

The International Comparative Legal Guide to: Telecommunication Laws and Regulations 2009

A practical insight to cross-border Telecommunication Laws and Regulations



Published by Global Legal Group with contributions from:

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Dirk Stolz

1 Framework

1.1 When did Germany first liberalise telecommunications networks and/or services?

In 1989 the markets for telecommunications end-user devices, data and value added services, satellite and mobile communications were liberalised. The first mobile communications licence was awarded to a private entity in 1989 (Mannesmann Mobilfunk, now Vodafone D2).

However, only the Telecoms Act of 1996 fully liberalised the market for telecommunications networks and services with effect as of 1 January 1997.

1.2 Has Germany fully implemented the EU 2003 regulatory framework? If Germany has not fully implemented the new regulatory framework, have proceedings been brought against Germany by the European Commission and if so, for which contraventions?

In general, Germany has implemented the EU 2003 regulatory framework. Certain delays in conducting the required market analysis have led to infringement procedures by the EU Commission.

Of more significant concern is a provision of the amended Telecoms Act which came into effect on 24 February 2007 dealing with “New Markets” which allegedly allows for a regulatory holiday for next generation networks (NGN). According to the EU Commission, the relevant Sec. 9a Telecoms Act (*Telekommunikationsgesetz, TKG*) unduly limits the NRA’s (*Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen; BNetzA*), discretion regarding market definition and remedies as the law already provides for the decision that New Markets (as a rule) shall not be subject to regulation. The EU Commission has brought action against Germany at the European Court of Justice challenging this provision.

1.3 Please give an overview of the different laws and regulations governing the operation of electronic communications networks and the provision of electronic communication services.

The main law governing the operation of electronic communications networks and the provision of electronic communications services is the Telecoms Act.

On the basis of the Telecoms Act, several ordinances have been enacted, including ordinances regarding:

- allocation of numbers;

- technical intercepts;
- emergency calls; and
- criteria and guidelines for the structuring, configuration and administration of numbering space (currently still draft) and respective fees.

The allocation of frequency spectrum is governed by the:

- Frequency Range Allocation Plan Ordinance (*Frequenzbereichszuweisungsplanverordnung*); and
- the Frequency Utilisation Plan (*Frequenznutzungsplan*).

Further technical regulations deal with the safety and security of telecommunications devices and the avoidance of interferences (electromagnetic compatibility).

1.4 Please describe the regulatory framework, in terms of regulatory authorities and associated agencies, e.g. national competition authority (where different).

The competent regulatory authority for electronic communications is the Federal Network Agency, BNetzA, which has its seat in Bonn.

The Federal Cartel Office (FCO) is responsible for the enforcement of the Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*) and as such is responsible for merger control procedures and general control of anti-competitive practices.

As regards the market definition and market analysis to be conducted by BNetzA pursuant to the Telecoms Act, BNetzA shall take decisions in agreement with the FCO. As regards proposed remedies, BNetzA shall hear the FCO but is not required to adhere to FCO’s view.

1.5 Which principal aspects of electronic communications regulation fall under the supervision of the national regulatory authority for electronic communications?

Pursuant to the Telecoms Act, BNetzA, inter alia, is responsible for:

- defining relevant markets and conducting market analysis;
- imposing remedies on SMP operators and certain non-SMP operators;
- exercising ex-ante and ex-post rate regulation (as applicable);
- exercising special control of anti-competitive practices by SMP undertakings;
- allocation of frequency spectrum;
- structuring, configuration, administration of the numbering space and allocation of numbers;
- granting the right of use of public ways;
- securing the provision of universal services;

- regulation of fees for telecoms services;
- monitoring and enforcing the privacy provisions of the Telecoms Act;
- control of abusive practices by SMP operators;
- monitoring and enforcing the required technical implementation of requirements regarding technical safeguards to protect privacy of telecommunications and personal data, telecommunications and data processing systems against unauthorised access and to permit intercepts by authorities; and
- mediation.

1.6 In order to be properly authorised to provide electronic communications networks and services, is a registration, declaration or notification required and if so to whom and for which purposes? What rules or conditions, if any, may be attached to a registration, declaration or notification?

