

Réponses au questionnaire sur la régulation économique  
*Responses to the questionnaire on economic regulation*

**Allemagne**

**Cour administrative fédérale**

***Germany***

***Federal administrative Court***

# **ECONOMIC SECTORAL REGULATION IN EUROPEAN UNION COUNTRIES**

Statement on behalf of the Federal Administrative Court of Germany

by Carsten HAHN

Judge at the Federal Administrative Court  
6th panel

## **Introduction**

German law does not contain general provisions on economic sectoral regulation. Each relevant sector is regulated under specific laws. Density and design of the regulatory system in the individual sectors vary greatly. Although in the field of network industries a single independent authority, the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (Bundesnetzagentur – BNetzA) has been created, the objectives of regulation as well as the regulatory instruments placed at the BNetzA's disposal are specified in the respective legal framework for each regulated sector individually. Furthermore, not all regulatory decisions of the BNetzA are subject to administrative jurisdiction. In the energy sector, for example, recourse against the BNetzA's regulatory decisions is assigned to the ordinary courts.

The following remarks will focus on the telecommunications sector due to the fact that this sector, displaying a highly differentiated legal framework and a particularly wide range of regulatory decisions, has also been the main sphere of activity of administrative jurisdiction in the field of regulation.

## **I. Scope and purpose of economic sectoral regulation**

1. Economic sectoral regulation mainly focuses on sectors submitted to European Union's secondary legislation (transport, energy, postal activities, electronic communication, audiovisual media). Are other sectors subject to such regulation in your country?

The concept of regulation is not precisely defined. Understood in the broadest sense, as state intervention in market economy processes in order to achieve public service objectives, it may include sectors other than the above-mentioned, such as, inter alia, waste management, public health, higher education or financial markets. These sectors, however, unlike the sectors of network industries (telecommunications, postal services, energy, rail transport), are not subject to regulation by (completely or relatively) independent authorities disposing of specific regulatory instruments aiming at liberalisation and deregulation of markets via non-discriminatory network access and efficient access charges.

2. Is the whole set of European Union' secondary legislation for economic sectoral regulation transposed into national law and/or practically implemented?

As far as can be ascertained, all EU legislative acts regarding regulation of the telecommunications sector acts including the revised EU telecom framework (Directives 2009/136/EC and 2009/140/EC of the European Parliament and of the Council of 25 November 2009) have been transposed into national law.

3. Is economic sectoral regulation only aimed at introducing competition in sectors where there is State monopoly? If not, what are its other purposes (implementing an internal market, defining universal service obligations, consumer protection, etc.)?

As stated above, the regulatory system varies greatly in the individual sectors. Specific objectives of regulation are laid down for each sector in the respective legal framework.

Pursuant to Art. 87f(1) of the Basic Law (Grundgesetz – GG) the Federation shall ensure the availability of adequate and appropriate postal and telecommunications services throughout the federal territory. This guaranteeing mandate entails the state's responsibility to avoid competition-related disadvantages for the supply of basic services. It thus requires a competence to regulation that is not restricted to the aim of enforcing the principle of competition.

In the area of telecommunication the aims of regulation are listed in the Law on Telecommunications (Telekommunikationsgesetz – TKG). According to Paragraph 2(2) of the TKG, entitled „Regulation, objectives and principles“, the objectives of the regulation are as follows:

- protecting the interests of users, particularly consumers, in the telecommunications sector, and telecommunications confidentiality;
- guaranteeing fair competition and promoting sustainable competitive telecommunications markets for telecommunications networks and services together with associated facilities and services in both rural and urban areas;
- promoting the development of the internal market of the European Union;
- guaranteeing the basic provision of telecommunications services at affordable rates throughout the territory (universal service);
- accelerating the expansion of high-performance next generation public telecommunications networks;
- promoting telecommunications services at the level of public institutions;
- guaranteeing an effective use of frequencies free from interference, and taking account of the interests of radiobroadcasts;
- ensuring efficient use of numbering resources;
- protecting the interests of public safety.

4. Is economic sectoral regulation an ex ante control, aimed at defining obligations for companies in the regulated sectors a priori, or an ex post control, aimed at upholding competition provisions in case of infringement ?

This cannot be answered in a general way. The BNetzA is competent to impose ex ante regulatory obligations if certain legal conditions are fulfilled. It is otherwise confined to an ex post control.

