Bundesnetzagentur

Ruling Chamber 11
National dispute settlement body under the German Digital Networks Act (DigiNetzG)

Guiding principles from decisions by the national dispute settlement body under the Digital Networks Act (DigiNetzG)

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Preliminary remarks

This document presents the guiding principles in Ruling Chamber 11's decision-making in the period from 2019 to 2021. The decisions made by Ruling Chamber 11 are administrative acts and so can be subject to a full judicial review at first instance by the competent administrative court and do not become final until the deadline for appeals has expired. The decisions are administrative acts each relating to the individual case at hand, so the guiding principles are not transferable to each case and are not to be seen as generally applicable, but provide an insight into the ruling chamber's usual decision-making practice. The document presents decisions made up to 2021, which are therefore based on the old version of the German Telecommunications Act (TKG) in force until 30 November 2021. The full versions of all the decisions made by Ruling Chamber 11 are available (in German) on the Bundesnetzagentur's website at:

https://www.bundesnetzagentur.de/SiteGlobals/Forms/Suche/BDB/Suche_BeschlussDB_Formular.html;jsessionid=5CB7C11E668DF52403568E7382FF10F6?nn=651398&chamber=000011.

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Guiding principles with sources from the decisions

Effect of the sharing right like an administrative act in rem

BK11-21/002 margin no 143:

> "The ruling chamber, following case law from the higher administrative court of Rhineland-Palatinate, assumes here that the right to share in-building infrastructure arising from the right to install own cabling has an effect similar to that of an official order relating to property or a right arising from property ownership and in this respect is closely similar to an administrative act in rem. See Rhineland-Palatinate higher administrative court decision 8 A 10670/02 of 3 July 2002, Juris."

BK11-21/002 margin no 146:

> "[…] This corresponds to legal succession under procedural law, which does not require explicit operative provisions. This also means that the party summoned 18, with whom a contract relating to rights to the infrastructure in question was not concluded until later on 26 February 2021, must also assume responsibility for the request for sharing from the applicant to the respondent in form and in substance (see also margin no 160)."

Precautionary application admissible with property in dispute under civil law

BK11-21/002 margin no 106:

> "The increased probability of the applicant losing its ownership position, which is becoming clear from the course of the civil law proceedings, means that the applicant needs to examine alternatives such as the assertion, effectiveness, costs and scope of statutory sharing rights. Clarification at an early stage helps in looking at how to deal with existing contractual obligations towards the end-users concerned, the design of future products for relevant target groups, the technical conditions and prerequisites for (current and future) retail products and the commercial framework. The parallelism of the clarification of the possibility of sharing under telecommunications law and the question pending under civil law, including the law of unjust enrichment, does not nullify the interest in a decision being made for a request for dispute settlement. […]"

BK11-21/002 margin no 108:

> "The interest in a decision being made ultimately also arises from the need to clarify questions raised in the proceedings about the relevant costing methodology for the use of in-building network infrastructure. The telecommunications law costing methodology can have an effect on the level of any civil law unjust enrichment claims made by the respondent and in this respect on the interest of both parties to the dispute and of the party summoned in a decision being made."

The interpretation of the request for sharing must take account of the purpose of the request and identifiable surrounding circumstances

BK11-20/001 margin no 70:

> "The applicant's request should be interpreted in accordance with the principles of general administrative procedural law and should make it sufficiently clear that the applicant's wish here is not for the ruling chamber to order that shared access 'should' be granted but for the respondent to be required to make an offer. This is clear from both the context of the applicant's correspondence as a whole and the applicant's clearly stated wish. In this respect, the substance of a requirement to make an offer is also clearly enforceable."

BK11-20/001 margin no 71:

> "Here, not only the wording of the request but rather the purpose of the request and the identifiable surrounding circumstances are relevant to interpreting the applicant's wish.
>
> 'When interpreting a request, the authority must take into account both the wording and whether the applicant's explanation has not in fact introduced a meaning other than the general meaning if suggested by the purpose of the request and identifiable surrounding circumstances; this may be the case if it is clear and readily obvious that the request would not make sense on strict interpretation of the wording.', headnote, Federal Administrative Court judgment 2 C 13.04 of 3 March 2005."

