



National appeal systems - Germany –

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The design of judicial review in electronic
communications

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Outline

- Overview of the German appeal system
- Some figures
- Two examples of court cases
- Increased role of the European Commission
- Implications of the Commissions proposals concerning the 2006 Review
- Conclusions





The German appeal system

- Main proceedings
 - Competent court: administrative court
 - Two stages of appeal
- Summary proceedings:
 - Suspension of BNetzA's decisions?
 - Only one stage
- Interlocutory proceedings
 - Business secrets





Summary proceedings

- Importance of summary proceedings
 - Decision whether or not BNetzA's decisions can be implemented
 - Guidance for NRA and market
- Criteria applied by the court:
 - Prospect of success on the main issue
 - Weighing of interests





Some figures

- 34 summary proceedings concerning decisions taken under the NRF (excluding remedies)
 - 7 suspensions, 24 decisions in favour of BNetzA, 3 decisions outstanding
- 10 summary proceedings concerning remedies decisions
 - 4 decisions so far -> no suspensions
 - Decisions taken within 3 weeks to 3 months
- Quick decisions due to changes in law (shortening of legal process) and establishment of new Chamber in Administrative Court of Cologne





Case study 1: Interpretation of transitional provision (I)

Section 150 para 1 of the Telecommunications Act stipulates:

“Determinations of market dominance made by the Regulatory Authority prior to the entry into force of this Act and the resulting obligations shall remain in effect until such time as they are replaced by new decisions taken in accordance with Part 2...”





Case study 1: Interpretation of transitional provision (II)

- Interpretation of the term “obligations”?
 - wide interpretation => application of TKG¹⁹⁹⁶
 - narrow interpretation => application of TKG²⁰⁰⁴
- BNetzA decisions
- Interpretation by Administrative Court of Cologne
- Interpretation by Federal Administrative Court
- Request to the Court of Justice for a preliminary ruling





Case study 2: Market 11 (I)

- BNetzA's decision:
 - exclusion of access to fibre glass connections on the basis of recommendation on relevant markets ("wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services") and
 - as a consequence withdrawal of existing obligations
- Cion's comments:
 - withdrawal of obligations not possible without prior market analysis
 - market analysis requires prior market definition on the basis of three-criteria test





Case study 2: Market 11 (II)

- Decision of the Administrative Court of Cologne:

“The Court is not able to follow the Commission's criticism... that a market analysis based on the three-criteria test can only be made after proper identification of the market. Ultimately, the determinant, under section 10(1) of the TKG²⁰⁰⁴, is whether regulation is warranted. If, under section 10(2) sentence 1 of the TKG²⁰⁰⁴, three conditions must be met cumulatively and one of these is not met, market regulation will not be warranted... In such a case, the final market definition can be left open, being regarded as not legally relevant.”

- Decision appealed, so far no final decision by Federal Administrative Court





Impact of Cion's proposals for the 2006 Review

- Veto on Remedies
 - complexity and legal uncertainty increase
- National appeals:
 - Criterion for suspension of NRA decisions: “irreparable harm”
 - Implications for German appeal procedures depend on implementation





Case study 3: Market 16

- BNetzA designated MNOs as having SMP and imposed remedies on them including an interconnection obligation and ex ante price control
- All MNOs appealed the decision
- Administrative Court of Cologne decided not to suspend decision
 - No assessment of prospect of success on the main issue
 - Decision based on weighing of interests only





Conclusions

- Appeal system in Germany improved – quick resolution of cases
- Question with regard to legal value of veto decisions remain unsolved
- Veto on remedies would increase legal uncertainty
- Proposal concerning suspension of NRA decision must be implemented carefully

