner, in this case, can claim appropriate monetary compensation if the use of his property or the income that he receives from it is affected beyond what is reasonable. This compensation can be claimed from either the:

- Operator of the telecommunications line.
- Owner of the network.

In addition, the property owner can claim a one-off payment if there were previously no lines on the property that could be used for telecommunications purposes.

Rights of access to public and private land can be enforced at either the civil or the administrative courts (depending on the procedural rules).

The BNetzA has not provided any specific planning or zoning regime for the installation of network infrastructure.

16. Are there any rules on laying submarine cables in your jurisdiction or authorising their use?

There are no specific telecommunications rules applying to submarine cables within Germany's territory. The general provisions of coastal protection, environmental and waterway laws apply. Authorisations from the competent local authorities may be required.

SATELLITE AND CABLE

17. How are satellite earth stations regulated?

Operating a satellite earth station requires an allocation of the corresponding frequency spectrum from the BNetzA, on an individual or general basis (see *Question 18*). There is no requirement to obtain an authorisation to receive signals as the concept of landing rights does not apply in Germany.

In addition, satellite earth stations generally require a site approval from the BNetzA to exclude the risk of interferences. Low radiation earth stations are exempted from this requirement.

Finally, it may be necessary to obtain additional permits to comply with planning and environmental laws or to certify that the equipment meets the standards on electromagnetic compatibility (see *Question 14*).

RADIO FREQUENCY SPECTRUM

18. On what basis and by whom is access to radio frequency spectrum made available? Are there any requirements for authorisation and are there any types of service that are exempt from authorisation?

General assignments

The BNetzA can, on its own initiative, assign certain spectrum ranges to the general public for specific purposes, such as:

- Digital enhanced cordless telecommunications (DECT) telephones.
- Medical devices.
- Low power radio devices for private use.

Individual assignments

The BNetzA can allocate spectrum on an individual basis where it considers a general assignment is not feasible. Where there is insufficient spectrum available for assignment to all interested parties, the BNetzA will publish a procedure for the selection of applicants. The procedure will usually be an auction. In exceptional cases where an auction is not likely to secure the regulatory aims (for example, where it is likely to have anti-competitive effects), the BNetzA will invite tenders and conduct a beauty contest.

Under the current TKG, the BNetzA has always conducted auctions and not beauty contests. This is likely to apply in the future.

Fees

The following fees are payable to receive spectrum on a general or individual basis:

- A one-off fee (*Frequency Fee Ordinance (Frequenzgebührenverordnung)*).
- An annual fee, depending on usage (*Frequency Usage Ordinance (Frequenznutzungsbeitragsverordnung)*).

19. Is it possible to trade or return allocated radio frequency spectrum?

Although the BNetzA can permit the trading of radio frequency spectrum and set the rules for this trading, it has not as yet done so.

A transfer of individually allocated spectrum is permitted where another undertaking succeeds to a former undertaking's business (for example, in cases of corporate restructuring). However, the BNetzA must consent to this transfer. The BNetzA grants consent if:

- The succeeding party meets the conditions imposed on the use of that spectrum.
- There are no concerns that this transfer will distort competition.
- The interference-free use of the spectrum is guaranteed.

20. Has the switchover from analogue to digital television freed up spectrum for other services?

Spectrum in the range of 790 MHz to 862 MHz has been freed as the result of the switchover from analogue to digital television (the "digital dividend").

This spectrum is planned to be auctioned as part of the "digital dividend" during 2009. The federal government hopes it will be specifically used to provide broadband internet access in rural areas which currently have no, or only limited, access to digital subscriber line (DSL) services (see *Question 12*).

NEXT-GENERATION NETWORKS

21. To what extent have next-generation networks been implemented?

The following offer next generation network services over their VDSL services:

- Deutsche Telekom.
- Arcor.
- Some regional carriers.

The geographical reach of these networks, however, is still limited. For example, Deutsche Telekom offers access to its VDSL network only in 50 major cities.