BK11-20/001 margin no 72:

> "In accordance with sections 88 and 122(1) of the Code of Administrative Court Procedure (VwGO), not necessarily the wording of a request alone but also the substance of a request or appeal is relevant to the court's understanding, even if the request itself is usually of considerable moment to determining what is sought. In accordance with the constitutional principle of effective legal protection as an interpretation aid, in the case of doubt it must be assumed, in favour of the party seeking legal protection, that the party intended to seek the legal remedy coming into question in the matter, provided that this corresponds to the identifiable aim of the legal protection and the party seeking legal protection did not consciously rule out this interpretation."

Correction of an obvious error in the request does not constitute an amendment

BK11-20/001 margin no 76:

> "The amendment of the request is readily admissible in accordance with section 173 of the Code of Administrative Court Procedure (VwGO) in conjunction with section 264 para 1 of the Code of Civil Procedure (ZPO). Although the wording of the request was amended, the request itself is based on the same circumstances as the previous request. The request of 7 May 2020 with the correct street name corrected the request of 4 April 2020 without amending

the subject matter; based on the general principles alone, this does not constitute a 'modification of the suit filed'."

BK11-20/001 margin no 79:

"The substance and scope of a request are not determined by the wording of the request alone. This must be interpreted taking into account the reasons given for the request."

BK11-20/001 margin no 80:

"The wording of a request is not binding if it is evident which area was meant. This depends on the meaning of the explanation from the point of view of the ruling chamber and the respondent. The request must be interpreted objectively from the point of view of the authority and the respondent, in line with customary practice and in good faith. If it is then clear that the intended purpose of the request is other than that declared, the purpose actually intended applies."

BK11-20/001 margin no 83:

"The incorrect name is an obvious error which, in line with the concept in section 118(1) VwGO, is comparable to a typing error; for reasons of procedural economy, its correction is not subject to any other conditions. It is an obvious error in the request in light of the accompanying documents and in this respect was unproblematic from the beginning."

Sharing requests and rights with affiliated companies

BK11-21/002 margin no 112:

"The responsibility is due to the fact that the respondent and the party summoned 18, as the respondent's potential legal successor, are affiliated undertakings as defined in section 3 para 29 of the Telecommunications Act (TKG). The respondent and the party summoned 18 come into question as potential obligated parties within the meaning of section 77n(6) TKG in conjunction with section 77k(3) TKG. It is possible to assert a right to sharing against both as parties with rights of disposal (for details, see margin no 174 below). In this scenario, this means that both undertakings are obligated parties with respect to the right to sharing. [...]"

BK11-21/002 margin no 137:

"The classification of the respondent and the party summoned 18 as affiliated undertakings as defined in section 3 para 29 TKG means that the party summoned 18 – with whom a contract relating to rights to the infrastructure in question was not concluded until later on 26 February 2021 – must also assume responsibility for the request for sharing from the applicant to the respondent in form and in substance (see also margin no 160). This does not lead to a legal disadvantage for the party summoned 18 because an intrinsic part of an affiliation is that legal acts within the affiliated undertaking can be attributed to the individual companies. […]"

Sharing rules in the Telecommunications Act do not interfere with the core area of municipal self-government

BK11-21/001 margin no 89:

> "Contrary to the respondent's argument here that there is an adverse effect on the municipal right of self-government constitutionally protected by Article 28 of the Basic Law (GG), this right is not restricted by the present decision. In the first instance, it must be noted that the municipal right of self-government is not unlimited, but is 'within the limits prescribed by the laws' as stated in Article 28(2) sentence 1 GG. The municipalities are therefore bound by all the laws and ordinances issued by the federal government within the limits of its constitutional legislative powers just as by provisions of federal state laws."

BK11-21/001 margin no 90:

> "The Telecommunications Act (TKG) is a provision of law in this sense and its rules on sharing do not interfere with the inviolable core area of municipal self-government.
>
> See Federal Constitutional Court (BVerfG) decision 2 BvL 2/13 of 19 November 2014 for detailed information on the concept of municipal self-government and its limits."

BK11-21/001 margin no 91:

> "(…) The decision issued within the limits of the municipal right of self-government would also be subject to full monitoring and verification in accordance with Article 20 GG. In this respect, the decision could not go so far as to override the basis for rights in federal law and prohibit sharing, for which none of the reasons for refusal from the exhaustive list can be presented."

No hierarchical relationship between the assertion of rights against owners or operators of public supply networks

BK11-20/006 margin no 215:

> "The respondent remains the owner of the ducts and thus the obligated party within the meaning of section 77d of the Telecommunications Act (TKG) even after conclusion of the contract. The enforceability and effectiveness of the arrangements for sharing mean that the applicant is entitled to choose which of the two obligated parties – the owner or the operator – (or both) to assert its rights against. The applicant therefore had the choice of asserting its right to sharing against the owner and/or the operator of the public telecommunications networks. The lawmakers have not laid down a hierarchical relationship requiring a party to assert its right to sharing against the operator, for example."