Any person operating a public telecommunications network or providing a publicly available telecommunications service on a profit-oriented basis shall notify BNetzA without undue delay the beginning, any changes or the ceasing of service provision to BNetzA.

Currently, BNetzA's office in Chemnitz is responsible to receive and administer the notifications.

For the initial application, a form sheet should be filled in.

No conditions will be attached to a notification.

1.7 Are any network operators or service providers subject to rules governing their operations over and above rules and conditions governing authorisations and imposing SMP obligations, for example under competition law?

The Competition Act, in general is applicable to telecommunications network operators or service providers as regards merger control and general control of anti-competitive practices.

Any mergers that exceed the relevant revenue thresholds of the Competition act therefore will have to be notified to the Federal Cartel Office. This will, in particular be relevant to any mergers which involve Deutsche Telekom and their affiliates, any of the cable network operators and any of the mobile network operators.

In addition, all network operators and service providers, irrespective of their market power have to comply with the prohibition of anti-competitive practices pursuant to the Competition Act.

1.8 How and to what extent is content delivered over electronic communications networks regulated and by whom?

Content delivered over electronic communications networks is not regulated by the Telecoms Act but by a number of federal, regulations, inter-state agreements and state regulations, namely:

- the Telemedia Act of 2007 (*Telemediengesetz*) which deals with electronic information services which are not regarded as broadcasting;
- the States Treats on Youth Protection in Media (*Jugendmedienschutz-Staatsvertrag*);
- the States Treaty on Broadcasting (*Rundfunkstaatsvertrag*) in regard of broadcasting services; and
- the various media laws of the 16 states (*Bundesländer*).

These laws, inter alia, contain provisions on responsibility and liability for content, requirements to provide information on the service provider, and advertisement.

Competent authorities are the state media authorities (as far as the States Treaty Youth Protection and the States Treaty on Broadcasting and the state media laws are concerned) and authorities nominated by the states in regard to the telemedia services (e.g. regional government authorities).

In addition, content delivered over electronic communications networks is subject to the general laws, such as the laws on minor protection, unfair competition, criminal laws, etc.

1.9 Which (SMP) markets have been notified to the European Commission under Article 7 of the Framework Directive?

Germany, in general, has completed the required market analysis in accordance with the market recommendations issued by the EU Commission in 2003. Recently, BNetzA has started to conduct an (updated) market analysis in accordance with the EU Commission's revised market recommendations as of 17 December 2007 (2007/879/EC) according to which only 7 instead of the previous 18 markets shall be subject to regulatory control.

In line with the Commission Staff Working Dokument SEC (2007) 1483 final, BNetzA has confirmed that any remedies imposed on markets in line with the 2003 recommendation shall be explicitly revised in order to determine whether any remedies imposed in the past shall be upheld or revoked.

In consequence, BNetzA has determined that the previous markets No. 3 and 5 shall not be subject to regulatory control anymore. The new market No. 1 (previously No. 1 and 2) will, however, remain subject to regulatory control and Deutsche Telekom will thus remain subject to an ex-ante rate control.

Similarly, BNetzA has determined for the new market No 7 (previous market No. 16) that all four German mobile network operators plus the MVNO Vistra are regarded as SMP operators. They are currently subject to an ex-ante rate regulation in regard to voice call termination while on the market for access and call origination (previous market 15) they are not regarded as having SMP. In respect to international roaming (previous market No. 17), the market analysis and notifications were postponed since the EU had dealt with mobile roaming charges directly through an ordinance.

Effective competition, according to BNetzA, already existed on the (previous) markets No. 4 and No. 6 (international telephone services at a fixed location for residential and non-residential customers). This should be confirmed by BNetzA under a new rule taking into account the new market recommendations.

A national consultation is currently conducted in respect to a possible definition of regional sub-markets for wholesale broadband access/bitstream access. Until now, BNetzA has only defined national markets. In regard to the market for fixed call termination (previous market No. 9), BNetzA initially notified Deutsche Telekom as the only SMP operator. Upon concerns raised by the EU Commission, BNetzA finally identified all alternative fixed network operators and Kabel Deutschland as having SMP in their network. This will probably be confirmed in respect to the new market recommendations.

