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## The International Comparative Legal Guide to: Telecommunication Laws and Regulations 2011

A practical insight to cross-border  
telecommunication laws and regulations

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# Germany

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## 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. According to the ruling of the ECJ, a provision which is interpreted as granting Deutsche Telekom a regulatory holiday for next generation networks infringes EU law (see question 4.8).

### 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 (*Telekommunikationsgesetz*, TKG).

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

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

The allocation of frequency spectrum is governed by the:

- Frequency Range Allocation Plan Ordinance (*Frequenzbereichszuweisungsplanverordnung*); and
- 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 (*Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen*), 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.

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**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?**

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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.

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**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?**

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The Telecoms Act prohibits the abuse of a telecommunications service or network operator.

In addition, 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.

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

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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 Document 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.

According to BNetzA, all 7 markets pursuant to the 2007 market recommendation lack competition. Deutsche Telekom and its affiliates have SMP on markets 1 - 6. However, in a decision BNetzA determined that, in regard to markets 2 and 3, Deutsche Telekom does not possess SMP anymore in regard to transit

services. In addition all alternative operators of customer access networks have been designated SMP operators. In respect to market 7 all 4 mobile network operators as well as the MVNO Vista have been designated SMP operators.

Markets pursuant to the 2003 recommendation which are not anymore included in the 2007 market recommendation have been and will further be subject to a market analysis. In consequence BNetzA has already withdrawn previous SMP designations for the (previous) markets 3 - 7 of the 2007 market recommendation and respective remedies have been withdrawn.

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## 2 Licensing

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**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, timescales and costs.**

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Authorisation (general or individual) is only required to use frequency spectrum (see section 8 below) and regarding the use of public ways. In general, BNetzA must decide within a 6-week 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?**

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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?**

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Spectrum may be transferred as set out below question 8.7. 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?**

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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.

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## 3 Public and Private Works

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**3.1 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?**

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

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.

### 3.2 Is there a specific planning or zoning regime that applies to the installation of telecommunications infrastructure?

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

### 3.3 Are there any rules requiring established operators to share their infrastructure, e.g. masts, sites, ducts or cables (i.e. dark fibre)? Are there any proposals to mandate 'passive access' to such basic infrastructure?

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 11 imposes an obligation on Deutsche Telekom to make ducts and black fibre available for use by alternative operators. Sharing of other parts of the infrastructure is not mandatory.

## 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.

### 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 any operators 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.

### 4.4 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 those alternative operators of customer access networks who have not agreed on reciprocal interconnection charges with Deutsche Telekom (to the extent they are SMP operators) 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 provision of the service (plus a reasonable margin), BNetzA may declare them void, request a modification or determine the reasonable rates.

### 4.5 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.

### 4.6 How are existing interconnection and access regulatory conditions to be applied to next generation (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.

### 4.7 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.

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

Cable TV operators are not subject to grant unbundled access.

#### 4.8 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?

There are currently no regulations or specific proposals in place relating to next generation access networks. BNetzA has published "Cornerstones on Open Access" that shall be the basis for the future regulation of NGNs.

Currently, pursuant to Sec. 9a Telecoms Act, so-called "New Markets" shall not be subject to regulation unless regulation - as an exception - is required to avoid a disturbance of competition. This provision is interpreted as granting a regulatory holiday to Deutsche Telekom's next generation access network (which predominantly is fibre to the cabinet or fibre to the node). After the European Commission has brought this to the ECJ, the ECJ has ruled that this provision infringes EU regulations. It has to be stated, however, that the provision of Sec. 9a Telecoms Act, has never been applied by BNetzA so far. A current position paper by the competent Federal Ministry for Economics and Technology proposes to delete Sec. 9a Telecoms Act entirely.

### 5 Price and Consumer Regulation

#### 5.1 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.

#### 5.2 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 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 1 hour.

### 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?

The allocation of numbers is subject to the general provisions of the Telecoms Act and the Telecommunications Numbering Ordinance. 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.

