

DIGITAL

Guidance

on the classification of number-independent interpersonal telecommunications services (NI-ICS)



Bundesnetzagentur

**Guidance on the classification of
number-independent interpersonal
telecommunications services
(NI-ICS)**

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**Bundesnetzagentur für Elektrizität, Gas,
Telekommunikation, Post und Eisenbahnen**

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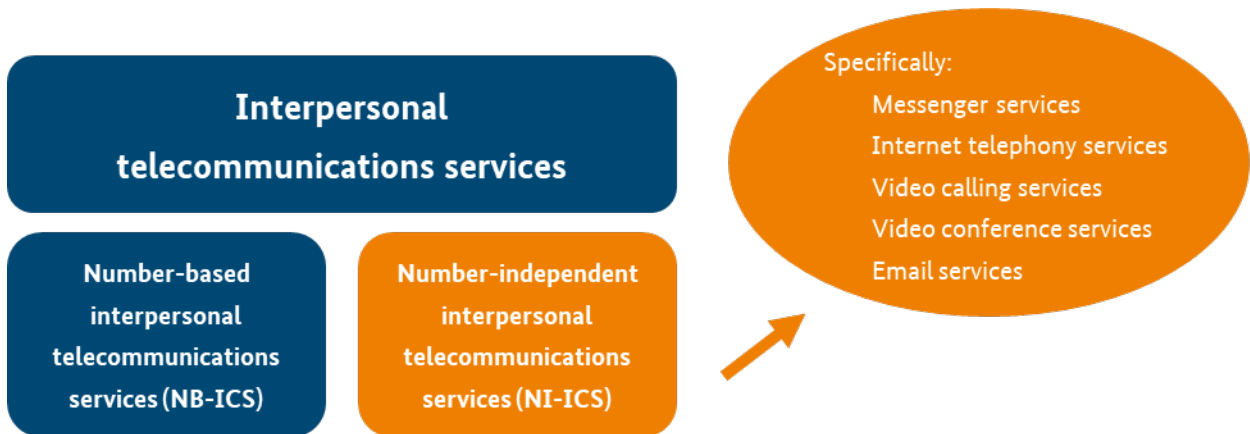
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1 Background

The revised **Telecommunications Act (TKG)** entered into force on 1 December 2021. The object of the revision was to implement into German law the requirements of the new legal framework for European telecommunications law set out in Directive (EU) 2018/1972 establishing the European Electronic Communications Code (EECC).¹ The term "telecommunications service" (section 3 para 61 TKG), which is a connecting factor to numerous regulatory obligations, was expanded to introduce the category of "**interpersonal telecommunications service**". This new category is subdivided into "number-based" (in the following referred to as NB-ICS (number-based interpersonal telecommunications services), section 3 para 37 TKG) and "number-independent" (section 3 para 40 TKG) interpersonal telecommunications services (section 3 para 24 TKG).

The services referred to as "**number-independent interpersonal communications service**" (NI-ICS, which stands for number-independent interpersonal communications service) have been included in sector-specific regulation for telecommunications services in the amended TKG. NI-ICS includes, for example, messenger services, internet telephony, video conferencing and email.²