As regards broadcasting transmission services (previous market No. 18), BNetzA found that the major cable network operators hold significant market power (Iesy Hessen, Ish NRW - now jointly Unity Media, Kabel Baden-Württemberg, Kabel Deutschland).

In respect to the further markets pursuant to the previous market recommendation, Deutsche Telekom and its affiliates are still considered to have SMP.

2 Licensing

- 2.1 If a licence or other authorisation is required to install or operate electronic communications networks or provide services over them, please briefly describe the process and timescales.

Authorisation (general or individual) is only required to use frequency spectrum (see section 9 below) and regarding the use of public ways. In general, BNetzA must decide within a 6-weeks period after having received an application.

- 2.2 What other requirements, permits or approvals must be met or obtained before networks may be installed or operated and services provided?

Besides a spectrum allocation, a site approval for operating radio equipment (if not low radiation) and an authorisation by the planning authorisations may be required.

- 2.3 May licences or other authorisations be transferred and if so under what conditions?

Spectrum may be transferred as set out below question 9.4. Numbers may only be transferred to affiliates and/or legal successors (requiring BNetzA's consent). Rights of way may not be transferred.

- 2.4 What is the usual or typical stated duration of licences or other authorisations?

Only individual spectrum allocations are limited in time. The duration is determined by BNetzA prior to the allocation and usually ranges between 10 and 20 years.

3 Public and Private Works

- 3.1 Are there specific legal or administrative provisions dealing with access to public and private land in order to install telecommunications infrastructure?

BNetzA shall transfer upon written application to public telecommunications network operators a right of use of public trafficways (public ways, squares, bridges, public waters) free of charge for telecommunications lines serving public services. Where such use is not possible or only at disproportionately high expenses, the operator shall have a right of shared use of other installations already existing where this shared use is economically reasonable and no major additional construction work is needed.

In regard to private property, the owner has to accept the installation, operation or renewal of telecommunications lines on his property insofar as (1) on his property, a line or instalment that is secured by a right is used also for a telecommunications line and the usability of the property is not thereby additionally restricted on a lasting basis or (2) the property is not, or is not significantly, affected by such use. A property owner having to acquiesce in such use may claim appropriate pecuniary compensation of the operator of the telecommunications line or the owner of the network if the use of his property or the income from it is affected beyond what is reasonable. A one-time compensation may be claimed, provided there were no lines hitherto that could be used for telecommunications purposes.

- 3.2 Do any specific rules exist which assist in securing or enforcing rights of way over public or private land, for the installation of network infrastructure?

Rights over access to public and private land can be enforced at the courts, according to the general rules. Thus the civil or the administrative courts may have jurisdiction.

- 3.3 Is there a specific planning or zoning regime that applies to the installation of network infrastructure?

There is no specific planning or zoning regime in regard to the installation of network infrastructure issued by BNetzA.

- 3.4 Are there any rules requiring established operators to share their infrastructure, e.g. masts, sites, ducts or cables?

BNetzA shall impose an obligation on SMP operators to share infrastructure, including building, duct and mast sharing.

Remedy orders by BNetzA specify such obligation. The current remedy regarding (the previous) market No. 11 imposes an obligation on Deutsche Telekom to make ducts available for use by alternative operators.

4 Access and Interconnection

- 4.1 Is network-to-network interconnection and access mandated, and what are the criteria for qualifying for the benefits of interconnection?

Every public telecommunications network operator shall, upon request, undertake to make an interconnection offer to other public telecommunications network operators.

BNetzA shall, in general, impose access obligations on SMP operators which include the granting fully unbundled access to the local loop, interconnection, open access to technical interfaces, key technologies and the provision of co-location and other forms of facility sharing.

In exceptional cases, BNetzA may impose such obligation on non-SMP operators which control access to end-users in order to secure user communication and end to end connectivity.

BNetzA requires the SMP operator to publish a reference offer which sets out the specifics of the access granted.