According to the regulatory principle laid down in Paragraph 2(3) No. 6 of the TKG, the BNetzA shall impose regulatory obligations ex ante only if there is no effective and sustainable competition, and relax or rescind these obligations as soon as such competition exists.

Price control is the most important area of application of *ex ante* regulation. According to the first sentence of Paragraph 30(1) of the TKG, rates charged by a public telecommunications network operator having significant market power for access services mandated under Paragraph 21 are subject to approval by the Regulatory Authority in accordance with Paragraph 31. Paragraph 31(1) of the TKG provides that the BNetzA is to approve rates either on the basis of the cost of providing an efficient service for each type of service or on the basis of the average price, set by that authority, for a basket of services (Price-Cap-procedure); in specifically justified cases, however, charges can be approved on the basis of other procedures (see Paragraph 31(2) No. 2 of the TKG).

Where rates are only subject to *ex post* regulation, pursuant to Paragraph 38 of the TKG they have to be submitted to the BNetzA two months prior to their planned effective date. The BNetzA shall prohibit introduction of the rates until such time as it has completed its examination, if planned rates would clearly not be compatible with Paragraph 28 (regarding anti-competitive conduct in levying and agreeing rates by an undertaking having significant market power). If the BNetzA becomes aware of facts warranting the assumption that rates for access services provided or facilities made available by undertakings having significant market power are not in compliance with the requirements of Paragraph 28, it shall open an investigation of the rates without undue delay and take a decision within a period of two months of the investigation being opened. Where the BNetzA establishes that rates do not meet the aforementioned requirements, it shall declare the objected rates to be invalid. At the same time, the BNetzA may order the application of rates which meet the requirements of Paragraph 28. If the provider having significant market power subsequently submits his own rates proposals, the BNetzA shall examine, within a period of one month, whether these rates rectify the breaches of the requirements of Paragraph 28 which have been established.

The Federal Administrative Court (Bundesverwaltungsgericht – BVerwG) has interpreted Paragraph 30(1) of the TKG in accordance with EU law. It does not constitute a strictly binding obligation but grants the BNetzA a regulatory dis-

cretion („Regulierungsermessen“) to impose either ex ante price control obligations or to only apply an ex post rate regulation. In this context the BNetzA shall examine whether the strict cost standard regularly applicable in the approval procedure is necessary and appropriate to accomplish the regulatory objectives (see below No 20).

Another area of application of ex ante regulation is the BNetzA's power, under Paragraph 23 of the TKG, to require a public telecommunications network operator having significant market power and subject to an access obligation to publish a reference offer for the access service for which there is general demand. BNetzA shall check and, in the event of failure to comply with the requirements relating to particular conditions, particularly with regard to fairness, reasonableness and timeliness, amend the reference offers submitted. The operator is obliged to include the reference offer in his general terms and conditions.

5. Has the implementation of an economic sectoral regulation prompted the emergence of competition in the relevant sectors? Did new entrants manage to fit in regulated markets? If not, why?

According to a report recently prepared by the European Commission regarding Telecommunication Market and Regulatory Developments in Germany competition in the fixed market was slowly increasing in 2011 with around 100 competing players. The incumbent's market share for fixed access lines was still estimated at 65%. However, the competitors' market share increased by 6.7%. In the fixed broadband market the incumbent still held a share of 45% of fixed broadband lines compared to an EU average of 43%. However its main competitors including cable operators gained a significant share of new fixed broadband customers. In the mobile markets the two largest mobile network operators, which were the first entrants historically, had a stable revenue market share of each around 30%. The remaining market share was divided between the other two mobile network operators and service providers acting as resellers, which had a significant share in the order of 15%.

6. Has the implementation of an economic sectoral regulation directly or indirectly led to the total or partial privatisation of publicly owned companies?

In the telecommunications sector, the privatisation process of the incumbent is well advanced. In 1989 the special trust Deutsche Bundespost was split into three public enterprises, and operational functions were separated from regulatory ones. In 1995, Deutsche Bundespost Telekom, which assumed responsibility for telecommunications, was partly privatised, taking the corporate name Deutsche Telekom (DTAG). According to data published by DTAG in 2013, however, the state continues to hold 31.9 % of capital stock.

7. Which economic sectors would you like to address more specifically in terms of regulation?

In Germany, the issue of identifying sectors for which regulatory action might be needed does not fall within the competence of administrative jurisdiction. Even the Federal Administrative Court has solely judicial functions.