BK11-20/006 margin no 216:

> "A hierarchical relationship between owners and operators of public supply networks would also be contrary to the basic concept of expedient and swift

sharing because the operator could then invoke the owner and the fact that it does not have an ownership right. This would make it impossible to exercise rights that can be asserted against both parties. In addition, while the exact operator of the network is often not known, it is usually easy to identify the owner because of the local circumstances and the function of the passive network infrastructure."

Term "public" supply network requires interpretation

BK11-20/004 margin no 65:

"In the absence of a general legal definition of the term 'public', interpretation of the specific provision is needed to determine the meaning."

BK11-20/004 margin no 67:

"A systematic comparison with the term 'public telecommunications network' defined in section 3 para 16a of the Telecommunications Act (TKG) – which, however, was introduced in the 2012 version of the TKG implementing the Framework Directive (Directive 2002/21/EC, OJ L 108, 24.4.2002, p. 33) and therefore earlier and on a different EU legal basis than the term 'public communications network' – shows that a network is public if it is used to provide publicly available services. These services are in turn characterised as being 'available to the public'. These provisions do not provide any detailed indications of the necessary degree of availability to the public, which, however, would be decisive for conclusions as to whether the respondent's district heating network is a public supply network as defined in section 3 para 16b TKG."

BK11-20/004 margin no 69:

"The explanatory notes on the legislation state the following on the term 'public supply network' and the exceptions not covered by the term:

'The supply services of the networks must still be provided specifically for the public. This means that private transport routes and closed corporate or public authority networks for energy or telecommunications services, for example, are not covered by the term. They are therefore not subject to the rights under sections 77a et seq either. Each supply network is considered as a whole. This is why telecommunications systems set up for telematics on federal motorways, for example, are covered by the term as part of the public supply network of the transport infrastructure, even though the telecommunications equipment as such is not publicly available.' Bundestag printed paper 18/8332, page 35."

BK11-20/004 margin no 76:

"Contrary to the respondent's opinion, a public supply network need not necessarily be a public institution within the meaning of municipal law either. The terms 'public institution' and 'public supply network' are not identical. Neither section 3 para 16b TKG nor the explanatory notes on the legislation provide indications of such a restrictive interpretation of the term 'public supply network'. Rather, the list of telecommunications, gas and electricity networks in the

provision is an argument against such an interpretation. In accordance with Article 87f(2) sentence 1 of the Basic Law (GG), telecommunications services are generally provided by private enterprises. Energy and gas are not necessarily provided by public institutions either, but in many cases by private-sector companies. The explanatory notes also indicate that – with respect to sharing under section 77d TKG – the provisions as regards private-sector companies and the public sector are being merged with the implementation of the Cost Reduction Directive."

The disclosure of the network planning involves trade and business secrets

BK11-20/003 margin no 111:

"In particular the disclosure of the network planning with respect to the planned connections and capacity as called for by the applicant was not undertaken. The ruling chamber takes the view that this involves the respondent's own information and trade and business secrets because it involves details of the network planning. It would disclose details not only of planned connections but also of dimensioning, occupancy and duct structures deployed, which are ultimately only relevant to the respondent's own network planning. A direct competitor with access to these details would be able to gain specific knowledge about the network and therefore information about investments and price calculations and thus ultimately about business plans. The same applies to the redacting of some prices for particular fibre products. It is possible for the respondent to vary its prices as part of its underlying deployment using its own resources. The prices do not therefore need to be disclosed to all access seekers."

Dispute settlement request aimed at provision of information is admissible

BK11-20/004 margin no 58:

"The applicant also has a sufficient interest in a decision being made. A refusal of the request in the absence of an interest in a decision being made would come into question if an applicant merely misused the option of dispute settlement and only sought to act in a vexatious and abusive manner."

BK11-20/004 margin no 59:

"(…) Rather, the applicant wishes to have sufficient information about the construction work in order to consider the possibility of coordination."

Right to provision of information no longer applies if coordination of construction work is unreasonable

BK11-20/004 margin no 85:

"(…) This provision states that a request for information can be wholly or partly rejected if the coordination of construction work is unreasonable."