22. Is there any specific regulation of next-generation networks?

The TKG does not specifically regulate next-generation networks. However, next-generation networks are not to be subject to regulation unless this is required to avoid damage to competition (*section 9a, TKG*). This provision is interpreted as meaning that Deutsche Telekom's next-generation network will not be subject to regulation.

The European Commission has brought an action challenging this provision against Germany at the ECJ challenging this provision. Judgment is pending, but the Advocate General has issued an opinion in support of the Commission's view.

23. To what extent have next-generation access (NGA) networks been implemented?

Deutsche Telekom and a number of regional and city carriers have currently rolled out NGA networks. Deutsche Telekom uses fibre to the cabinet (FTTC) and fibre to the node (FTTN) models up to the street cabinet. The regional and city carriers predominantly use fibre to the building (FTTB) and fibre to the home (FTTH) networks.

24. Are owners of NGA networks required to share ducts with competitors?

The regulation of access to NGA networks is currently subject to a consultation process in Germany. The BNetzA published a draft consultation text in May 2009 raising, among others, issues concerning:

- Sharing of infrastructure.
- Incentives to invest in infrastructure.
- *Ex ante* or *ex post* regulation.
- Possible higher termination charges for termination in FTTB networks.

Currently, competitors of Deutsche Telekom are entitled to access to ducts or to the black fibre between the mainframe and the street cabinet of Deutsche Telekom and the cabinets themselves to provide services to end-customers. However, the BNetzA still needs to determine the rates for that access.

In mid-2009, Deutsche Telekom voluntarily agreed with Vodafone and 1 und 1 that those two companies are entitled to resell Deutsche Telekom's VDSL services under their own name.

BROADBAND

25. How extensive is broadband coverage in your jurisdiction and what policies are in place to increase broadband availability nationwide? How fast are broadband speeds?

At the end of 2008, 24 million households had broadband access. This is a significant increase from 20 million households in 2007. 80% of the connections have a downstream speed of at least 2 MBb/s.

In rural areas, broadband access can be particularly limited. The federal government initiated a study (*Breitbandatlas*) which found that, in 692 municipalities, less than 50% of the households had technical access to broadband (white spots). The federal government intends to have mobile broadband access cover these white spots and the digital dividend will be used predominantly for this purpose (see *Questions 12 and 20*).

In addition, the federal government promotes broadband access in rural areas by financial schemes which are mainly available for local municipalities. The government's aim is to ensure that broadband access will be available everywhere in Germany by the end of 2010.

INTERNET

26. Please summarise the regulation of the internet in your jurisdiction, including any proposals for reform.

There is no special regulation of the internet in Germany. The TKG covers transmission issues while the general German media law regulates content transmitted over the internet (see *Question 28*). There are no proposals for reform.

27. Are there any constraints on the ability of network service providers to discriminate in terms of the different types and sources of data travelling across their networks as the demand for bandwidth increases?

There is no regulation concerning network neutrality in Germany. Therefore, there are no specific constraints on the network service provider filtering out unwanted traffic on the basis of its origin or content. However, general telecommunications and competition law principles bind the network service provider.

BROADCASTING AND ON-DEMAND SERVICES

28. What authorisation is required to deliver content over electronic communications networks (for example, to operate a broadcasting service or offer IPTV)? By whom and on what basis is authorisation granted?

Whether an authorisation is necessary does not depend on the means of distribution. Broadcasting services that offer audio-visual media services in the form of linear content distribution (television broadcasting) require prior authorisation whether they are distributed by satellite, broadband cable terrestrially or IPTV. Non-linear services (on-demand services) do not require any authorisation (see *Question 29, Regulation of on-demand services*).

The state media authorities grant authorisation. Interested parties must file their applications for an authorisation with one of the state media authorities. The Commission for Authorisation and Supervision (*Kommission für Zulassung und Aufsicht (ZAK)*) handles the application process. Other content-related services do not require authorisation.

Authorisation for broadcasting services is granted on the basis that the content provider:

- Has full legal capacity.
- Has not lost its ability to be elected into office because of a court judgment.

- Has not forfeited its right to freedom of opinion because it has abused that freedom under Article 18 of the German basic law (*Grundgesetz*).
- Is situated in Germany or a member state of the EU or European Economic Area (EEA).
- Is not part of a forbidden union or association.
- Can guarantee that it will broadcast its content on the basis of the applicable legal provisions.

