



Bundesnetzagentur

Ruling Chamber 11

**National dispute settlement body for the
German Digital Networks Act (DigiNetzG)**

**Best practice
for setting charges
for duct sharing
in accordance with
section 149(2) and (3) of the
German Telecommunications Act
(TKG)**

Bonn, 2 May 2022

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1 Introduction

This document presents an overview of the practice followed by the national dispute settlement body under the German Digital Networks Act (DigiNetzG) for setting charges for duct sharing in accordance with section 149(2) and (3) of the German Telecommunications Act (TKG), based on its decisions to date as a contribution to implementing point 15 of Commission Recommendation (EU) 2020/1307 (Connectivity Toolbox Recommendation).¹ The document presents a summary of past decisions on specific individual cases that can serve as guidance for setting reasonable charges.

2 General

2.1 Applicable pricing criterion from section 149(2)/(3) TKG

The question of which pricing criterion/criteria to apply – section 149(3) and/or section 149(2) TKG (section 77n(3)/(2) TKG 2004²) – depends on the original investment decision and not on the use at the time the request for sharing or dispute settlement was made. If the infrastructure was built for telecommunications purposes, subsections (2) and (3) are applicable; if the infrastructure was not originally built for telecommunications purposes, only subsection (2) is applicable.³

2.2 Hierarchical relationship between section 149(2) and (3) TKG

There is a hierarchical relationship between section 149(2) and (3) TKG (section 77n(2) and (3) TKG 2004). Subsection (3), which lays down a pricing criterion that safeguards fair competition by retaining a deployment incentive, also includes the additional costs referred to in subsection (2).⁴ By contrast, the costs of the basic investment for public supply networks that are not public telecommunications networks are not taken into account. Only the additional costs are taken into account when setting a fair and reasonable sharing charge.

2.3 Project-related charges

Charges are set for the specific route(s) requested and not for the whole network.⁵ This means that charges are always based on the distance over which the network infrastructure is actually shared.

¹ Commission Recommendation (EU) 2020/1307 of 18 September 2020 on a common Union toolbox for reducing the cost of deploying very high capacity networks and ensuring timely and investment-friendly access to 5G radio spectrum, to foster connectivity in support of economic recovery from the COVID-19 crisis in the Union, OJ L 305, 21.9.2020, p. 33-41.

² TKG 2004: version applicable until 30 November 2021.

³ See BK11-18-003, margin nos 107-109; BK11-18/005, margin nos 74-79; BK11-18/006, margin nos 90-98; BK11-19/001, margin nos 86-90; BK11-19/002, margin nos 117-121; BK11-19/003, margin nos 110-114.

⁴ See BK11-18/003, margin nos 110-113; BK11-18/005, margin no 78; BK11-18/006, margin no 92; BK11-19/001, margin no 88; BK11-19/002, margin no 119; BK11-19/003, margin no 112.

⁵ See BK11-18/003, margin nos 114-120; BK11-18/006, margin nos 99-109; BK11-19/001, margin nos 91-101; BK11-19/002, margin nos 122-132; BK11-19/003, margin nos 115-125.

3 Additional costs – section 149(2) TKG

3.1 Additional costs within the meaning of sentence 2

Additional costs within the meaning of section 149(2) sentence 2 TKG (section 77n(2) sentence 2 TKG 2004) are incurred in connection with granting shared access. Access seekers must pay provisioning costs⁶ as well as running costs such as costs for ongoing operation or administration incurred in connection with sharing⁷. Additional costs include costs for work charged on an hourly basis.⁸ The work is charged based on proof countersigned by the access seeker.⁹ If fixed charges verified by the Bundesnetzagentur are offered, they can also be approved.¹⁰

3.2 Reasonable surcharge within the meaning of sentence 3

The reasonable surcharge within the meaning of section 149(2) sentence 3 TKG (section 77n(2) sentence 3 TKG 2004) has been set at 20% of the median of the charges from the sharing contracts available to the Bundesnetzagentur at the time a decision is made.¹¹ It should be noted that the median charge or another charge derived from the contracts is not usually taken as the basis for setting charges in accordance with subsection (3) because these charges must primarily be based on the costs.¹²

4 Costs to be taken into account for telecommunications networks in accordance with section 149(3) TKG

4.1 Relationship to charges from other information sources and pricing criteria

Relationship to the regulated wholesale charge for underground duct infrastructure

The regulated wholesale charge for underground duct infrastructure cannot usually be used because of insufficient comparability.¹³ However, the charge can be used in justified cases.¹⁴

Relationship to charges from contracts for sharing available to the Bundesnetzagentur

The charges from the sharing contracts presented to the Bundesnetzagentur in accordance with the requirement in section 138(4) TKG (section 77d(4) TKG 2004) were

⁶ See BK11-18/006, margin nos 124, 126-136; BK11-19/001, margin nos 227-229; BK11-19/002, margin nos 258-260; BK11-19/003, margin nos 250-252.