BK11-20/004 margin no 88:

> "However, the fact that coordination in these sections of the construction work is unreasonable is clear from an overall assessment of the individual circumstances. In this individual case, a request for coordination would have been unreasonably late even if it had been made at the time the request for the provision of information was made."

BK11-20/004 margin no 92:

> "(…) Whether coordination in accordance with section 77i of the Telecommunications Act (TKG) is reasonable or unreasonable in these sections depends on various factors that are currently unknown. These include in particular the course of the tendering process, the construction timetable for these sections, and the timing and content of a possible request for coordination from the applicant."

Section 2 of the Telecommunications Act does not protect against competition but specifically aims to promote effective and sustainable competition

BK11-20/003 margin no 219:

> "(…) For section 2(2) para 1 sentence 2 of the Telecommunications Act (TKG) aims to promote the ability of end-users to access and distribute information and use applications and services of their choice. From the end-user's perspective it is advantageous to be able to choose between several providers. The respondent's claim that granting shared access to the benefit of the applicant and the loss of customers would make its deployment plans economically unviable is merely an unfounded assertion. A potential loss of customers does not result in a different assessment here either. Section 2 TKG, like the other provisions of the legislation, does not protect against competition but, on the contrary, specifically aims to promote effective and sustainable competition. Furthermore, a scenario in which the applicant would have to offer its product using dark fibre at market price, carry out its own civil engineering works or restrict its activities in Jülich town would not serve the interests of consumers because all three options are likely to mean either an increase in the price for end-users or a decrease in the choice available to end-users. The third option (the applicant restricting its business activities) would also mean that the respondent would have a monopolistic structure in the relevant parts of Jülich, which would adversely affect the dynamic function of competition in the medium to long term and ultimately result in higher retail prices, poorer quality and less choice to the detriment of the end-users."

Onus to provide reasons and proof for refusal lies with the owner or operator of a supply network and so the general civil law burden of proof principles are applicable

BK11-21/001 margin no 72:

> "The onus to provide reasons and proof lies with the obligated party because the grounds for refusal are similar to an objection. A refusal to grant shared access

can be reviewed by the dispute settlement body in order to prevent an unjustified and excessive use of grounds for refusal. See Bundestag printed paper 18/8332, page 48 et seq."

BK11-21/001 margin no 76:

"The owner or operator of a supply network to whom a request is addressed is required to provide reasons and proof justifying a refusal. Doubts about a lack of space as referred to in section 77g(2) para 2 of the Telecommunications Act (TKG) are therefore at the expense of the owner or operator. The principle of investigation means that administrative law does not generally have an onus of proof comparable with that in civil law. However, a situation may arise in administrative law where facts relevant to the decision-making process cannot be proven. General burden of proof principles are applicable in such a situation. In accordance with the principle applicable in section 77d(2) TKG, an offer for sharing must generally be made upon request. The owner or operator to whom a request is addressed must therefore present and prove the lack of space ruling out the request."

Economic viability assessment process for products

BK11-20/006 margin no 142:

"The ruling chamber's assessment looks at the question of whether the alternative product is economically viable. If the alternative product – with the provider's conditions – is assessed to be viable, the requested sharing can be avoided. In this case, the conditions of the obligated party/the provider offering the alternative product are also implicitly viable for the party/provider. However, if the access seeker questions the viability on the grounds of unreasonable and unfair charges, the charges must be assessed.

See Bundestag printed paper 18/8332, page 47 [...]."

BK11-20/006 margin no 143:

"If the assessment shows that the conditions for the access seeker are not fair and reasonable – and therefore not viable for the access seeker – the reason for refusal is not valid. However, the purpose is not to set a fair and reasonable charge for the alternative product in addition to assessing viability because the sole aim is ultimately to determine whether or not the objection raised is valid."

BK11-20/006 margin no 144:

"The first step in assessing whether the conditions are fair and reasonable is to compare the prices offered with the market prices for comparable products. The data basis must be as stable as possible, that is the sample must include a sufficiently large number of prices and the prices must not have been selected using arbitrary criteria. Where possible, the prices assessed should also have already been contractually agreed because these prices can be assumed to be viable for both providers and access seekers. However, it must be noted here that the prices are not necessarily undistorted competitive prices but may be

distorted because of asymmetric market power. It is not clear from the prices agreed whether or not they are distorted, but the further away they are from average – and therefore usual – market prices, or the corridor with the largest number of prices, the more likely they are to be distorted. The prices offered for the alternative product should therefore not be compared with prices at either end of the sample but with average market prices because it can be assumed that prices for the alternative product that are within the range of average market prices are fair and reasonable and therefore usually viable for both the provider and the access seeker. In these cases, the assessment can be concluded, provided that there are no further indications that question the viability of the charges."