Authorisation cannot be granted to public entities or political parties.

See box, *The regulatory authorities*.

29. Please summarise:

- The regulation (if any) of on-demand services in your jurisdiction.
- How the definition of "audio-visual media services" under Directive 2007/65/EC (Audio-Visual Media Services Directive) will be interpreted in your jurisdiction? (EU member states only.)

Regulation of on-demand services

On-demand services are regulated by the:

- TMG, which provides among others:
 - rules for the identification of the service provider (see *Question 37*);
 - the country of origin principle (that is, that the applicable law is the law of the country from which the service is broadcast). This only applies if the country of origin is an EU member state; and
 - data protection within on-demand services.
- RfStV (as amended), which provides brief rules on the content of on-demand services.

Audio-visual media services

German regulation for audio-visual media services was amended on 1 June 2009 to apply the criteria contained in the Audio-Visual Media Services Directive. Audio-visual media services are information services that can be either:

- **Linear services.** These are defined as broadcasting services and are regulated by the RfStV (see *Question 28*).
- **Non-linear services.** These are on-demand services and are not fully regulated. Broadcasting services are governed only by the RfStV (see *Question 28*). Telemedia services are governed by both the TMG and the RfStV (see *above, Regulation of on-demand services*).

THE REGULATORY AUTHORITIES

Federal Network Agency (*Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (BNetzA)*)**Head.** Matthias Kurth**Contact details.** Tulpenfeld 4

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Outline structure. At the top of the organisation is the presidential chamber, which makes strategic decisions. It consists of the BNetzA's president and two vice-presidents.

Below that level, the BNetzA's ruling chambers make decisions on rate regulation, granting network access and abuses of SMP.

The BNetzA's office in Mainz is responsible for carrying out ordinary regulatory tasks.

There are numerous regional offices entrusted with special tasks, mainly relating to the technical regulation of the telecommunications market.

Responsibilities. The BNetzA's task is to develop the electricity, gas, telecommunications, postal and (from 1 January 2006) the railway infrastructure markets, by liberalisation and de-regulation. For the telecommunications market this includes, among other things:

- Market review, identifying SMP operators, imposing remedies (granting access, rate regulation, and so on).
- Control of abusive practices by SMP operators.
- Number allocation.
- Spectrum allocation.
- Granting rights of way.
- Consumer protection (that is, in the case of abuse of numbers).
- Monitoring and enforcing the technical implementation of requirements concerning technical safeguards to protect privacy of telecommunications and personal data.
- Mediation.

Contact for queries. See above, *Contact details*.

Obtaining information. See above, *Contact details*.

State media authorities (*Landesmedienanstalten*)

There are 14 state media authorities.

Contact details. These vary according to the authority. Links to all state media authorities can be found at www.alm.de/283.html

Outline structure. This varies according to the authority.

Responsibilities. The state media authorities have a number of responsibilities, including:

- The licensing of broadcasters.
- The regulation of audio-visual media services.
- Advertising in audio-visual media services.

Contact for queries. See above, *Contact details*.

Obtaining information. See above, *Contact details*.

Commission to Investigate Concentration in the Media (*Kommission zur Ermittlung der Konzentration im Medienbereich (KEK)*)**Head.** Insa Sjurts**Contact details.** Helene-Lange-Straße 18 a

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Outline structure. The KEK is composed of 12 members. Six of these members are broadcasting and business law experts. The other six are representatives of the state media authorities (see above). The prime ministers of the German states mutually nominate the expert members for a term of five years. The state media authorities elect their representatives.

Decisions are made by a simple majority vote. In the event of a tie, the KEK's president holds the decisive vote.

Responsibilities. The KEK is responsible for monitoring and enforcing compliance with legal provisions designed to ensure pluralism in nationally transmitted private television.

It considers applications for broadcasting licences. Where the applications concern nationally transmitted programmes or changes in the ownership structures of broadcasters, the KEK examines whether granting the applications will result in the broadcaster being able to exercise a dominant impact on public opinion.