- 4.2 How are interconnection or access disputes resolved? Does the national regulatory have jurisdiction to adjudicate and impose a legally binding solution?

If the conclusion of an access agreement (incl. an interconnection agreement) fails and provided that one of the parties is required to grant access, both parties are entitled to apply to BNetzA, which will order access, in principle within 10 weeks.

- 4.3 Are charges for interconnection and/or network access subject to price or cost regulation and, if so, how?

BNetzA has imposed an ex-ante price control on SMP operators for, inter alia, interconnection and unbundled access to the local loop.

Prices are approved by BNetzA on the basis of the costs of efficient service provision which are derived from the long run incremental cost of providing the service and appropriate mark-up for volume-

neutral common cost, inclusive of a reasonable return on capital employed, as far as these costs are required to provide the service. International benchmarking may be taken into account.

4.4 In the local loop are existing owners of access infrastructure required to unbundle their facilities and if so, on what terms or regulatory controls?

BNetzA has imposed on Deutsche Telekom the obligation to offer fully unbundled access to the local loop, shared access and access to necessary co-location facilities.

In addition, Deutsche Telekom is required to publish respective reference offers setting out the specifics. Currently, such reference offers are either disputed or still subject to consultation procedures.

BNetzA in its current (2nd) review of (previous) market No. 11 and corresponding remedies ordered on Deutsche Telekom the obligation to grant access to certain ducts where no free ducts are available, access shall be granted to the black cable (copper or optical). Thus, Deutsche Telekom's competitors shall be enabled to access Deutsche Telekom's NGN optical fibre network.

The wholesale rates charged by Deutsche Telekom for the grant of access are subject to an ex-ante price regulation.

4.5 How are existing interconnection and access regulatory conditions to be applied to new network technologies such as so-called next generation networks or IP-based networks?

Currently, the provisions regarding interconnection between and access to PSTN apply to IP-based networks as well. Accordingly, IP-based network operators receive termination charges identical with those of the PSTN. In fact, the originating network currently does not obtain any information on whether the traffic is terminated in a PSTN, in a managed NGN or the Internet.

BNetzA is aware that the regulatory framework needs to deal specifically with All-IP-networks and has set up a respective working group. In February 2008 BNetzA has published "Cornerstones" of an interconnection regime for All-IP networks which takes into consideration the quantity and geographic locations of PoIs, quality of services aspects, pricing and billing.

5 Price and Consumer Regulation

5.1 Are (i) retail or (ii) wholesale price controls imposed on any operator in relation to fixed, mobile, or other services?

Retail Prices

BNetzA may make retail rates charged by SMP undertakings subject to ex-ante control only where facts warrant the assumption that obligations imposed in connection with access issues or with carrier selection and carrier pre-selection would not be sufficient. Currently, no ex-ante approval obligation is imposed on retail prices.

Retail rates by SMP operators may not be abusive. BNetzA has the authority to declare retail rates that it deems abusive void and to request an adjustment or determine appropriate rates itself.

Wholesale Prices

BNetzA shall mandate that rates charged by an SMP operator (fixed or mobile) for access services and /or facilities are subject to ex-ante control. BNetzA may derogate from this requirement if the SMP operator does not also, at the same time, has SMP in the

corresponding retail market ("double dominance test") or BNetzA deems ex-post control as sufficient to achieve the regulatory aims. Other rates charged by an SMP operator are subject to ex-post control unless BNetzA explicitly orders an ex-ante approval obligation. Ex-ante price control currently applies to markets 8-10 (including interconnection, unbundled access to the local loop) and 16.

Where BNetzA has imposed access obligations on a non-SMP operator the respective rates are subject to ex-post control.

Where rates are subject to ex-post control, they shall be submitted to BNetzA two months prior to their planned effective date to allow BNetzA to review them.

5.2 Is the provision of electronic communications services to consumers subject to any special rules and if so, in what principal respects?