BK11-20/006 margin no 145:

"If the charges offered are above average market prices, the second step of the assessment is to look at whether the special circumstances of the individual case to be presented by the objector – for example if especially unfavourable circumstances make high costs inevitable – justify a higher charge. This rules out the possibility that a reason for refusal is unfairly rejected because of the comparison with market prices even though the alternative is offered at fair and reasonable conditions. However, if the second step of the assessment does not show any reasons justifying that the charges offered are fair and reasonable, the alternative is not economically viable and the reason for refusal is therefore not valid."

Legal requirements of section 77d(1) sentence 2 para 2 of the Telecommunications Act require a specific time frame for implementing the planned shared access

BK11-20/001 margin no 92:

"However, the legal requirement in section 77d(1) sentence 2 para 2 of the Telecommunications Act (TKG) – giving a specific time frame for implementing the planned sharing requested in the applicant's request – is not met. The EU and national lawmakers explicitly require a specific time frame in Article 3(2) sentence 2 of the Cost Reduction Directive [...] and its implementing provision in section 77d(1) sentence 2 para 2 TKG. A time frame is therefore generally expected to specify when the measure to deploy elements in the infrastructure will begin, how long it will take, when it is expected to end and whether delays are to be expected."

BK11-20/001 margin no 96:

"However, the time frame specified by the applicant of around three quarters of a year beginning with a possible positive reply from the respondent (on 4 April 2020 – and so two months from the time the request was made) still has so many unclear points and does not give a time frame in which sharing can then actually be implemented, for instance once approval has been issued; it is therefore not possible to take proper account of this aim with the information provided."

Refusal on the grounds of reserving space needs sufficiently precise investment planning; intention to sell infrastructure in question does not in itself justify reserving space

BK11-21/001 margin no 75:

> "Here, the German lawmakers made it clear in the legislation that a refusal on the grounds of reserving space needs to be accompanied by separate proof, stating: 'The set forecast period of five years balances the interests of the long-term planning usually needed for supply networks and the administration's budgetary planning with the interests of the fast-paced telecommunications industry. (…) The forecast must be substantiated so as to prevent insufficiently firm distant planning to be used as grounds for refusal. Substantiation must therefore be based on the obligated party's sufficiently precise investment planning.' Bundestag printed paper 18/8332, page 48"

BK11-21/001 margin no 78:

> "The respondent's intention to 'sell' the infrastructure in question to a potential network operator winning funding does not itself alone justify a refusal on the grounds of a lack of space. Rather, taking into account the respondent's statements, it is a mere presumption that the space needed for the funded deployment would no longer be available after the sale of the infrastructure in question. The respondent itself pointed out that the network operator awarded funding would be solely responsible for the design, which would be based on the operator's network typology and other plans for deployment in the municipality using its own resources."

BK11-21/001 margin no 79:

> "It should also be noted that the respondent was unable to answer the ruling chamber's question during the hearing as to how a company awarded funding could be forced into a purchase and whether this was permissible under the legal award rules. It therefore remains sufficiently unclear as to whether at all the duct infrastructure would be sold in connection with a funding award."

BK11-21/001 margin no 80:

> "In this respect, the principle of 'Purchase is subject to existing leases' cited by the respondent in this connection does not lead to a different assessment of the possibility of sharing. This argument does not lead to the sale being 'blocked' either. In principle, leased infrastructure can always be sold: there is no legal prohibition, for instance, that would make the sale of leased infrastructure impossible. Thus the intention to sell the infrastructure does not generally rule out sharing: the respondent itself cites the basic civil law principle that 'Purchase is subject to existing leases' from sections 566, 578 and 581(2) of the Civil Code (BGB), which ultimately means that shared and partly leased infrastructure can be sold to a third party. In this case, only the parties subject to the sharing order would change."