## **II. Organisation of economic sectoral regulation**

8. Is economic sectoral regulation implemented by one or several independent authorities? If so, on what grounds was this choice made and how is this independence guaranteed?

Economic sectoral regulation is implemented by the aforementioned Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (Bundesnetzagentur - BNetzA). The BNetzA is an autonomous higher federal authority within the scope of business of the Federal Ministry of Economics and Energy. It was set up as Regulatory Authority for Telecommunications and Postal Services (Regulierungsbehörde für Telekommunikation und Post - RegTP) in 1996. After assuming additional regulatory responsibilities in the energy sector by the Law on electricity and gas supply (Gesetz über die Elektrizitäts- und Gasversorgung - Energiewirtschaftsgesetz - EnWG) and in the

railway sector by the General Railways Law (Allgemeines Eisenbahngesetz - AEG) the Regulatory Authority was renamed into Bundesnetzagentur in 2005.

9. Are these authorities independent of the regulated economic sectors? If so, how is this independence guaranteed?

As required by Art. 3(2) of Directive 2002/21/EC (Framework Directive) the BNetzA is legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. In particular, there are no organisational links between the BNetzA and the still partly state-owned incumbent (DTAG) or the Federal Ministry of Finance performing the tasks related to ownership.

As the BNetzA is an autonomous higher federal authority within the meaning of Art. 87(3) of the Grundgesetz, it is, as a general rule, subject to legal, technical and administrative supervision by the competent Federal Ministry of Economics and Energy. The BNetzA's complete independence of government and parliamentary control would require a basis in German constitutional law which is missing. The Law on telecommunications, however, contains a set of organisational and procedural rules conferring a certain degree of (relative) independence to the BNetzA.

To begin with, the vast majority of the BNetzA's regulatory decisions are made by its ruling chambers (Beschlusskammern). Pursuant to Paragraph 132 of the TKG, the ruling chambers are composed of one chairman and two assessors. In certain matters regarding, inter alia, market definitions and analyses in the context of regulatory decisions or the issuing of orders requiring frequency assignment to be preceded by award proceedings, the ruling chambers make decisions in the composition of the BNetzA's president as chairman and the two vice-presidents as assessors.

Furthermore, ruling chamber proceedings are similar to judicial proceedings. According to Paragraph 135 of the TKG, the ruling chamber shall decide on the matter in question on the basis of public oral proceedings; subject to the

agreement of the parties concerned, it can take its decision without oral proceedings. It shall give parties concerned the opportunity to state their views. Where appropriate, the ruling chamber may give persons representing business circles affected by the proceedings the opportunity to state their views.

In the event of legal action against a ruling chamber's decision, according to Paragraph 137(2) of the TKG, by way of derogation from general administrative law, there are no preliminary proceedings (*Widerspruchsverfahren*). Actions may be brought directly before the administrative courts.

10. Do these authorities have a regulatory power? If so, is it a general regulatory power for the sectors concerned or a narrower regulatory power limited to certain specific aspects of regulation?

The BNetzA is empowered to issue regulations (*Rechtsverordnungen*) in limited areas if certain procedural requirements are fulfilled.

According to Paragraph 45n(7) of the TKG, the authority to issue a regulation regarding general provisions for the promotion of transparency, the publication of information and additional cost control facilities in the telecommunications market may be delegated to BNetzA by a regulation issued by the Federal Ministry of Economics and Technology. The regulation issued by the BNetzA shall require the agreement of the Federal Ministry of Economics and Technology, the Federal Ministry of the Interior, the Federal Ministry of Justice, the Federal Ministry of Food, Agriculture and Consumer Protection and the Bundestag.

Moreover, pursuant to Paragraphs 142(3) and 143(4) of the TKG, the authority to issue regulations stipulating the details of fees for official acts as well as frequency usage contribution charges may be delegated to the BNetzA by a regulation issued by the Federal Ministry of Economics and Technology. Regulations issued by BNetzA on this basis shall require the agreement of the Federal Ministry of Economics and Technology and the Federal Ministry of Finance.

11. Do these authorities take part in drafting the relevant legislation for regulated sectors, through notice procedures for instance?

There are no specific rules regarding the participation of the BNetzA in the legislative procedures for regulated sectors.

12. Do these authorities have a sanctioning power toward companies of the regulated sectors? If so, what kind of sanctions can they adopt and under which procedure? Do these procedures guarantee compliance with provisions of article 6 § 1 of the CPHRFF?