#### 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 Submarine Cables

#### 7.1 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.

### 8 Radio Frequency Spectrum

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

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

#### 8.2 How is the use of radio frequency spectrum authorised in Germany? What procedures are used to allocated 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, 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 procedure shall be an auction and only where an auction is likely not to secure the regulatory aims may BNetzA invite tenders (beauty parade).

### 8.3 Are distinctions made between mobile, fixed and satellite usage in the grant of spectrum rights?

Regulation does not differentiate between different types or purposes of spectrum use. However, the different spectrum ranges have been reserved for use for specific types of use.

### 8.4 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.

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

### 8.6 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*).

### 8.7 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.

## 9 Data Retention and Interception

### 9.1 Are operators obliged to retain any call data? If so who is obliged to retain what and for how long? Are there are data protection (privacy rules) applicable specifically to telecommunications?

Implementing the EU Data Retention Directive, the Telecoms Act

required providers of telecommunications services (voice telephony, e-mail, internet access) to retain traffic data specified in the Telecoms Act for a period of 6 months. This provision, however, 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. As the court did not hold the obligation of data retention as unconstitutional *per se*, it can be expected that a data retention requirement will be implemented in a new and amended Telecoms Act in a modified manner.

The secrecy of communications is protected under the Telecoms Act and the Criminal Code. Accordingly, telecommunications service providers are prohibited from disclosing any details relating to communications (including, the numbers, time and content of communications).

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.

### 9.2 Are operators obliged to maintain call interception (wire-tap) capabilities?

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 constitutional concerns. A decision on this is expected by the Federal Constitutional Court.

### 9.3 What is the process for authorities obtaining access to retained call data and/or intercepting calls? Who can obtain access and what controls are in place?

As set out under question 9.1 above, currently no obligation to retain data applies. As regard the request to wire-tapping facilities, only criminal prosecutors may request access to the wire-tapping facilities upon prior approval by the competent court.

## 10 The Internet

### 10.1 Are conveyance 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 (i.e. peering or transit) and/or retail (i.e. broadband access) level? Are internet service providers subject to telecommunications regulation?

There are no specific regulations dealing with the internet. No specific rules exist regarding access to the internet at a wholesale or retail level. Internet access providers and services providers are subject to the regulation under the Telecoms Act as set out above.

**10.2 Is there any immunity (e.g. 'mere conduit' or 'common carrier') defence 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 in general are not liable for illegal content carried over their networks.

**10.3 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.

**10.4 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?**

There are no specific net-neutrality requirements in place. Currently, net-neutrality and different charging or blocking of different types of content is not practiced in Germany. The general rules of the Telecoms Act and the Competition Act which prohibit an abuse of power would apply to SMP operators.

**10.5 How are 'voice over IP' services regulated?**

There is no specific regulation of voice over IP services. As regards the numbering, please see questions 6.1 and 6.4 above.

**10.6 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 9.1 apply.

**11 USO**

**11.1 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.

**12 Foreign Ownership Rules**

**12.1 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.

**13 Future Plans**

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

The competent Federal Ministry for Economics and Technology has published the "Cornerstones for the Amendment of the Telecoms Act - 2010", which sets out the major action points for future changes to the legal and regulatory framework.

Mainly, the amended Telecoms Act will have to implement the new EU regulatory framework ("Better Regulation" and "Citizens' Rights"). This shall, in particular, include the new remedy of "functional separation".

In addition, an amended Telecoms Act will have to take into consideration the ECJ ruling on new markets. The Cornerstones published by the Federal Ministry for Economics and Technology propose to delete all references to "New Markets".

As the previous statutory provisions which attempted to implement the EU Data Retention Directive were held null and void, the legislator will have to provide new draft legislation for such implementation.

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Dirk Stolz advises clients on all regulatory and commercial aspects of communications law, including data protection and copyright related matters. 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, and private equity investors in the sector.

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