Rough ideal plan does not fulfil the requirements for a master plan as proof for reserving space

BK11-20/005 margin no 86:

> "For one thing, the master plan – as already stated by the respondent itself – only represents an intended and therefore future 'rough ideal plan' for the infrastructure that does not reflect the actual pool of resources. The plan was therefore drawn up irrespective of the resources actually available and the use of the resources actually planned at present and in this respect is to be seen as different to a master plan. As the respondent has not yet planned to implement the ideal plan for the section of the route in question, including for financial reasons, and there is therefore no relevant proof on the basis of contracts that have been awarded or construction work that has begun, it is not possible to take account of the master plan in the considerations on the lack of available space and in particular in the assumption of a future lack of space in the area in question. According to the explanatory notes on the legislation, one particular factor to be taken into account is the public administration's budgetary planning; in the Directive, the EU lawmakers cite 'for instance [...] publicly available investment plans' to demonstrate the lack of space. See Bundestag printed paper 18/8332 [...]."

BK11-20/005 margin no 87:

> "A forecast must therefore be substantiated. (…)"

BK11-20/005 margin no 89:

> "Based on the principle that doubts about a lack of space are at the expense of the party required to provide reasons (see margin no 82 above), the respondent has not sufficiently demonstrated the lack of space for the route specifically requested. Rather, the respondent's information is vague – without a specific planning horizon – or proves to be untenable in a comparison (see margin no 90 et seq). The master plan presented represents an ideal plan that will not necessarily be implemented in that form and – according to the respondent itself – was drawn up without taking account of the existing infrastructure (and therefore also the cable conduit in question here with an outer diameter of 50mm). The validity of the information with respect to the deployment now specifically planned – taking into account the existing infrastructure as well – therefore remains unclear."

Duct upgrading with microducts and cost attribution

BK11-21/001 margin no 110:

> "The ducts already installed by the respondent to/through the areas in question are empty ducts with an outer diameter of 50mm that do not contain any microducts. If the applicant installed fibre cables in this infrastructure without first upgrading the ducts with microducts, it would be more difficult, if not even impossible in some cases, to install more fibre cables later. In this case, sharing would restrict the use of the infrastructure by the owner and/or other third parties."

...

BK11-21/001 margin no 112:

> "The costs necessary for upgrading the ducts (50mm outer diameter) with microducts (7 × 10mm outer diameter) must be borne by the applicant itself. The costs are additional costs incurred from enabling sharing. The obligation for the applicant to bear the costs also creates a balance between the conflicting interests of the applicant and the respondent. On the one hand, the respondent's infrastructure and therefore property is being upgraded with the applicant's contribution; this investment in upgrading is not taken into account by the respondent when calculating the charge for sharing, to the benefit of the applicant, and makes sharing the other passive infrastructure cheaper. On the other hand, the applicant has saved significant costs by sharing the other passive network infrastructure and has the advantage of the first deployment of a broadband network, which gives the applicant a better starting position in competition and therefore enables the applicant to recover its investment more quickly."

Argument that fibre to the building/home deployment will be in line with the federal materials concept needs substantiation

BK11-20/006 margin no 110:

> "The respondent's general argument that the future fibre to the building (FTTB)/fibre to the home (FTTH) deployment will be in line with the federal materials concept does not demonstrate a future lack of space either. The federal materials concept lays down requirements for new infrastructure for which funding is granted. The requirements specify – in light also of the obligation directly attached under state aid rules to grant open access, including duct access – that sufficient space must be available to enable access for as many access seekers as possible. In this respect, it is possible to draw on the materials concept in particular when new infrastructure is constructed using funding. In this case, however, the obligation under state aid rules to design the infrastructure so as to enable open access, including duct access, for competitors also applies. Irrespective of this, it is not clear in the present case when additional tendering may take place for which sections – the respondent has proposed deployment in successive stages – and whether at all funding will be awarded."

BK11-21/001 margin no 111:

> "If the respondent intends to use the federal materials concept for fibre to the building (FTTB)/fibre to the home (FTTH) deployment using existing infrastructure, its argument is again not plausible because the respondent has not provided sufficient information about existing and planned additional infrastructure. It is not possible to assess which fibre cables could be installed in existing or planned ducts solely with information about the lengths of routes. It would have been necessary to have information in particular about the size of the existing and new infrastructure (position, number and diameter of the ducts, duct occupancy and any inner tubes)."

Dark fibre can generally be a viable alternative within the meaning of section 77g(2) para 6 of the Telecommunications Act

BK11-20/006 margin no 114:

> "The fact at all that dark fibre comes into question as an alternative within the meaning of section 77g(2) para 6 of the Telecommunications Act (TKG) in this individual case is due to the rules in the Cost Reduction Directive and their implementation in national legislation viewed as a whole."