Distinction should be made between the BNetzA's authority to supervise and its jurisdiction concerning prosecution and sanctioning of regulatory offences.

As regards the authority to supervise, Paragraph 126 of the TKG grants the BNetzA substantial enforcement powers in the event that an undertaking fails to meet its obligations by or under the TKG or under the Regulation (EC) No 717/2007. In the first stage the BNetzA shall require the undertaking to state its views and to take remedial action within a set time limit set. In the second stage, the BNetzA may order such measures as are necessary to secure adherence to the obligations. A reasonable time limit is to be set to allow the undertaking to comply with the measures. To enforce such orders a penalty up to 500,000 euros may be set in accordance with the Law on Administrative Enforcement (Verwaltungsvollstreckungsgesetz – VwVG).

As a last resort, in the case of serious or repeated breaches of obligations by the undertaking or failure to comply with measures for remedial action, the BNetzA may prohibit the undertaking from acting in the capacity of telecommunications network operator or service provider. Where such breach of obligations represents a direct and serious threat to public safety and order or where such neglect of duty will create serious economic or operational problems for other providers or users of telecommunications networks or services, the BNetzA may, in derogation of the above-mentioned procedures, take provisional measures. The BNetzA shall decide, after it has given the undertaking

concerned the opportunity to state its views within a reasonable period, whether the provisional measures will be confirmed, withdrawn or modified.

In addition to the general provision in Paragraph 126, the TKG contains specific provisions granting the BNetzA further enforcement powers in certain areas. For example, according to Paragraph 25 of the TKG, in the event that an access agreement or an agreement on access services and facilities pursuant to Paragraph 25 of the TKG has not been achieved either wholly or in part, and the conditions specified in the TKG for imposing an obligation to grant access are given, the BNetzA shall, after hearing the parties concerned, order access within a period of ten weeks from referral by one of the parties to the intended agreement.

The BNetzA's jurisdiction concerning prosecution and sanctioning of regulatory offences is laid down in Paragraph 149 of the TKG, entitled regulatory fining provisions. This rule contains an extensive list of regulatory offences (Ordnungswidrigkeiten) which may be sanctioned by the imposition of a regulatory fine. Furthermore, the aforementioned provision states that BNetzA shall be the administrative authority within the meaning of Paragraph 36(1) No 1 of the Law on administrative offences (Gesetz über Ordnungswidrigkeiten – OWiG). It follows that BNetzA, pursuant to Paragraph 35(1) of the OWiG, shall have jurisdiction over the prosecution of the regulatory offences in question unless the public prosecution office has such jurisdiction or, in its place, the judge, in respect to specific acts of prosecution.

According to Paragraph 46 of the OWiG, unless otherwise herein provided, the provisions of the general legislation on criminal procedure, particularly those of the Code of Criminal Procedure (Strafprozessordnung – StPO) and the Law on Court Organisation (Gerichtsverfassungsgesetz – GVG) shall determine the procedure for imposing fines. As a general rule, the prosecuting authority shall have the same rights and obligations in the regulatory fining proceedings as the public prosecution office when prosecuting criminal offences. Committal to an institution, apprehension, and provisional detention, confiscation of postal items and telegrams, as well as requests for information regarding matters

that are subject to post and telecommunications secrecy shall be inadmissible. The person concerned shall be given an opportunity to make a statement in response to the accusation (see Paragraph 55(1) of the OWiG). According to Paragraph 67 to 69 of the OWiG the person concerned may file an objection to a regulatory fining notice issued by BNetzA within two weeks after service. BNetzA shall then examine whether to uphold or withdraw the regulatory fining notice. If it does not withdraw the regulatory fining notice, it shall forward the files via the public prosecution office to the Local Court. The subsequent procedure shall be governed, subject to some exceptions, by the provisions of the Code of Criminal Procedure applicable following an admissible objection to a penal order (see Paragraph 71 to 78 of the OWiG).

13. Is every economic sector regulated by a specific authority, or are there some authorities exercising their powers in several sectors?

See question No 8.

14. How are economic sectoral regulatory authorities' competences articulated with those, when appropriate, of a transverse authority in charge of assessing compliance to competition law?

According to Paragraph 2(4) of the TKG, unless this law expressly makes definitive arrangements, the provisions of the Law against restrictions on competition (Gesetz gegen Wettbewerbsbeschränkungen - GWB) remain applicable; the duties and responsibilities of the cartel authorities remain unaffected.

