

# ICLG

The International Comparative Legal Guide to:

## Telecoms, Media & Internet Laws & Regulations 2015

**8th Edition**

A practical cross-border insight into telecoms, media and internet laws and regulations

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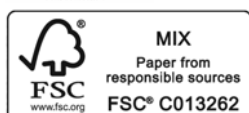
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## EDITORIAL

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Welcome to the eighth edition of *The International Comparative Legal Guide to: Telecoms, Media & Internet Laws & Regulations*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of telecoms, media and internet laws and regulations.

It is divided into two main sections:

Two general chapters. These chapters provide overviews of the EU regulatory framework and of the different approaches and attitudes towards mobile network consolidation in the United States and Europe.

Country question and answer chapters. These provide a broad overview of common issues in telecoms, media and internet laws and regulations in 34 jurisdictions.

All chapters are written by leading telecoms, media and internet lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Rob Bratby of Olswang LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at [www.iclg.co.uk](http://www.iclg.co.uk).

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# Germany

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## 1 Overview

**1.1 Please describe the: (a) telecoms; (b) audio-visual media distribution; and (c) internet infrastructure sectors in Germany, in particular by reference to each sector's: (i) importance (e.g. measured by annual revenue); (ii) 3-5 most important companies; (iii) whether they have been liberalised and are open to competition; and (iv) whether they are open to foreign investment.**

According to the annual report of the German Federal Network Agency, BNetzA (*Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen*), the total revenue of the telecoms sector (which includes the internet infrastructure sector) was about EUR 57.4 billion in 2013. With a share of more than 40%, the incumbent Deutsche Telekom still plays a very significant role in the telecoms sector. The strongest competitors of Deutsche Telekom are Vodafone, United Internet, Telefónica Germany, and freenet mobilcom debitel. On 23 July 2013, Telefónica Germany announced the acquisition of E-Plus from its Dutch mother company KPN. The acquisition is subject to regulatory approval. The approval by the European Commission was given under the condition that Drillisch, a smaller mobile operator, is allowed to takeover 20% of the network capacity of Telefónica Germany.

Audio-visual media distribution is also part of the telecoms sector as regards the signal transmission (e.g. cable, satellite, DSL broadband, etc.). The different subsectors are heterogeneous. The private broadcasting sector generates total revenues of about EUR 9.5 billion. The Pay-TV sector has grown from total revenue of EUR 1.84 billion in 2012, to EUR 2.05 billion in 2013 including VoD. VoD and also Blue-Ray sales and rentals are increasing, while DVD sales and rentals are decreasing. The biggest privately owned competitors in the audio-visual media distribution sector are Pro Sieben Sat 1 Media, the RTL Group and Sky Deutschland.

All sectors have been liberalised and are open to foreign investment. However, the EU Directive 2010/13, which has been fully implemented in Germany, aims to promote European programmes.

**1.2 List the most important legislation which applies to the: (a) telecoms; (b) audio-visual media distribution; and (c) internet, sectors in Germany.**

The main law governing the operation of electronic communications networks and the provision of electronic communications services is the Telecoms Act (*Telekommunikationsgesetz*, TKG), which was revised in 2012.

The Telecoms Act constitutes a technology-neutral regulation and also covers signal transmissions and internet (including, but not limited to, internet infrastructure).

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

- numbering (structuring, configuration and administration);
- allocation of numbering space and respective fees;
- technical intercepts; and
- emergency calls.

The allocation of frequency spectrum is governed by the:

- Frequency Ordinance from 31.08.2013 (*Frequenzverordnung*); and
- Frequency Plan (*Frequenzplan*).

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

Audio-visual media services are governed by the Interstate Treaty on Broadcasting (*Rundfunkstaatsvertrag*, RStV), the Interstate Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting and in Telemedia (*Jugendmedienschutz-Staatsvertrag*, JMStV) and the Telemedia Act (*Telemediengesetz*, TMG).

**1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms; (b) audio-visual media distribution; and (c) internet sectors in Germany.**

The competent regulatory authority for the telecoms sector is BNetzA, which has its seat in Bonn. BNetzA is the national regulatory authority regarding telecommunications-related issues like, for example, rates, spectrum allocation and data privacy.