Figure 1: New "interpersonal telecommunications services" category



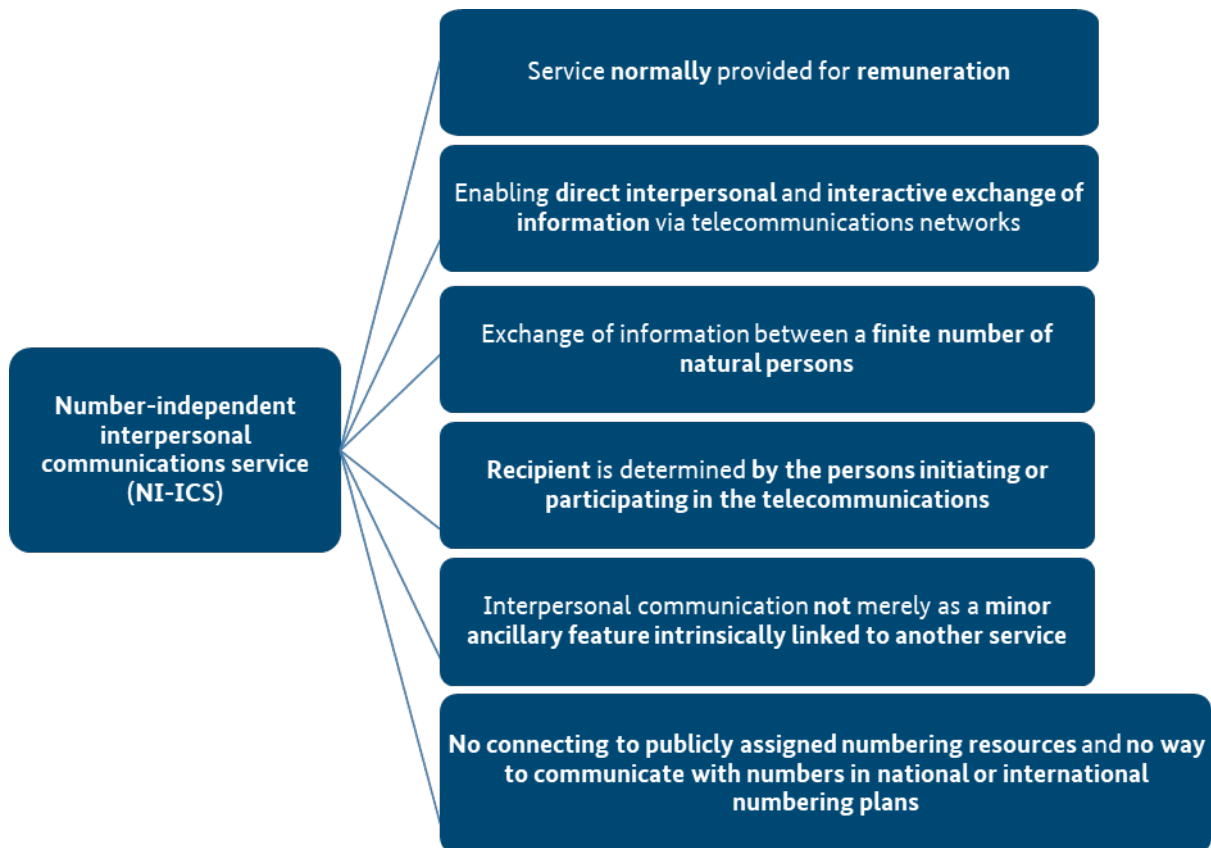
The newly-introduced category of NI-ICS (Article 2 point (5) EECC and section 3 para 24 TKG) is defined in the legislation as a service normally provided for remuneration which enables direct interpersonal and interactive exchange of information via telecommunications networks between a finite number of persons, whereby the persons initiating or participating in the telecommunication determine its recipient(s). "Interpersonal telecommunications service" does not include services that enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service. "Number-independent" (Article 2(7) EECC and section 3 para 40 TKG) are telecommunications services that do not connect with publicly assigned numbering resources (a number or numbers in national or international numbering plans), or

¹ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) OJ L 321 of 17 December 2018, page 36.

² Some email services ("any person who provides a publicly available electronic mail service in a business capacity") were already subject to certain obligations under section 111(2) TKG (2004) in connection with information requests by authorities concerned with public safety.

that do not enable telecommunication with a number or numbers in national or international numbering plans.

Figure 2: Characteristics of a number-independent interpersonal telecommunications service



The objective of including these services in the regulatory regime of the TKG is primarily to **ensure effective and equivalent protection of end-users** and their rights when using online services equivalent in functionality to traditional telecommunications services. This stems from the recognition that the services used for communication purposes and the technical means used to provide them have evolved significantly. End-users are less and less concerned about whether they use a "classic" telecommunications service (eg conventional voice telephony or SMS) to communicate or equivalent online services.³ The definition of the telecommunications service thus adheres more to a **functional approach** and less to a technical focus.⁴

Unlike providers of number-based interpersonal telecommunications services (such as fixed and mobile telephony), providers of NI-ICS are **not subject to the requirement** in section 5 TKG to notify their activities to the Bundesnetzagentur. In order to still be able to ensure reliable application of the regulatory provisions of the TKG, the Bundesnetzagentur **assesses any NI-ICS active on the German market** and informs the providers how their services are categorised and which requirements are applicable. Regulatory obligations

³ Explanatory notes on the new TKG, Bundestag Printed Paper 19/26108, re section 3, re para 24 page 231, Recital 15 EECC.