The competent authority for the enforcement of the GWB is the Federal Cartel Office (Bundeskartellamt - BKartA). It is responsible, inter alia, for merger control procedures and general control of anti-competitive practices. Paragraph 123 of the TKG contains provisions on cooperation between the BNetzA and other authorities on the national level, in particular the BKartA. As regards the market definition and analysis to be conducted by the BNetzA pursuant to Paragraph 10 and 11 of the TKG, the BNetzA shall take decisions in agreement with the BKartA. As regards proposed regulatory decisions, the BNetzA

shall consider the view of the BKartA. Vice versa, in cases where the BKartA carries out procedures in the telecommunications sector under certain provisions of the GWB or under Art. 102 TFEU, it shall give the Regulatory Authority the opportunity to state its views. Both authorities shall seek to achieve a uniform interpretation of the TKG.

### **III. Judicial review of economic sectoral regulatory authorities' decisions**

15. Are all economic sectoral regulatory authorities' decisions subject to judicial review? If not, which decisions are not subject to such checks and why?

Constitutional law requires that decisions of the BNetzA are subject to judicial review without any exception. Art. 19(4) of the GG guarantees access to the courts to any person in the event that their rights are violated by public authority.

16. Which system of jurisdiction is competent to verify these decisions? When relevant, is the same system of jurisdiction competent to control the decisions of the authority in charge of assessing compliance to competition law?

According to Paragraph 40(1) of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung – VwGO), recourse to the administrative courts shall be available in all public-law disputes of a non-constitutional nature insofar as the disputes are not explicitly allocated to another court by a federal statute. Unlike Paragraph 75(4) of the EnWG regarding the energy sector, the TKG does not contain such a special allocation. It follows that regulatory decisions of the BNetzA in the telecommunications sector are subject to administrative jurisdiction. Recourse against decisions of the BKartA, on the other hand, is assigned to the ordinary courts pursuant to Paragraph 63(4) of the GWB.

17. Which kind of legal recourse is open against these decisions? What are the relevant legal proceedings in this matter?

Where decisions of the BNetzA are subject to administrative jurisdiction, the general provisions of the VwGO are applicable. The main legal recourses in this context are the rescissory action (Anfechtungsklage) and the enforcement action (Verpflichtungsklage) which, according to Paragraph 42(2) of the VwGO, unless otherwise provided by law, shall only be admissible if the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or omission.

18. Which control does the judge exercise on these decisions? Does he monitor the formal requirements, legal proceedings and/or reasons for these decisions? For which kind of decisions does he have limited control? In contrast, for which kind of decisions does he exercise thorough control?

As a general rule, due to the constitutional right to effective judicial protection (Art. 19(4) of the GG, cited above), the control of the BNetzA's decisions by the administrative courts is not limited. There is an exception in general administrative law, however, insofar as the administrative authority is empowered to act in its discretion. According to Paragraph 114 of the VwGO, the court shall then examine whether the administrative act or the refusal or omission of the administrative act is unlawful because the statutory limits of discretion have been overstepped or discretion has been used in a manner not corresponding to the purpose of the empowerment.

Regarding regulatory decisions in the telecommunications sector, the BVerwG has confirmed that the TKG confers a „regulatory discretion“ („Regulierungsermessen“) upon the BNetzA. According to the established practice of the court, the exercise of the regulatory discretion is defective if the BNetzA has failed to conduct a balancing of interests, to consider all relevant interests, to recognize the significance of the affected interests or if the result of the balancing is disproportionate to the objective importance of individual interests.

Furthermore, the BNetzA has a wide margin of appreciation (Beurteilungsspielraum), as regards the market definition and analysis pursuant to Paragraph 10 and 11 TKG, that is to say, in identifying the relevant product and geographic telecommunications markets warranting regulation, in determining whether there is effective competition in the market being analysed and in designating the undertakings with significant market power in this market. The administrative court's examination is limited in these cases to whether the Authority has complied with the applicable procedural rules, whether its decision is based on a correct comprehension of the applicable legal terms, whether it has investigated the facts of the matter completely and correctly and whether it has complied in its assessment with generally accepted appraisal standards including not acting arbitrarily.