In addition, the Federal Data Protection Officer has authority in telecommunications-related privacy matters.

The Federal Cartel Office (FCO) is responsible for the enforcement of the Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB) and, as such, is responsible for the merger control procedures and the 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. Pursuant to the revised Telecoms Act that entered into force on 10th May 2012, comments of the *European Commission* and the *Body of European Regulators for Electronic Communications*

(BEREC) regarding market regulation have to be accommodated by BNetzA (cooperation and consultation proceedings).

Regarding audio-visual media distributions, state media authorities are also competent supervisory bodies. An important self-regulatory body for the telecoms sector is the German Association for Telecommunications and Media (*Deutscher Verband für Telekommunikation und Medien e.V.*, DVTM), and for the sector of audio-visual media the German Voluntary Self-Regulation of the Movie Industry (*Freiwillige Selbstkontrolle der Filmwirtschaft GmbH*, FSK).

#### 1.4 Are there any restrictions on foreign ownership or investment in the: (a) telecoms; (b) audio-visual media distribution; and (c) internet sectors in Germany?

There are no restrictions on foreign ownership or investment in the telecoms, audio-visual media distribution and the internet sectors in Germany.

## 2 Telecoms

### General

#### 2.1 Is Germany a member of the World Trade Organisation? Has Germany made commitments under the GATS regarding telecommunications and has Germany adopted and implemented the telecoms reference paper?

Germany is a member of the WTO and has made commitments regarding telecommunications under GATS in 1994, together with the then Member States of the European Community (legal predecessor of the European Union), and has also adopted and implemented the telecoms reference paper.

#### 2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

See question 1.2 above.

#### 2.3 Who are the regulatory and competition law authorities in Germany? How are their roles differentiated? Are they independent from the government?

See question 1.3 above.

#### 2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Addressees of orders issued by BNetzA have to file an objection to BNetzA. If BNetzA rules on the objection, the order can be appealed at the Administration Court of Cologne. The bases of this procedure are the German Federal Administrative Procedure Act (*Verwaltungsverfahrensgesetz*, VwVfG) and the Administrative Court Procedures Code (*Verwaltungsgerichtsordnung*, VwGO). The final level of jurisdiction is the German Federal Administrative Court in Leipzig (*Bundesverwaltungsgericht*, BVerwG). Moreover, decisions can (under certain circumstances) be appealed at the German Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) and the European Court of Justice.

## Licences and Authorisations

#### 2.5 What types of general and individual authorisations are used in Germany?

Authorisation (general or individual) is only required to use frequency spectrum (see section 3 below) and regarding the use of public ways. In general, BNetzA must decide within a six-week period after having received an application.

#### 2.6 Please summarise the main requirements of Germany's general authorisation.

General authorisation only applies to the use of spectrum. BNetzA typically assigns *ex officio* frequency spectrum as general authorisation for the use of particular frequencies by the general public or a group of persons defined or capable of being defined by general characteristics.

#### 2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded.

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. The limitation has to take into account the amortisation of investments needed to make use of the assigned frequencies.

Spectrum may be transferred as set out below in question 3.6. Numbers may only be transferred to affiliates and/or legal successors (requiring BNetzA's consent). Rights of way may not be transferred.

## Public and Private Works

#### 2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights 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 traffic ways (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.

Moreover, the revised Telecoms Act obliges corporate bodies under public law to make offers (upon written request) for the shared use of their infrastructure by operators of public telecommunications networks, if the infrastructure can be used to setup or develop Next Generation Networks. The same applies to the shared use of federal roads, federal waterways and railroad infrastructure owned by the Federal Republic of Germany.

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. In addition, one-time compensation may be claimed, provided there were no lines hitherto that could be used for telecommunications purposes.

The revised Telecoms Act also authorises BNetzA to order the shared use of in-house cables and ducts at a reasonable charge to be determined by BNetzA.

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

## Access and Interconnection

### 2.9 How is network-to-network interconnection and access mandated?

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 of 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. Due to the revised Telecoms Act, BNetzA is also authorised to impose access obligations in regard to inactive network components such as black fibre and ducts.