⁴ Explanatory notes on the new TKG, Bundestag Printed Paper 19/26108, re section 3, re para 61 page 236, Recital 15 EECC.

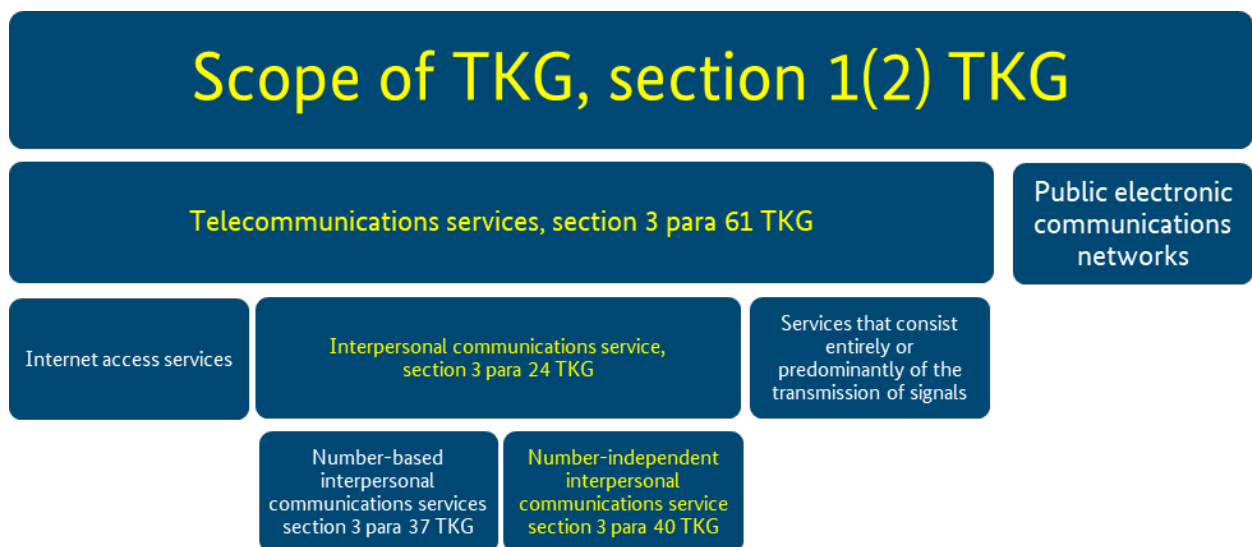
imposed on NI-ICS apply particularly in the areas of public safety/security, customer protection and market monitoring. The assessment and categorisation are for information purposes. Even without being informed of the categorisation as NI-ICS by the Bundesnetzagentur, providers of NI-ICS are subject by operation of law to the relevant obligations under the TKG.

The purpose of this document is to **assist telecommunications service providers in assessing** whether the telecommunications services they provide in Germany are to be categorised as NI-ICS. Guidance for interpreting the definition of NI-ICS reflects the current legal understanding of the Bundesnetzagentur (See 2 below). Individual questions of interpretation are currently still the subject of legal proceedings.⁵ This document also aims to provide information about which legal obligations generally apply to providers of NI-ICS in Germany (See 3 below).

2 Guidelines on categorisation as NI-ICS

Different statutory provisions and definitions of the TKG are important for classifying a communication service as NI-ICS, in particular the provisions regarding the geographical scope of its application (section 1(2) TKG) and the definitions of the telecommunications service (section 3 para 61 TKG), the interpersonal telecommunications service (section 3 para 24 TKG) and the number-independent interpersonal telecommunications service (section 3 para 40 TKG). In some cases the respective statutory provisions also apply to the respective subcategories of telecommunications services (see Figure 3). However, these guidelines are limited to clarifying questions of interpretation with regard to the special nature of categorising NI-ICS. Transfer to other categories of telecommunications services is not possible per se due to the respective special features.