Contact for queries. See above, *Contact details*.

Obtaining information. See above, *Contact details*.

30. Are there any obligations requiring certain programmes to be carried by distribution networks?

All German states implemented “must-carry obligations” (that is, requirements to broadcast specified channels) for broadband cable network providers in accordance with Article 31 of Directive 2002/22/EC on universal service and users’ rights (Universal Service Directive). The must-carry obligations vary according to state, but mostly cover the public service broadcasters as well as the main private broadcasters. The state media authorities identify the channels that the cable network providers must carry.

In addition to the must-carry obligations for the cable network providers, which only cover the analogue cable spectrum, section 52b of the RfStV identifies must-carry obligations for digital programme platforms. These obligations apply to all programme platforms, regardless of the means of distribution.

31. Please summarise how market dominance in broadcasting is controlled (including any restraints on concentrations of media ownership and cross-ownership).

Sections 25 to 34 of the States Treaty on Broadcasting control market dominance in broadcasting. In general, all broadcasting services must uphold principles of pluralism. Although there are no restrictions on the number of channels one person or one company can operate, once a certain share of total viewership is reached, measures to secure pluralism must be taken. These can include:

- Introducing third party “windows”, which carry programmes operated by independent content providers, into the regular broadcasting schedule.
- Establishing a programming advisory board to supervise the maintenance of pluralism.

The Commission to Investigate Concentration in the Media (*Kommission zur Ermittlung der Konzentration im Medienbereich (KEK)*) supervises market dominance in broadcasting (see box, *The regulatory authorities*). The KEK is entitled to act to prevent dominant concentrations in the media and, after concentrations have arisen, act afterwards to introduce measures to ensure media pluralism.

In addition, concentrations in the media sector must be notified to the Federal Cartel Office (*Bundeskartellamt*), which must approve of the concentration.

Further, the different states have implemented (different) restrictions on cross-media ownership, especially in relation to:

- Local dominance in the printing markets.
- The possibility of newspaper organisations acquiring shares in companies providing broadcasting channels.

ADVERTISING IN ELECTRONIC MEDIA

32. What restrictions are there on:

- **How much advertising and teleshopping (that is, direct offers broadcast to the public) can be included in programmes/on the internet?**
- **The particular types of channels on which they can be shown?**

There is no restriction on the amount of advertising or teleshopping for on-demand services.

Advertising in linear broadcasting services is restricted to:

- 12 minutes per hour.
- 20% of the daily broadcasting time.

The 20% limit will be removed when the Audio-Visual Media Services Directive is fully implemented. This is expected to happen by the end of 2009.

Teleshopping can be offered as either:

- Teleshopping windows, which must be at least 15 minutes in duration. There can be eight windows a day, with a total duration of three hours.
- A content service as a teleshopping channel. In that case, teleshopping can last for an entire day.

On private channels there are no restrictions on the kind of channels on which advertising and teleshopping can be shown. There are no restrictions on the scheduling of advertising and teleshopping, other than restrictions on advertising during (*RfStV*):

- Programmes for children.
- Religious programmes.
- News shows.

Public service broadcasters cannot show any advertising:

- On Sundays.
- During federal holidays.
- After 8 pm.

33. Are there any standards or quality requirements for advertising in audio-visual media services?

Advertising in audio-visual media must (*section 7, RfStV*):

- Be separated from ordinary programmes.
- Not influence ordinary programmes.
- Not be deceptive.

- Not harm the interests of consumers.

Surreptitious advertising is forbidden. The German states intend to allow product placement as defined in the Audio-Visual Media Services Directive when the RfStV is amended at the end of 2009.