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.

The issue of the “last mile” has been addressed by the obligation to share (if imposed by BNetzA). Such obligation can be imposed where a multiplication of infrastructure would be economically inefficient or impossible.

### 2.10 How are interconnection or access disputes resolved?

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.

### 2.11 Which operators are required to publish their standard interconnection contracts and/or prices?

BNetzA requires the SMP operators to publish a reference offer which sets out the specifics of the access granted. Accordingly, Deutsche Telekom has published a reference interconnection offer and prices.

### 2.12 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

BNetzA has imposed *ex ante* price control obligations on Deutsche Telekom in regard to the markets 2-6 and the mobile network operators in regard to their voice terminations charges (market 7).

In addition, alternative operators of customer access networks are subject to an *ex ante* rate regulation.

All other SMP operators are only subject to an *ex post* rate regulation. BNetzA may investigate these rates *ex officio* and – if they do not match the actual costs of the provision of the service (plus a reasonable margin) – BNetzA may declare them void, request a modification or determine the reasonable rates.

### 2.13 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

Operators, currently, are not subject to accounting, functional or legal separation. However, the revised Telecoms Act authorises BNetzA, under certain conditions, to impose functional separation on vertical integrated undertakings in regard to access services. Such obligation can be imposed in the case BNetzA comes to the conclusion that there is a lack of effective competition or even market failure on markets of access products. Affected undertakings would have to offer their products to all competitors and even captive undertakings under the very same conditions.

### 2.14 Are owners of existing copper local loop access infrastructure required to unbundle their facilities and if so, on what terms and subject to what regulatory controls? Are cable TV operators also so required?

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. The rates are subject to *ex ante* price control. In addition, Deutsche Telekom has been ordered to grant access to certain ducts where no free ducts are available and its black fibre (copper and optical) between the mainframe and the street cabinet. Moreover, due to a remedy order issued in late 2010, Deutsche Telekom has to install distribution frames past the MDF in specific rural areas for use by alternative operators.

Deutsche Telekom is required to publish respective reference offers setting out the specifics.

Cable TV operators are not subject to grant unbundled access.

### 2.15 How are existing interconnection and access regulatory conditions to be applied to next-generation (IP-based) networks? Are there any regulations or proposals for regulations relating to next-generation access (fibre to the home, or fibre to the cabinet)? Are any ‘regulatory holidays’ or other incentives to build fibre access networks proposed? Are there any requirements to share passive infrastructure such as ducts or poles?

The provisions regarding interconnection between and access to PSTN apply to IP-based networks as well. At the moment, IP-based network operators receive termination charges identical with those of the PSTN. However, the revised Telecoms Act contains the aim to accelerate the development of area-wide NGN infrastructure. Thus, price regulation has to take into account the risk of investments in NGN infrastructure. Although the aim is to establish cost-efficient NGN services to the public on a mid-term perspective, initially it might lead to higher access costs for competitors of Deutsche Telekom.

Regarding the requirements to share passive infrastructure, see questions 2.8 and 2.9 above.

In August 2013 BNetzA has decided to implement the new “Vector” technology for VDSL. This technology makes it necessary to give a bundled access to one operator to all copper twin wires in one street cabinet. Thus it is now possible for Deutsche Telekom to deny the access to the last mile under certain conditions, in order to

allow Deutsche Telekom or another operator to use Vectoring. In July 2014 BNetzA has made another important decision regarding NGN: the incumbent Deutsche Telekom is compelled to build new and more street cabinets closer to the customers, so that a minimum of 30Mbit/s could be realised (instead of the former minimum of 1 Mbit/s).

According to another decision of BNetzA the frequency range of 900 MHz and 1,800 MHz will be available to mobile broadband utilisation from January 2017 onwards.

## Price and Consumer Regulation

### 2.16 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

BNetzA does not impose any *ex ante* price control on any operator or service provider anymore.

BNetzA, however, has the authority to declare retail rates that it deems abusive or void and to request an adjustment or determine appropriate rates itself.

Pursuant to Sec. 66d of the Telecoms Act, since 2010, price caps apply to premium services and shared cost services.