⁷ See BK11-18/006, margin nos 137-148; BK11-19/001, margin nos 220-226; BK11-19/002, margin nos 251-257; BK11-19/003, margin nos 243-249.

⁸ See BK11-18/005, margin nos 80-92.

⁹ See BK11-18/005, operative part 1a).

¹⁰ See BK11-18/006, margin nos 124, 126-148; BK11-19/001, margin nos 220-229; BK11-19/002, margin nos 251-260; BK11-19/003, margin nos 243-252.

¹¹ See BK11-18/005, margin nos 93-181.

¹² See BK11-18/006, margin nos 117-120; BK11-19/001, margin nos 107-110; BK11-19/002, margin nos 138-141; BK11-19/003, margin nos 130-133.

¹³ See BK11-18/006, margin nos 112-116; BK11-19/001, margin nos 105-106; BK11-19/002, margin nos 136-137; BK11-19/003, margin nos 128-129.

¹⁴ See BK11-18/003, margin nos 121-127.

not used. As the charges set must make it possible for the owners and operators of the shared network to cover their costs, the costs of the shared network were primarily used to calculate the charges. Unlike with the reasonable surcharge in accordance with section 149(2) sentence 3 TKG (section 77n(2) sentence 3 TKG 2004), the costs are a significantly more accurate information source for calculating sharing charges in accordance with section 149(3) TKG (section 77n(3) TKG 2004) than a comparison as made, for example, using the above-mentioned sharing contracts.¹⁵

Relationship to the pricing criterion in wholesale regulation (costs of an efficient operator)

If the examination of the charges offered by the obligated parties identifies an inappropriate choice of methods or parameters leading to unreasonably high costs, the methods/parameters are adjusted accordingly when setting the charges. Unlike with the criterion of the costs of an efficient operator, no efficiency analyses are taken into account when calculating the charges.¹⁶

4.2 Calculating the investment value

Fully depreciated assets are not taken into account because there are no longer any investment costs for these assets that need to be refinanced.¹⁷

Only assets constructed at the same time as the shared asset are taken into account when calculating the investment value. This means that if a route has ducts and cables that are not yet fully depreciated and that were laid at other times than the asset offered, the calculation only takes account of the ducts laid together with the shared ducts, unlike with the charges based on the costs of an efficient operator in accordance with section 42. If assets were activated in the same year as the shared asset, and it is not possible to determine exactly which ducts and cables were laid together, all of the ducts and cables laid in the year in question are taken into account (which is more favourable for the obligated party).¹⁸

The investment value of the assets is calculated based on the historical acquisition and production costs and not the replacement costs. This is because the primary aim of the charges under the DigiNetzG is to reduce the costs of deploying high-speed networks, and so to accelerate network deployment, and not to induce any make-or-buy decisions under quasi-competitive conditions by the access seekers.¹⁹

¹⁵ See BK11-18/006, margin nos 117-120; BK11-19/001, margin nos 107-110; BK11-19/002, margin nos 138-141; BK11-19/003, margin nos 130-133.

¹⁶ See BK11-19/001, margin nos 202, 205-206, 225; BK11-19/002, margin nos 233, 236-237, 256; BK11-19/003, margin nos 225, 228-229, 248.

¹⁷ See BK11-18/006, margin nos 151-154; BK11-19/001, margin nos 145, 167-169, 176; BK11-19/002, margin nos 176, 198-200, 207; BK11-19/003, margin nos 168, 190-192, 199.

¹⁸ See BK11-18/006, margin no 155; BK11-19/001, margin nos 163, 178; BK11-19/002, margin nos 194, 209; BK11-19/003, margin nos 186, 201.

¹⁹ See BK11-18/006, margin no 161; BK11-19/001, margin nos 128-131, 164; BK11-19/002, margin nos 159-162; BK11-19/003, margin nos 151-154.