Figure 3: Statutory provisions for the categorisation of services as NI-ICS



⁵ Note: this document may be subsequently amended on the basis of court decisions.

A communications service can generally only be subject to the TKG as NI-ICS when the geographical scope of the TKG (section 1(2) TKG) is open (see 2.1). A service is to be classified as NI-ICS only if the characteristics of a number-independent interpersonal telecommunications service (sections 3 para 24, para 40 and para 61 TKG) have been fulfilled (see 2.2). However, categorisation as NI-ICS is ruled out despite the presence of NI-ICS characteristics when the service is a minor ancillary feature that is intrinsically linked to another service (section 3 para 24 TKG), (see 2.3).

In addition, many of the TKG's statutory provisions only apply to providers of NI-ICS that fulfil another specific condition, namely that they are "publicly accessible" within the meaning of section 3 para 44 TKG (see 2.4).

2.1 NI-ICS provided within the scope of the TKG (section 1(2) TKG)

Pursuant to section 1(2) TKG telecommunications services fall within the geographical scope of the TKG if the telecommunications service is provided within the scope of the TKG, ie in Germany. Thus the marketplace principle is expressly laid down in the TKG. This includes not only companies that are established or resident in Germany, but all companies and persons providing telecommunications services in Germany, regardless of where their business is registered.⁶ The question of when a telecommunications service is provided in Germany requires an **assessment**. In the Bundesnetzagentur's view it can generally be assumed that an NI-ICS is provided in Germany if the telecommunications service is used by users in Germany.

For the question as to when users use the service in Germany, the principle of judicial investigation pursuant to section 24 Administrative Procedure Act (VwVfG) applies. By this principle the Bundesnetzagentur is required to investigate all relevant facts on its own initiative. It determines the nature and the scope of the investigation. It is not bound by the comments or requests for evidence submitted by the parties concerned. Pursuant to section 26(2) sentence 1 of the VwVfG, the parties are to cooperate in fact-finding and in particular to state facts known to them. This plays an important role with regard to the circumstances surrounding the party's sphere of knowledge and influence.⁷

2.1.1 Indicators that an NI-ICS is provided in Germany

In light of this the Bundesnetzagentur assumes that an NI-ICS is provided in Germany if one or more of the indicators listed below exist. These indicators are sufficient to show that the NI-ICS actually has users in Germany (circumstantial evidence). It is not necessary for all indicators to be present, though **at least one indicator** must be present when an individual case is analysed. There are also other conclusive indicators that can be used to demonstrate the provision of the service in Germany.

The Bundesnetzagentur believes that the following factors in particular can be taken into account as indicators that a NI-ICS is provided in Germany:

- company place of business in Germany;
- service offered in Germany;

⁶ See explanatory notes on the amended TKG, Bundestag Printed Paper 19/26108, re section 1 re para 2 page 226.

⁷ Kallerhoff/Fellenberg, in: Stelkens/Bonk/Sachs, VwVfG, 10th edition, 2023, margin number 28.

- service offered in German;
- service offered under a DE domain;
- application of German telecommunications law by choice of law clause;
- app available in German app store.

In addition, an NI-ICS is to be regarded as provided within the scope of the TKG if none of the above mentioned indicators are present, ie no German language version is available, but the NI-ICS is nonetheless used by users in Germany or there is another conclusive indicator for the provision of the service in Germany.

Companies have the opportunity to **invalidate** the **indicative effect** of the existence of an NI-ICS provided in Germany. To do so the company must provide qualified proof that the NI-ICS offered does not actually have any users in Germany. If the indicative effect can be invalidated, the NI-ICS is not subject to regulation under the TKG. However, the indicative effect cannot be **invalidated by referring to a contractual exclusion** clause for German users in the company's general terms and conditions or conditions of use.