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

Besides the rules regarding unsolicited electronic communication, the general rules authorising a consumer to withdraw from a contract concluded by electronic means, specific provisions in the Telecoms Act deal with the provision of premium-rate telephone services, operator services, waiting loops and alike. They provide, *inter alia*, for details regarding the price communication in advertisements and proper information of the terms and conditions, in particular, in case of recurring charges, announcement of rates prior to the commencement of a telephone service, maximum charges and the interruption of premium rate services after a maximum of one hour.

## Numbering

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

The 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.

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.

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

The allocation of numbers is subject to the general provisions of the Telecoms Act and the Telecommunications Numbering Ordinance (*Telekommunikations-Nummerierungsverordnung*). Further details regarding the permitted use and allocation procedures are set out in specific deeds issued by BNetzA in regard to the various numbering ranges.

### 2.20 Are there any obligations requiring number portability?

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. In the past, the porting to another telecommunications service provider or in case of moving within the same local loop was often accompanied by hindrances, especially in regard to interruption of service. Thus, the revised Telecoms Act states that the porting to another telecommunications service provider shall be conducted without interruption, meaning that the interruption of service shall not last more than one day.

Due to a variety of complaints, BNetzA has issued administrative fines against 1&1, Vodafone and O2 because of the interruption of service during the porting to another telecommunications service provider.

## 3 Radio Spectrum

### 3.1 What authority regulates spectrum use?

The use of radio frequency spectrum is regulated by the Telecoms Act under the authority of BNetzA, which allocates frequency spectrum.

### 3.2 How is the use of radio spectrum authorised in Germany? What procedures are used to allocate spectrum between candidates - i.e. spectrum auctions, comparative 'beauty parades', etc.?

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, frequencies are assigned individually upon application.

As a general rule, frequencies are assigned limited time. The limitation has to take into account the amortisation of investments needed to make use of the assigned frequencies.

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 procedure shall be an auction, and only where an auction is likely not to secure the regulatory aims, may BNetzA invite tenders (beauty parade).

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

Technically, the use of spectrum is never licence-exempt. However, in case that spectrum has been generally allocated for specific purposes, no individual licence is required. Besides the general or

individual frequency assignment, no further licence is required. However, if the transmitted content contains broadcasting in terms of the Interstate Treaty on Broadcasting, a licence for the purpose of providing broadcasting services has to be obtained (see question 5.3).

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

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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*).

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### 3.5 What happens to spectrum licences if there is a change of control of the licensee?

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Any change of control has to be notified to BNetzA. In general, the change of control does not affect the spectrum licence. However, BNetzA is entitled to revoke the spectrum licence, among other things, in case that a change of control may result in a distortion of competition on the relevant market.

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### 3.6 Are spectrum licences able to be assigned, traded or sub-licensed and if so on what conditions?

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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 assignment of frequency usage rights by singular or universal succession, e.g. as part of corporate restructurings.

## 4 Cyber-security, Interception, Encryption and Data Retention

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### 4.1 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

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Due to the federal system and differing competences, competent authorities obtain access to private (tele-)communications on different legal grounds.

Law enforcement authorities can obtain access to private communications due to Secs. 100a and 100b of the Code of Criminal Procedure (*Strafprozessordnung*) in the case of a reasonable suspicion of a crime listed in the catalogue of Sec. 100a para. 2 of the Code of Criminal Procedure. Access can be obtained to the communications of the suspect and its contact person(s). A court-order is required, only in the case of exigent circumstances; access can be obtained without a prior court-order (subsequent order required). By annex competence, source telecommunications surveillance can also be obtained on the aforementioned legal grounds. Persons concerned have to be informed about the surveillance once it has ended unless such information would endanger the purpose of the surveillance. Data unnecessary for law enforcement has to be deleted.

Intelligence services like, e.g. the German intelligence service (*Bundesnachrichtendienst*) or the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*) can obtain

access to private communication due to Secs. 3, 5 and 8 of the Act concerning Article 10 (*Artikel 10-Gesetz*) in the case of a reasonable suspicion of (the preparation) of a crime listed in the catalogue of Sec. 3 para. 1 of the Act concerning Article 10. Permission for such surveillance is given by the competent Supreme State Authority or Federal Minister.