BK11-20/006 margin no 116:

> "This first suggests that the alternative product must comprise access to physical infrastructure as defined in Article 2 point 2 of the Directive. Cables, including dark fibre, are not physical infrastructure within the meaning of the provision. However, it must be noted that the Directive only gives examples of reasons for refusal and not an exhaustive list. In addition, the Directive as a whole – and not only with respect to the reasons for refusal – does not actually harmonise legal matters but merely lays down minimum rights and obligations."

BK11-20/006 margin no 117:

> "(…) The provision does not contain a restriction to the effect that the alternative product must be designed for access to passive network infrastructure, which in this respect is identical to the term 'physical infrastructure' as defined in Article 2 point 2 of the Cost Reduction Directive (without dark fibre). Rather, the second half of the sentence in the provision states that sharing passive network infrastructure other than that for which access is requested, suitable wholesale products for telecommunications services, and access to existing telecommunications networks can be offered as alternatives. Access to dark fibre, if the wholesale product is generally considered to be suitable, is covered by the latter two examples; in each case it involves access to an existing telecommunications network."

BK11-20/006 margin no 118:

> "The fact that the dark fibre product comes into question as a viable alternative – given that the other prerequisites are met – is confirmed by the comments on this reason for refusal in the explanatory notes on the legislation:
>
> 'With the availability of viable alternatives, para 6 makes it clear that rights to sharing serve to economically facilitate network deployment by reducing costs, and therefore not every case of sharing is in the interests of society as a whole, irrespective of the costs incurred. With respect also to the degree of intervention of rights to sharing, the use of existing regulated wholesale products in the telecommunications market can come into question. In cases where the network operator already grants access to passive network infrastructure at wholesale level and thus accommodates the requirements of the parties interested in sharing, extending access may be economically disadvantageous for the operator's business model and investment incentives and could lead to superfluous network elements, which would be inefficient.

...

If a request for sharing is refused, specific alternatives must be offered and the alternatives must be viable. It must be possible to use the alternatives without further delay. The standard examples beyond the wholesale level aim to provide more scope for action in the interests of swift network deployment. This applies in particular to the possibility of using passive network infrastructure by alternative means.' See Bundestag printed paper 18/8332, pages 48-49"

The viable alternative can exceptionally be a third-party product

BK11-20/006 margin no 127:

"The fact that – within strict limits – it is nevertheless generally possible to use a product from a third party as well follows from the German legislative provisions, which – beyond the reasons listed in Article 3(3) of the Cost Reduction Directive – also cite open access to an existing optical fibre network as a special reason for refusal in section 77g(2) para 7 of the Telecommunications Act (TKG). Duplication as a reason for refusal follows from a systematic interpretation of the Cost Reduction Directive."

BK11-20/006 margin no 128:

"The wording of the provision and the accompanying explanatory notes do not assume that the network of the infrastructure owner to whom a request for sharing is made is necessarily affected. Rather, they assume that 'existing optical fibre networks' are duplicated (section 77g(2) para 7 TKG) or 'optical fibre networks already exist in a deployment area' (Bundestag printed paper 18/8332, page 48). This makes it clear that the provisions also enable the access seeker to be referred to a general product that can be used without problems and without access negotiations (as is the case with open access)."

End-users concerned are free to choose between a new, faster fibre connection and keeping a standard DSL product

BK11-21/002 margin no 230:

"The effects of a possible right of choice on the contractual relationships between the applicant and the end-users concerned and on any other possible contractual relationships based on the use of the infrastructure in question are of great importance. It can be assumed that both the deployment of active technology to convert optical signals from optical fibre infrastructure to electrical signals for copper infrastructure and the necessary deployment of optical fibre structures and associated necessary provision of fibre connections would lead to changes in the contracts with end-users. As a result, end-users would no longer have their old connection with the applicant and would be forced to switch to a possibly better but also usually more expensive option. (…) In this respect, whether or not sharing is reasonable is therefore based in particular on the (…) objective of safeguarding user and consumer interests in the field of telecommunications. The aim here is specifically to promote the ability of end-users to use applications and services of their choice, which would be significantly restricted by a different decision by the ruling chamber."

BK11-21/002 margin no 232:

> "Not least, an order to that effect would disregard specific user interests and represent an intervention in the basic rights of the general freedom of action and the freedom of ownership. The end-users concerned already have a choice in the respondent's properties […]. Their freedom of choice would be disregarded and they would be forced by regulation to choose a better but usually significantly more expensive product."