2.1.2 Geographical mapping of NI-ICS users

Other than for number-based interpersonal telecommunications services (NB-ICS), NI-ICS users are not assigned a unique national number. For the question as to whether the NI-ICS actually has users in Germany, assignment criteria must be used as part of an assessment of when a user is to be considered a domestic user of a service.

To be able to examine geographical mapping by the provider of the NI-ICS, the Bundesnetzagentur is dependent **on information from the sphere of knowledge and influence of the NI-ICS providers**. In this context the Bundesnetzagentur takes into account provider-specific differences in the technical implementation of the NI-ICS and the availability of user data relevant for geographical mapping. In the opinion of the Bundesnetzagentur it thus seems appropriate for the geographical mapping of users to generally consider **different objective criteria**. Providers of NI-ICS are therefore free, within the framework of technical circumstances and available data, to use practical and appropriate mapping criteria for geographical mapping of users. It should be noted that the mapping should generally have a certain temporal longevity. The Bundesnetzagentur assesses on a case-by-case basis whether the provider's geographical mapping of users of the NI-ICS seems reasonable.

Objectively mapping users as located in the German market can be done using the following criteria:

- country codes of the user's telephone number;
- language setting;
- GPS data;
- mapping via IP address.

2.1.3 Determining the number of users

When determining the actual number of users, the question arises particularly in the area of NI-ICS as to whether to use the **number of registered users or the number of active users**.

While use of the word "providing" in section 1(2) TKG suggests that the actual provision and thus use of the service in Germany is decisive, whether or not the service is actually used in Germany is actually most likely to be reflected in the number of active (monthly/annual) users. Taking into account the different technical circumstances and availability of user data, NI-ICS providers are likely, as a minimum, to be familiar with registered user figures. For practical reasons the Bundesnetzagentur therefore considers it sufficient to **focus on registered users**, which are a strong indicator that the service has users in Germany.

For classifying a service as NI-ICS, section 1(2) TKG **does not actually set out a minimum number of users** beyond which the provisions of the TKG apply.

However, **technical regulations** in the TKG sometimes set **their own minimum numbers of users** beyond which certain obligations apply for the respective legal provisions. This takes into account considerations of proportionality and appropriateness in consideration of the low number of users in Germany in the context of the respective specific obligation pursuant to the requirements of the relevant subject area. For example, for the market data survey, data is only collected from providers of NI-ICS with more than 100,000 users (active users) as an NI-ICS's market relevance within the meaning of section 195(1) and section 196 TKG can only be assumed once this minimum has been reached. A minimum of 100,000 users connected to a telecommunications system also applies with regard to telecommunications interception under section 170 TKG in conjunction with section 3 of the Telecommunications Interception Ordinance (TKÜV). However, in some cases there are also standards in the TKG that do not apply to NI-ICS anyway (eg in the customer protection provisions of the TKG) or the Bundesnetzagentur can use discretion to decide whether or not to apply a rule to an NI-ICS with low user numbers. For example, the order to present a security concept for publicly available telecommunications services is at the discretion of the Bundesnetzagentur (see section 166(2) sentence 2 TKG).

2.2 Characteristics of a NI-ICS

The TKG specifies criteria that define an NI-ICS. These characteristics are listed below and include information about how the Bundesnetzagentur currently interprets them.

2.2.1 Provisions of a telecommunications service (section 3 para 1 and para 24 TKG)

Under section 3 para 1 TKG, "telecommunications service provider" means anyone who provides telecommunications services.

The "provision" of a telecommunications service involves a **third-party relationship** in the sense that the telecommunications service must be provided as a **service to a third party**. This is usually not the case whenever a company or a public authority operates communications equipment for the purpose of its own communication within the company or within the authority, for example with its own BigBlueButton. This must be assessed differently if a company in a group of affiliated companies provides the NI-ICS to other companies within the corporation. In this case the various companies are to be regarded legally as third parties and an NI-ICS is basically provided.

2.2.2 Normally or generally provided for remuneration (section 3 para 24 and para 61 TKG)

Under section 3 para 24 TKG, the interpersonal telecommunications service must be "normally provided for remuneration" or, under section 3 para 61 TKG, "generally provided for remuneration".