Due to Secs. 23a to 23c and 23e of the Customs Investigation Service Act (*Zollfahndungsdienstgesetz*), the Customs Criminal Investigation Office (*Zollkriminalamt*) can obtain access to private communication in the case of a reasonable suspicion of (the preparation) of a crime listed in the catalogue of Sec. 23a of the Customs Investigation Service Act. A court-order by the Regional Court of Cologne (*Landgericht Köln*) is required only in the case of exigent circumstances.

Similar provisions regarding surveillance by the German Federal Office of Criminal Investigation (*Bundeskriminalamt*) and the state police authorities (*Polizeibehörden*) apply regarding crime prevention. Relevant legal frameworks are set out in the Federal Criminal Police Office Act (*Bundeskriminalamtgesetz*) and the state police laws.

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### 4.2 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

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Telecommunications operators providing telecommunications services are obliged to provide for the technical systems to allow call interception. Details are regulated in the Telecommunications Interception Ordinance (*Telekommunikationsüberwachungsverordnung*, TKÜV) and a technical directive. Exceptions apply to operators with only a small number of end customers. Currently, operators are required to maintain the necessary technical equipment for interception at their own costs. However, the legality of the cost bearing obligation is subject to constitutional concerns. In May 2009, the Federal Constitutional Court rejected a judicial review as inadmissible. A substantive decision on this by the Federal Constitutional Court is expected in the near future. The Telecommunications Interception Ordinance covers any forms of telecommunications including traditional telephone calls, VoIP calls, emails and SMS.

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### 4.3 How does the state intercept communications for a particular individual?

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Due to the Telecommunications Interception Ordinance, operators providing telecommunications services have to transmit the intercept including the relevant data to the competent authority. Operators must configure their interception equipment in such a way that it can implement a judicial order (see question 4.1 above) without delay (the same applies if the competent authority requires that an interception measure be switched off prematurely). The intercept itself is made by the operators and not by the competent authorities.

Source telecommunications surveillance is implemented by the competent authorities themselves, e.g. by installing so-called Trojan horses on the target’s computer.

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### 4.4 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

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There is no provision dealing with a duty to provide encryption keys to the state.



#### 4.5 What call data are telecoms or internet infrastructure operators obliged to retain and for how long?

On 8 April 2014 the European Court of Justice declared the EU directive on data storage from 2006 null and void. The German act which should implement the rules of the EU directive on data storage in the German law was declared null and void by the Federal Constitutional Court in March 2010. Thus, currently, no obligation to retain traffic data applies to telecommunications service providers.

Both courts did not hold the obligation of data retention as unconstitutional *per se*, so it could be possible to create a data storage act in conformity with the fundamental right of the German constitution and the EU law. But as far as can be seen, neither the German nor the EU legislator has started a new attempt.

## 5 Distribution of Audio-Visual Media

### 5.1 How is the distribution of audio-visual media regulated in Germany?

Audio-visual media services are governed by the Interstate Treaty on Broadcasting and the Interstate Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting and in Telemedia; see question 1.2. Also, the Directive 2010/13/EU (*Audiovisual Media Services Directive*) applies.

### 5.2 Is there a distinction between the linear and non-linear content and/or content distributed over different platforms?

Since the regulation is technology-neutral, in general, there are no distinctions regarding the content of distributed audio-visual media. However, distributions over different platforms can lead to different obligations regarding consumer protection (e.g. information obligations, right of withdrawal).

### 5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

In general, only providers of broadcasting services have to obtain a licence due to the Interstate Treaty on Broadcasting. Broadcasting in these terms means a linear information and communication service providing the transmission of offers for the general public for simultaneous reception in moving images or sound along a schedule, using electromagnetic oscillations.

However, the Interstate Treaty on Broadcasting makes certain exemptions. Broadcasting does not mean offers: (1) which are offered to fewer than 500 potential users for simultaneous reception in any case; (2) which are destined for the immediate reproduction from reception equipment storage media; (3) which exclusively serve personal or family purposes; (4) which are not journalistic edited offers; or (5) which consist of programmes which are each activated against individual payment. Providers of radio services distributed exclusively on the internet do not require a licence either, but instead have to notify the competent state media authority.