In addition, following a ruling by the Court of Justice of the European Union (Case C-55/06 Arcor AG & Co. KG [2008] ECR I 2931), the BVerwG has decided that the BNetzA enjoys a margin of appreciation regarding methods of cost calculation when examining whether the rates charged by a public telecommunications network operator with significant market power for access services are in accordance with the principle of the costs of efficient service provision. According to Paragraph 32(1) TKG, the costs of efficient service provision are derived from the long-term additional costs of providing the service plus an appropriate amount for volume neutral common costs, including an appropriate return on capital employed, to the extent that these costs are required to provide the offering. In this context, a margin of assessment has been confirmed by the BVerwG with respect to the BNetzA's decision whether the calculation basis for interests on invested capital and depreciation of fixed assets has to be determined by taking into account the costs of acquisition and production or, alternatively, the current replacement value of the assets. As this decision requires a balancing of conflicting regulatory objectives, the court shall not only examine whether the BNetzA's decision stays within the bounds of its margin of appreciation (Beurteilungsspielraum), but also whether it meets the above-mentioned criteria applicable in cases of a regulatory discretion (Regulierungsermessen) and, in particular, whether the BNetzA has argued in a plausible and exhaustive way.

19. While exercising his power of judicial review, how does the judge keep himself informed (appointment of experts, specialised and contradictory investigation, resort to universities, international sources consultation, etc.)?

Paragraph 86(1) of the VwGO provides that the court shall investigate the facts ex officio; those concerned shall be consulted in doing so. Pursuant to Paragraph 96(1) of the VwGO the court may, inter alia, consult experts or public records and documents. Furthermore, according to Paragraph 87(1) No 3 of the VwGO, it can obtain information from public authorities. Paragraph 99 (1) of the VwGO provides that authorities shall be obliged to submit certificates or files, to transmit electronic documents and provide information.

20. Which role does the administrative Supreme Court take toward these decisions? What are the major decisions of supreme administrative justice in economic sectoral regulation matters?

The Federal Administrative Court (BVerwG) shall rule on appeals on points of law only. According to Paragraph 137(2) of the VwGO it shall be bound by the factual findings handed down in the impugned judgment unless admissible, well-founded grounds for the appeal on points of law have been submitted in relation to these findings.

The BVerwG has handed down far more than 100 judgments and orders since the outset of regulation in the telecommunications sector. Below is a brief selection of important decisions, which can be found on the court's internet-site (<http://www.bverwg.de/entscheidungen/entscheidungen.php>):

a) By its Judgment of 25 April 2001 – BVerwG 6 C 7.00 - the Court confirmed that the incumbent (DTAG), having a dominant position in the market for public telecommunications services, is obliged to offer „unbundled access“, i.e. access without transmission technology, to the local loop. In this way competitors are granted free disposition in designing the telecommunication services they make available to end-users.

b) In its Judgment of 3 December 2003 – BVerwG 6 C 20.02 – the Court clarified the definition of „essential“ services, to which an operator having dominant market power on a specific market, is obliged to grant access. Access to a telecommunications network is essential if it is indispensable for rendering a telecommunication service. It is of no significance whether the undertaking requesting access has recourse to alternatives or is in a position to provide the service from its own resources. Competitors may therefore request access to local loops for resale to end-users.

c) According to the Judgment of 21 January 2004 – BVerwG 6 C 1.03 – the incumbent’s (DTAG) refusal to grant contractually accorded access to its local loop until rates are approved by the Regulatory Authority amounts to an abuse of a dominant position. On the other hand, the approval of rates for access to the local loop has retroactive effect to the date of the conclusion of the contract.

d) In its Judgment of 28 November 2007 – BVerwG 6 C 42/06 – the Court ruled that a competitor may file an enforcement action against the BNetzA to the end that additional or more far-reaching regulatory obligations be imposed on the undertaking with significant market power. The Court has made clear, in this context, that regulatory obligations regarding access, transparency and accounting separation imposed under the TKG also serve the purpose to ensure the protection of competitors. The admissibility of an enforcement action, however, requires that the plaintiff has applied for the imposition of these obligations in the course of administrative procedures in order to allow the BNetzA to investigate the different interests concerned and achieve an appropriate balance in exercising its regulatory discretion (Regulierungsermessen).