However, the obligated party's fixed asset accounts have not included acquisition and production costs for each year and route in all the cases to date, which is why it has been necessary to use an alternative calculation method. The investment value of the shared route was calculated by determining the required trench cross-sections using customary dimensioning rules²⁰ and pricing the trenches using the material and construction work prices documented by the obligated party.

4.3 Imputed depreciation

Useful lives/depreciation periods of ducts and chambers

To date it has been possible to use the useful lives for ducts given by the obligated party. No information has been given for cable chambers to date because either the chambers were already fully depreciated or there were no chambers along the route. If necessary, it would be possible to base the useful lives on those given in the Recommendation on non-discrimination and costing methodologies.²¹

Depreciation method

Where possible, as with market regulation the annuity method is preferred because it can be used to calculate a constant amount for the sum of depreciation and interest over the entire useful life. However, to date it has been necessary to use linear depreciation because it has not been possible to calculate the project-related acquisition and production costs of the shared assets.²²

4.4 Return on capital employed

Reasonable return

The reasonable return calculated for market regulation in accordance with section 42(3) TKG (section 32(3) TKG 2004) is used. However, because the assets are valued using historical costs, a nominal rate of return is used instead of the real rate of return.²³

Rate of return basis

As it has not been possible to date to use the annuity method because the acquisition and production costs of the asset to be shared have not been known, the imputed rates

²⁰ See, for example, ZTV-TKNetz10 (Telekom's additional technical terms of contract for construction work on the telecommunications network part 10).

²¹ See Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment OJ L 251, 21.9.2013, p. 13-32, point 36 (p. 17); see also the explanations in decisions BK11-18/006, margin no 162; BK11-19/001, margin no 185; BK11-19/002, margin no 216; BK11-19/003, margin no 208.

²² See BK11-18/006, margin nos 161-164, 178; BK11-19/001, BK11-19/002, BK11-19/003, not explicitly stated, but implicitly taken as a basis.

²³ See BK11-18/006, margin nos 165-176; BK11-19/001, margin nos 188-201; BK11-19/002, margin nos 211-224; BK11-19/003, margin nos 219-232.

of return have been calculated using the average capital invested in the relevant asset class. Given constant (re)investment in the assets, the rate of return basis and therefore the rate of return are sufficiently constant over time, which means that – as with the annuity method – the capital costs for each year of the entire useful life are comparatively constant.²⁴

4.5 Division of the calculated costs between the parties

The costs are divided up according to the number of usages (cables) added by the access seeker to the existing usages.²⁵

4.6 Possibility of covering costs for the shared infrastructure ("most favourable test")

If the access seeker has offered payment of a particular charge for shared access in advance, this charge is set as long as the costs calculated by the ruling chamber are lower than the charge, otherwise the charges are set based on the costs.²⁶

4.7 Impact on the business plan

To date the obligated parties have not presented any documented impact on the business plan. One obligated company drew attention to the fact that it was hardly possible to do so with respect to locally very restricted sharing. The information available to date is therefore not very specific.²⁷

4.8 Non-consideration of the "reasonable surcharge" from section 149(2) sentence 3 TKG

To date the transfer of the reasonable surcharge from section 149(2) sentence 3 TKG (section 77n(2) sentence 3 TKG 2004) to charges in accordance with section 149(3) TKG (section 77n(3) TKG 2004) has been rejected.²⁸

²⁴ See BK11-19/001, margin no 187; BK11-19/002, margin no 216; BK11-19/003, margin no 210.

²⁵ See BK11-18/006, margin nos 179-180; BK11-19/001, margin nos 210-215; BK11-19/002, margin nos 241-247; BK11-19/003, margin nos 233-238.

²⁶ See BK11-18/006, margin nos 123, 179-185; BK11-19/001, margin nos 216-219; BK11-19/002, margin nos 247-250; BK11-19/003, margin nos 239-242; the last case was the first instance in which the charge calculated by the ruling chamber was higher than the charge offered by the access seeker.

²⁷ See BK11-18/006, margin nos 187-194; BK11-19/001, margin nos 230-245; BK11-19/002, margin nos 261-276; BK11-19/003, margin nos 253-268.

²⁸ See. BK11-18/003, margin no 142; BK11-18/006, margin nos 93-98 – most detailed reasoning to date; BK11-19/001, margin nos 89-90; BK11-19/002, margin nos 120-121; BK11-19/003, margin nos 113-114.