In applying for a licence, distributors of audio-visual media have to warrant that in providing broadcasting, they will respect the legal provisions and any administrative acts passed thereon. The most important legal provisions are set out in questions 1.2 and 5.1 above.

### 5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Licences are personal and non-assignable. In the event of an asset deal between the holder of a licence and a buyer, the buyer has to apply for a licence. In general, if the requirements of the Interstate Treaty on Broadcasting are met, the competent regulatory authority (*Landesmedienanstalt*) has to issue such licence.

Any forthcoming change of control has to be announced to the competent regulatory authority in writing. In the case the change of control is not in conflict with the requirements of a licence, the competent regulatory authority has to acknowledge the innocuousness of the change of control. Otherwise, the competent regulatory authority has to revoke the licence in the event of the change of control. The *Kommission zur Ermittlung der Konzentration im Medienbereich* (KEK) has issued an ordinance dealing with the innocuousness of minor changes of control which have yet to be announced to the competent regulatory authority.

## 6 Internet Infrastructure

### 6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Even though case law is not entirely consistent, in general, telecommunications providers and internet access providers are not liable for illegal content carried over their networks. Some Regional Courts and even Higher Regional Courts have, however, imposed various obligations on access providers like internet cafés or hotels. Obligations varied from port blocking to imposing obligations on the customers not to commit any copyright infringements. In a recent judgment a Regional Court has decided that the operator of a hotel/holiday apartment is not liable for the illegal downloads of the hotel/apartment guest, if he has prohibited illegal activity or just permitted limited use (the use of email for example). It is expected that in the near future, the Federal Court of Justice will deal with this matter.

### 6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Telecommunications operators and internet services providers are under no obligation to disconnect customers who infringe third party right. They are required to provide customer details upon request by public prosecutors. In addition, copyright owners can obtain a court order requiring the operator/service provider to disclose customer details (e.g. IP addresses) if they demonstrate to the court that the infringing customer was acting for commercial purposes. Without such court order, operators and service providers must not disclose personal details of customers to copyright owners. Recently, the Higher Regional Court of Düsseldorf ruled that there is no general obligation of an internet service provider to collect data like IP addresses in order to be able to provide information to copyright owners.

### 6.3 Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks? Are there any 'net neutrality' requirements?

Since the revised Telecoms Act entered into force, net neutrality has become one of the main aims of regulation. However, at the moment, telecommunications network providers are only obliged to inform consumers in detail about the most important performance data including limitations of use of services.

On EU-level, a directive concerning the European single market for electronic communications, which also deals with net neutrality, was accepted by the EU-Parliament in April 2014 but has to be adopted by Council and Commission as well. The German Federal Government, which first presented a draft of a net neutrality ordinance in 2013, now has declared to wait until the new EU-directive comes into force.

It is common that mobile network operators impose speed limits once a certain amount of internet traffic has been reached. In early 2013, incumbent Deutsche Telekom also announced plans to impose speed limits on internet access via DSL. As a consequence of the vast protests by consumers, as well as consumer protection associations, Deutsche Telekom withdrew its original plans. After a lawsuit of the Consumer Assistance Office of North Rhine-

Westphalia against Deutsche Telekom, the Regional Court of Cologne has declared the respective terms and conditions of Deutsche Telekom legally null and void. Deutsche Telekom has accepted the judgment.

### 6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content?

Even though case law is not entirely consistent, in general, telecommunications providers and internet access providers are not liable for illegal content carried over their networks. Some Regional Courts and even Higher Regional Courts have, however, imposed various obligations on access providers like internet cafés or hotels. Obligations varied from port blocking to imposing obligations on the customers not to commit any copyright infringements. It is expected that in the near future the Federal Court of Justice will deal with this matter.

### 6.5 How are 'voice over IP' services regulated?

There is no specific regulation of voice over IP services. As regards the numbering, please see questions 2.18 to 2.20 above.



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