e) By judgments of 2 April 2008 – BVerwG 6 C 15.07 et al. – the Court rejected rescissory actions filed by the four German mobile network operators against the BNetzA’s regulation of their termination rates. The Court confirmed that the BNetzA has a wide margin of appreciation (Beurteilungsspielraum) as regards the market definition and analysis pursuant to Paragraph 10 and 11 TKG, that is to say, in identifying the relevant product and geographic tele-

communications markets warranting regulation, in determining whether there is effective competition in the market being analysed and in designating the undertakings with significant market power in this market. The BNetzA's estimation that each operator dominates the market for mobile call termination on its individual mobile network is not affected by errors of judgment. Furthermore, according to the Court, the BNetzA's decision to make termination rates subject to the Authority's approval on the basis of the cost of providing an efficient service had not exceeded the bounds of its regulatory discretion (Regulierungsermessen).

f) In its judgment of 27 January 2010 – BVerwG 6 C 22.08 – the Court partly annulled a regulatory decision concerning the market for access to the local loop because of an insufficient justification for the imposition of obligations on DTAG concerning access to dark fibre. Apart from that, the BNetzA had not exceeded the bounds of its regulatory discretion by imposing on DTAG the obligation to offer access to necessary co-location facilities as well as to certain ducts between the mainframe and the street cabinet and by submitting the rates to ex-ante price control.

g) According to a judgment of 1 September 2010 – BVerwG 6 C 13.09 – the Commission's Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector entails a presumption that the markets listed therein are susceptible to regulation. In determining the relevant market, the BNetzA therefore exceeds the bounds of its margin of appreciation (Beurteilungsspielraum), if it misinterprets the content of the Recommendation.

h) By its judgment of 23 March 2011 – BVerwG 6 C 6.10 – the Court clarified the rules governing the BNetzA's order, that assignment of frequencies be preceded by award proceedings and, in that event, whether an auction be conducted or tenders invited. The requirement that frequencies are not available for assignment in sufficient numbers is subject to full control by the courts. On the other hand, the BNetzA has a certain margin of appreciation when deciding whether an auction should be conducted or tenders invited.

In the case of an auction, the rules for conducting the auction shall be detailed by the BNetzA, taking into account the objectives of regulation.

i) In its Judgment of 14 December 2011 – BVerwG 6 C 36.10 – the Court ruled that the BNetzA is authorised to make rates charged by an undertaking identified as having significant market power subject to the authority's approval with retroactive effect. In exercising its discretion, however, the BNetzA must not limit the investigation to factual data that existed at the time of the retroactive effect.

k) According to the Judgment of 9 Mai 2012 – BVerwG 6 C 3.11 – in cases where the BNetzA, at the request of the regulated undertaking, approves rates for a time period already covered by a previous approval, it has to withdraw the previous approval in accordance with the rules regarding the annulment or revocation of an administrative act which poses a burden on the person concerned. In the context of this discretionary decision, the BNetzA shall, on the one hand, consider the claim of the regulated undertaking to charge cost-covering rates, and on the other hand, the protection of confidence of the competitors which includes certainty in planning and calculation.

l) In its Judgment of 25 September 2013 – BVerwG 6 C 13.12 – the Court has confirmed and further developed its case-law relating to the BNetzA's margin of appreciation (Beurteilungsspielraum) regarding cost calculation methods when examining whether the rates charged by a public telecommunications network operator having significant market power for access services are in accordance with the principle of the costs of efficient service provision. The BNetzA has a discretion-like margin of assessment relating to the decision whether the calculation basis for interests on invested capital and depreciation of fixed assets has to be determined by taking into account the costs of acquisition and production or, alternatively, the current replacement value of the assets. According to the BVerwG the competent administrative court shall, in these cases, examine whether the Authority has complied with the applicable procedural rules, whether its decision is based on a correct comprehension of the applicable legal terms, whether it has investigated the facts of the matter

completely and correctly and whether it has complied in its assessment with generally accepted appraisal standards including not acting arbitrarily. As far as the BNetzA's decision requires a balancing of conflicting regulatory objectives, the court shall also examine whether the Authority has failed to conduct a balancing of interests, to consider all relevant interests, to recognize the significance of the affected interests or if the result of the balancing is not proportionate to the objective importance of individual interests. Finally the court has to examine whether the BNetzA has argued in a plausible and exhaustive way. In addition, the Court has clarified that in the event of a successful rescissory action filed by an interconnection partner against the BNetzA's approval of rates charged by the undertaking with significant market power, the administrative court shall rescind the approval only insofar as it affects the legal relationship between the parties to the lawsuit in question.

Leipzig, 28 February 2014

Carsten Hahn

Richter am BVerwG