A service provider may use a subscriber's telephone number or postal address, (including e-mail), which he has lawfully obtained, for the transmission of text or picture messages to a telephone, mail or e-mail address for subscriber advisory purposes, for promoting his own offerings and for market research, provided that the customer, when the telephone number, address or e-mail is first collected or stored and on each occasion a message is sent to the customer, is given information that he may object at any time, in writing or electronically to the dispatch of further messages and further provided, that the customer has not objected to such messages.

5.3 Are there any rules governing use and retention of customer call information?

Germany has implemented the EU Directive mandating data retention (2006/24/EC of 15 March 2006). Accordingly, as of 1 January 2008, customer call information as well as the other categories of data set out in the directive shall be retained for a period of 6 months.

6 Numbering

6.1 How are telephone numbers and network identifying codes allocated and by whom?

Telephone numbers of all number ranges are allocated by BNetzA upon application to network operators or service providers. Network identifying codes, i.e. carrier codes, are made available by BNetzA to network operators upon application, provided they demonstrate that they operate a telecommunications network.

VoIP service providers are entitled to obtain ranges of geographical numbers for allocation to their customers, provided, that the customers demonstrate that they have their business location or residence within the area code for which they request a geographical number.

6.2 Are there any special rules which govern the use of telephone numbers?

Currently, numbers are allocated on the basis of various (provisional) allocation rules issued by BNetzA that set out the prerequisites for a number allocation and the permitted use of the various number ranges.

A Telecommunications Numbering Ordinance, which is currently in draft, will in the future provide for general rules and regulations of number allocations and permitted use of numbers.

6.3 How are telephone numbers made available for network use and how are such numbers activated for use by customers?

Geographical numbers will be allocated to a network operator and activated and made available by such network operator for use by end-users. Other number ranges, such as numbers for premium rate, mass traffic, and inquiry services can be applied for and allocated to the user directly by BNetzA. In this case, the user will enter into an agreement with a network operator to ensure the activation of the number and that it can be reached from third party networks on the basis of existing interconnection agreements.

6.4 What are the basic rules applicable to the 'porting' (i.e. transfer) of telephone numbers (fixed and mobile)?

The Telecoms Act mandates number portability for all undertakings providing publicly available telecommunications services and assigning telephone numbers to end users, which includes all fixed and mobile network operators as well as VoIP service providers that do not only provide services for closed user groups.

This obligation has been effectively implemented by all obliged undertakings.

7 Fees

7.1 What fees and levies are payable and to whom with respect to the grant of a licence or other authorisation for the installation or use of network infrastructure or the provision of communication services?

Fees are due for the allocation of frequencies, numbers and the grant of rights of way in accordance with respective ordinances.

In addition, a general charge to be paid by all telecommunications service providers (calculated on the basis of the companies' revenues) to cover BNetzA cost is planned.

8 Submarine Cables

8.1 What are the main rules governing the bringing into Germany's territorial waters, and the landing, of submarine cables? Are there any special authorisations required or fees to be paid with respect to submarine cables?

No specific rules and regulations apply to submarine cables within Germany's territory. The general provisions of coastal protection, environmental and waterway laws apply and may require authorisations by the competent (local) authorities.

9 Radio Frequency Spectrum

9.1 Is the use of radio frequency spectrum specifically regulated and if so, by which authority?

The use of radio frequency spectrum is regulated by BNetzA, which allocates frequencies in general or individually.

9.2 In the grant of spectrum rights are distinctions made between mobile, fixed and satellite usage?

The same rules and regulations apply in regard to the allocation of

spectrum rights for mobile, fixed and satellite usage.

9.3 How is the installation of satellite earth stations and their use for up-linking and down-linking regulated?

No specific rules and regulations apply. The service provider has to apply for the allocation of respective spectrum with BNetzA, which will be assigned individually within the internationally coordinated spectrum range.

9.4 How is the use of radio frequency spectrum authorised in Germany? Do the procedures available include spectrum auctions and comparative selection of candidates?

Frequencies are typically assigned ex officio by BNetzA as general assignments for the use of particular frequencies by the general public or a group of persons.

Where general assignment is not possible, spectrum is assigned individually upon application.