PREMIUM-RATE TELEPHONE SERVICES

34. Are premium-rate telephone services specifically regulated in your jurisdiction? If so, please provide details.

The following are the main obligations concerning the provision and advertising of premium-rate telephone services (*TKG*):

- The price per minute or per usage must be displayed in close proximity to the number in advertisements for, among others:
 - premium-rate services;
 - operator services;
 - mass traffic services;
 - shared cost services; and
 - short codes.
- In relation to voice-based premium-rate services:
 - the price per minute, data volume or per usage must be announced free of charge prior to the start of the service;
 - there must be a gap of at least three seconds between the announcement and the start of charged services.
- In relation to voice-based mass traffic services, the price per call must be announced immediately after the call.
- In relation to a connection from a voice-based operator service, the price per call must be announced before the connection.
- Prices for data-based short codes must be displayed before the start of the usage. If the price exceeds EUR2 (about US\$2.8), the end-user must provide specific confirmation that it is prepared to pay that price.
- For time-based charging, the maximum price premium-rate services can be charged at is EUR3 (about US\$4.2) per minute, unless the customer has specifically confirmed that it is prepared to pay a higher price. For charging according to a specific event, the maximum charge is EUR30 (about US\$42.2) per event, unless the customer has specifically confirmed that it is prepared to pay a higher price.
- Service providers for premium-rate services must disconnect a service after one hour.

In addition, providers of premium-rate services must comply with the general law. Among other things, this prohibits the use of numbers and telecommunication services for illegal purposes (for example, cold calls and spam e-mails).

35. On whom does liability for breaches of regulations fall and what liability is there in relation to carrying out due diligence of other members of the supply chain?

Generally, the owner of a number used for illegally providing or advertising telephone services can be held liable.

The end-user does not have to pay charges where they are not properly indicated (in advertisements) or announced (in voice-based services) (*TKG*) (see *Question 34*).

In addition, the BNetzA can order that:

- That numbers (including short codes) that are used or advertised illegally must be disconnected.
- Revocation of the allocation of the number.
- The charges cannot be collected from end-users.

These orders are addressed to the:

- Service provider.
- Network operator in whose network the number is connected.
- Fixed or mobile network operator who bills the service to the end-user.

If these orders are not complied with, the BNetzA can fine the service provider or network operator.

INTERNET SERVICE PROVIDERS (ISPs)

36. Please summarise:

- **The potential liabilities that internet service providers (ISPs) can incur as a result of actions by their customers (such as the posting of material that infringes third party IP rights or is defamatory).**
- **The available defences to these liabilities.**
- **Whether there are separate liabilities and defences for criminal matters (such as publishing/distributing material of a terrorist nature or that is likely to incite racial hatred).**

Liabilities

Statutory provisions do not provide clear rules concerning the liability of ISPs. Case law provides some guidance but is not entirely consistent.

To the extent that ISPs are access providers (that is, providers who enable technical access to the internet), case law indicates that they are not liable for illegal content which is made available by access to the internet. Therefore, access providers do not have to block access to certain websites or IP-addresses. However, local authorities can order ISPs to block access to certain websites.

Where they are host providers (for example, providers of internet forums or blogs) they are not generally required to control third party content posted. They are only held liable where:

- They had knowledge that the third party content:
 - infringes third party rights (for example, copyright); or
 - breaches the law,
- They have not taken steps to remove that content.
- They have not taken reasonable steps to ensure that illegal content of the same kind is avoided in the future.

Defences

In civil law procedures, ISPs (unless they are mere access providers) must demonstrate that:

- The illegal content has been made available by a third party.
- The ISP had no knowledge of that content.
- The ISP has taken all reasonable measures to prevent infringements of the same kind after having obtained knowledge.

This may require the use of:

- Blacklists (for example, for users and key words).
- Filter software.
- Manual screening of the content, where this is both possible and reasonable.

Different rules apply where a platform's predominant purpose is to encourage illegal acts. For example, this may apply to certain peer-

to-peer (P2P) platforms whose focus lies on file sharing which breaches copyrights.

Criminal liability

Usually, ISPs are not subject to criminal liability. However, the authorities can order an ISP to block access to websites with content which infringes criminal laws.

37. Must ISPs provide consumers with prescribed information on the terms on which internet access is provided? Does this extend to the provision of specific public-interest information to subscribers?

ISPs must make available the commercial and legal terms under which they grant internet access, including the price list. In addition, each ISP website must contain an imprint, which must include, among other things, the:

- ISP's full name, address and telephone number.
- Full names of the ISP's directors.
- ISP's registration number.

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