In the opinion of the Bundesnetzagentur it is sufficient if services of the same category of services (eg email services, messenger services) are "**generally**" or "**normally**" offered for remuneration. In this case it is not necessary to verify that the specific service is offered for remuneration.⁸ The Bundesnetzagentur believes that an assessment of the characteristic of remuneration on the basis of **an abstract standard of valuation** is therefore sufficient for classification as NI-ICS.

However, **consideration of the specific service** is also suitable for assessing the remunerative characteristic. The use of the terms "generally" and "normally" also makes it possible to include situations in which the provider provides the service without remuneration, either temporarily or partially (for example, for certain groups of the population such as students at schools and universities) for business or social reasons.

The remunerative characteristic in section 3 para 24 and para 61 TKG stems from European law (Article 2 point (4) and point (5) EECC) and dates from the definition of services in Article 57 of the Treaty on the Functioning of the European Union (TFEU).⁹ Here the Court of Justice of the European Union (CJEU case law assumes a **broad definition of remuneration**.¹⁰

Under the CJEU's broad definition of remuneration, the provision of services can be presumed to be remunerated even if it is in the form of economic activities that are part of business life.¹¹ According to the case law of the CJEU, the characteristic of "normally or generally for remuneration" serves to **distinguish between economic and purely private situations**. The European Union only has legislative competence for these economic situations under the limited conferral of internal market competence of Article 114 TFEU in conjunction with Article 26(2) TFEU.¹²

Thus **purely private situations** are not covered by the **definition of remuneration**. **Accordingly**, in line with the aim and purpose of the EECC, all commercial telecommunications services should be included in the regulatory framework. The explicit legislative objective of including NI-ICS in regulation was to ensure the same effective protection for end-users of communication services such as video telephony, email and messenger services as is the case with functionally comparable traditional telecommunications services such as landline or mobile telephony and text messaging.¹³ Only those **offers that are not in a commercial context** should be excluded since there is no need in a non-commercial context to protect end-users as lawmakers intended. This means, for example, that messenger services do not fall under the definition of remuneration in section 3 para 24 TKG, provided that a separate messaging server is set up **privately** and used solely in a definable and purely private environment. Offers between **employer and employee** are also generally excluded. These are

⁸ See also: European Commission in the Apple proceedings concerning Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act): iMessage, Cases DMA.100013 Apple, Judgment of 5 September 2023, C(2023) 6100 final, paragraph 142 – Note: Apple filed an appeal against the EU Commission's Designation Decision and the decision to open a market investigation into iMessage (Cases T-1079/23 and T-1080/23); neither appeal has concluded.

⁹ See explanatory notes, Bundestag Printed Paper 19/26108, re section 3, re para 61 page 237.

¹⁰ See only CJEU, Case C-484/14, Judgment from 15 September 2016, paragraph 40; see also other case law in: Kluth, in: Callies/Ruffert, EUV/AEUV, 6th edition, 2022, Article 57, margin number 11.

¹¹ CJEU, Case C-484/14, Judgment from 15 September 2016, paragraph 40; see also case law in: Kluth, in: Callies/Ruffert, EUV/AEUV, 6th edition, 2022, Article 57, margin number 11.

¹² See Oster/Wagner, in Dausen/Ludwigs, Handbuch des EU-Wirtschaftsrechts, 58th supplement April 2023, margin number 136; Randelzhofer/Forsthoff, Das Recht der Europäischen Union, 79th supplement, May 2023, margin number 44.

¹³ See explanatory notes on the amended TKG, Bundestag Printed Paper 19/26108, re section 3, re para 24 page 231.

often a work tool that the employer makes available to the employee and not an independent economic activity of the employer. The private use of an email service by the employee, for example, does not result in the employer's offering being aimed primarily at a commercial advantage or another form of remuneration. The same generally applies when a **university offers students** a NI-ICS.