In case there is not sufficient spectrum available for assignment, BNetzA may order that an assignment be preceded by an award procedure. As a rule, the award procedures shall be an auction and only where an auction is likely not to secure the regulatory aims may BNetzA invite tenders (beauty contest).

9.5 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Besides the general or individual frequency assignment, no further licence is required.

9.6 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

For the individual assignment of spectrum a one-time fee is payable as set forth in the Frequency Fee Ordinance (*Frequenzgebührenverordnung*) as well as an annual fee calculated in accordance with the Frequency Usage Contribution Ordinance (*Frequenznutzungsbeitragsverordnung*).

9.7 Are spectrum licences able to be traded or sub-licensed and if so on what conditions?

BNetzA is authorised to release frequency bands for trading and stipulate the framework conditions of and the procedure for trading. However, until today, BNetzA has not taken any initiative in this respect.

The Telecoms Act, however, permits - upon BNetzA's consent - the transfer of frequency usage rights by singular or universal succession, e.g. as part of corporate restructurings.

10 Interception

10.1 What are the essential rules applicable to the interception of messages, traffic data and other call records? Which rules apply to the retention of such call data, and over which period(s)?

Pursuant to the Telecoms Act and the Telecommunications Interception Ordinance (*Telekommunikationsüberwachungsverordnung*; TKÜV), operators of telecommunications systems for the

public are required to provide the configuration of technical equipment necessary to implement measures for the interception of telecommunications. Exceptions apply in particular to operators with a small number of end users. Technical details are defined in a technical directive.

The retention of call data is discussed in question 5.3 above.

11 The Internet

11.1 Are services over the Internet regulated in any different way to other electronic communications services? Which rules, if any, govern access to the Internet at a wholesale and/or retail level?

There are no specific regulations dealing with the Internet; in particular, there are no specific provisions dealing with access to the Internet or network neutrality.

11.2 Are there any rules to prevent, restrict or otherwise govern Internet or email communications, in particular, marketing and advertising communications?

The same provisions as set out above under question 5.2 apply.

12 USO

12.1 Is there a concept of universal service obligation; if so how is this defined, regulated and funded?

The Telecoms Act defines a minimum set of publicly available services of specified quality to which every end-user shall have access at an affordable price. Where BNetzA finds that universal services are not adequately or appropriately provided, it may oblige one or more undertakings to provide such services. This concept includes a compensation of the obliged undertakings paid out of the universal service contribution to be paid by other market participants.

Until today, BNetzA has not imposed any universal service obligations on any undertaking.

13 Foreign Ownership Rules

13.1 Are there any rules restricting direct or indirect foreign ownership interests in electronic communications companies whether in fixed, mobile, satellite or other wireless operations?

No rules restrict direct or indirect foreign ownership interest in electronic communications companies in Germany.

14 Future Plans

14.1 Are there any imminent and significant changes to the legal and regulatory regime for electronic communications?

It remains to be seen whether the current dispute between Germany and the EU Commission regarding the regulation of NGNs will result in changes to the Telecoms Act.

In general, it can be assumed that those markets which have been taken out of the list of recommended markets by the EU Commission in 2007 will not be subject to regulatory control by BNetzA in the future. Respective regulatory decisions can be expected.



Dr Dirk Stolz

Heuking Kühn Lüer Wojtek
Magnusstrasse 13,
50672, Cologne
Germany

Tel: +49 221 2052 426
Fax: +49 221 2052 1
Email: d.stolz@heuking.de
URL: www.heuking.de

Dr Dirk Stolz is partner of Heuking Kühn Lüer Wojtek, one of the largest German commercial law firms, where he is in charge of the firm's telecommunications practice. A qualified German lawyer with work experience in Hong Kong and Tokyo, Dirk Stolz holds a PhD (Dr) in international comparative public procurement law. Dirk Stolz advises clients on all regulatory and commercial aspects of communications law, including data protection and copyright related matter. In addition, he is regularly involved in telecommunications and technology related transactions, both, within Germany and cross-border. He regularly represents leading satellite, wireless and mobile service providers, including wireless content providers as well as fixed network operators, PRS providers and private equity investors in the sector.

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