Technology-neutral request for sharing is fully admissible and cannot be restricted by the respondent to sharing optical fibre infrastructure (no right of choice for the respondent):

BK11-21/002 margin no 202:

> "In the ruling chamber's view there is therefore no basis for a general 'right of choice' that the party to whom a request for sharing is addressed can always invoke. (…)"

BK11-21/002 margin no 204:

> "Ultimately, it is therefore possible when assessing whether or not sharing would be reasonable to consider whether enabling shared use of the infrastructure requested does not seem acceptable in the specific case. However, the current and future legislative structure of the provision does not provide a general 'right of choice' that can always be invoked."

BK11-21/002 margin no 224:

> "The provision, with reference to the Digital Networks Act (DigiNetzG), only gives priority to digital high-speed networks in the sense that new high-speed-ready in-building infrastructure can be constructed if there is no such existing infrastructure. The present case is different in this very respect because the aim is to continue to enable shared use of the existing active infrastructure."

Sharing is not infinite

BK11-21/002 margin no 234:

> "The sharing ordered here will not – as incorrectly assumed by the respondent and the party summoned 15 – actually be maintained infinitely. Rather, by including operative part 3, the ruling chamber is already taking account of the finite nature of the order linked to the contracts for service provision. The intensification of competition for high-performance connections and the increasing needs of end-users for fast – purely fibre-based – connections mean it can be assumed that sharing will be for a limited period of time. The ruling chamber assumes that use of the indoor cabling in question will be phased out."

BK11-21/002 margin no 267:

> "The sharing ordered has a further fair and reasonable condition linking the end of the possible sharing not only to the end of the service contractually agreed between the end-users concerned and the applicant and provided using the infrastructure in question but also to a general end to services provided to any users using the infrastructure in question. Here, the ruling chamber is using the legal definition in section 3 para 14 of the Telecommunications Act (TKG) as a result of overarching competitive considerations. The term 'user' covers not only end-users but also users at wholesale level."

BK11-21/002 margin no 268:

> "Sharing for a limited period of time appears necessary and reasonable as a condition for sharing because the infrastructure is older and the arrangements need to take account of the objective of the Digital Networks Act (DigiNetzG) as well as the gigabit targets also set out in the future Telecommunications Act itself."

Costing methodology for sharing in-building network infrastructure

BK11-21/002 margin no 273:

> "The pricing methodology is based in this case on section 77n(6) sentence 2 of the Telecommunications Act (TKG). This provision requires the Bundesnetzagentur to base any charges it sets for sharing in-building network infrastructure as part of the dispute settlement procedure on the additional costs incurred by the owner of the building from enabling shared use of the in-building network infrastructure."

BK11-21/002 margin no 279:

> "Additional costs within the meaning of the provision that must be taken into account when setting charges are the additional costs incurred by the infrastructure provider solely from enabling the shared use. These costs may include costs for any necessary additional maintenance and adaptation work, any preventive safeguards to be adopted to limit adverse impacts on network safety, security and integrity, and any specific liability arrangements in the event of damages that would not have been necessary without the shared use […]."

BK11-21/002 margin no 239:

> "It should also be noted here that the pricing methodology in the new Telecommunications Act (TKG) will not change even for the new optical fibre infrastructure financed by the respondent and in section 149(5) TKG[2021] also only includes an additional costing methodology – even following a potential transfer to the party summoned 18. Bundesrat printed paper 325/21, page 109."

Cost causation principle: costs incurred due to the shared use must be borne by the party sharing use

BK11-19/007 margin no 49:

> "The owner of the accessed passive infrastructure must not incur any additional costs from enabling sharing. The costs incurred due to the shared use must therefore be borne by the party requesting sharing in line with the cost causation principle."

BK11-19/007 margin no 50:

> "Additional costs within the meaning of the provision that must be taken into account when setting charges are the additional costs incurred by the infrastructure provider solely from enabling the shared use. These costs may include costs for any necessary additional maintenance and adaptation work, any preventive safeguards to be adopted to limit adverse impacts on network safety, security and integrity, and any specific liability arrangements in the event of damages that would not have been necessary without the shared use."

BK11-19/007 margin no 51:

> "Additional costs that may be incurred due to sharing include in particular exploration costs (including passability checks), materials (such as cabling, cable conduits and sleeves), installing cabling, removing cabling after the end of use, additional safety measures, and documentation in the respondent's inventory management system. Any costs incurred as a result of the shared use during the period of use – for example because of additional safety measures – must also be borne by the applicant. The additional costs must be calculated in each individual case."