

[DE] Federal Network Agency Wants to Delegate Cable Regulation to Cartel Authority

IRIS 2010-9:1/23

Sebastian Schweda
Institute of European Media Law (EMR), Saarbrücken/Brussels

The Bundesnetzagentur (Federal Network Agency - BNetzA) announced on 3 September 2010 that it had sent a draft market definition, market analysis and regulatory measures concerning the wholesale market for broadcasting transmission services to the European Commission for comment. In the proposal, the Agency, which is responsible, *inter alia*, for regulating national telecommunications markets in Germany, suggests that the signal delivery and input markets for cable networks should be removed from sector-specific regulation and placed under the general competition supervision carried out by the Bundeskartellamt (Federal Cartel Office). The latter has already agreed to the proposal. The Commission now has one month to give its opinion on the proposals.

The "wholesale market for the provision of broadcasting transmission services to deliver broadcast content to end users", which is still identified as market no. 18 in the 2003 Commission Recommendation on markets (see IRIS 2003-3: 7/9), was omitted from the revised recommendation of 2007. The Commission did not consider that this market still needed specific regulation and therefore recommended to the member states that it should no longer be susceptible to *ex ante* regulation. National regulatory authorities can still maintain sector-specific regulation in this field, but must provide reasons for doing so. The recommendation lays down three criteria (contained in Article 10(2)(1) of the German Telecommunications Act), which must be fulfilled cumulatively in order to justify continued *ex ante* regulation: firstly, there must be "high and non-transitory barriers to entry"; secondly, the market must not tend towards effective competition within the relevant time horizon; and thirdly, competition law alone should not adequately address the market failure concerned.

Before the BNetzA proposals were submitted to the Commission, a consultation paper was published, on which interested parties were given until 21 May 2010 to comment. In this document, the Agency had firstly identified three market segments: as well as the two markets for the input of broadcast signals into the broadband cable network and for the delivery of signals by large cable network operators to home network operators, the investigation had included the market for the provision of terrestrial broadcasting facilities for the transmission of analogue VHF radio signals. In regard to the cable markets, the BNetzA concluded that the first two of the three aforementioned criteria for *ex ante* regulation were

met. However, it thought that general competition law was sufficient to effectively address the existing market failure. On the other hand, it decided that continued ex ante regulation was justified in the market for the transmission of analogue VHF radio signals. Due to its virtual monopoly of this market, Media Broadcast, as the owner of more or less all terrestrial VHF transmission facilities, would otherwise be unable to achieve competitive prices.

Konsultationspapier der BNetzA vom 21. April 2010 und die Ergebnisse des Anhörungsverfahrens

http://www.bundesnetzagentur.de/DE/DieBundesnetzagentur/Beschlusskammern/1_BK-Geschaftszeichen-Datenbank/BK1/2009/2009_001bis100/BK1-09-005/BK1-09-005_K_BKV.html?nn=76940

BNetzA consultation paper of 21 April 2010 and results of the hearing