Under the case law of the CJEU, remuneration may consist of a **direct monetary payment** or other forms of remuneration. This is particularly important for NI-ICS since these services are often provided free of charge to the end-user. NI-ICS are often financed by advertising or other indirect sources of revenue.¹⁴ The following **indirect and non-monetary forms of payment** are also considered equivalent to a cash payment under the concept of remuneration.

Specifically:

- **Collection of data**

Remuneration is to be assumed if personal or other data is collected from the users while the service is being provided. In the digital economy, market participants increasingly consider information about users as having a monetary value.¹⁵ The economic value of data is also currently confirmed by the European Data Strategy¹⁶ and the legal acts adopted in this context, in particular the Data Act.¹⁷

To meet the criterion of having a remunerative characteristic, it is sufficient but not necessary that the data is actually monetised by the provider of the NI-ICS or third parties. Merely the **possibility of being able to use the data** is sufficient and it is not necessary for the user to **actively make the data available**. It also encompasses situations where the end-user allows access to information without actively supplying it, such as personal data, including the IP address, or other automatically generated information, such as information collected and transmitted by a cookie.¹⁸

- **Advertising**

Remuneration can also take place whenever the **end-user is exposed to advertising as a condition of access to the service** and the service provider is paid by third parties and not by the recipient of the service.¹⁹

- **Indirect financing and cross subsidisation**

Other forms of indirect financing and cross subsidisation also fall under the concept of remuneration in section 3 para 24 and para 61 TKG. Thus the CJEU's definition of remuneration does not require a direct exchange relationship between the service and the service done in return. On the contrary, the idea of remuneration

¹⁴ See Recital 16 EECC.

¹⁵ Recital 16 EECC, explanatory notes on the amended TKG, Bundestag Printed Paper 19/26108, re section 3 re para 61 page 237.

¹⁶ Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 19 February 2020, "A European strategy for data", (COM(2020) 66 final).

¹⁷ Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act), OJ L, 2023/2854 of 22 December 2023.

¹⁸ Recital 16 EECC, explanatory notes on the amended TKG, Bundestag Printed Paper 19/26108, re section 3 re para 61 page 237.

¹⁹ See CJEU, case C-352/85, Judgment of 26 April 1988; margin number 16; Recital 16 EECC; explanatory notes on the TKG amendment, Bundestag Printed Paper 19/26108, re section 3, re para 61, page 237.

also applies to **indirect financing** where the recipient of the service does not pay for the service but instead the service is paid for by a third party.²⁰ **Cross subsidisation** refers to financial support for a corporate division operating on a deficit or a product or service offered free of charge by other profitable divisions. Under CJEU case law it can also be considered remuneration where a free of charge service is provided by a supplier for the purpose of advertising the goods sold or the services provided by the supplier.²¹ In a recent decision by the European Commission related to the Digital Markets Act²² the Commission also correctly accepted that a messenger service offered free of charge was remunerative because it could be assumed that the provider of the messenger service would receive remuneration **through the sale of its terminal equipment** within the service provider's digital ecosystem.²³

2.2.3 Interpersonal and interactive exchange of information (section 3 para 24 TKG)

The service must enable an interpersonal and interactive exchange of information by means of electronic communications networks. These include services such as traditional voice and video calls between two individuals but also all types of emails, messaging services (text, image and video messages) or group chats.²⁴

Communication, both on the sending and receiving end, must generally take place between **two or more natural persons** (interpersonal exchange of information). In addition to a natural person, a **legal person** may also be involved in the communication as an exception if the legal person is represented by a natural person who is acting on behalf of the legal person. This includes communication by a natural person with a legal person using a mailbox provided by the legal person. By contrast, **communication between a natural person and a machine** (eg a voice assistant or a chatbot) is not included.²⁵ A chatbot is a technical dialogue system that uses language or text on the basis of defined rules (rules-based) or artificial intelligence to enable dialogue between a human being and a technical system. Services for **machine-to-machine communication** are also not NICS. Machine-to-machine services are services involving an automated transfer of data and information between devices or software-based applications with limited or no human interaction.²⁶

The **interactive element** of the exchange of information indicates that the recipient of the information has the technical **possibility to respond**. This excludes services such as linear broadcasting, websites, social net-

²⁰ See CJEU case C-484/14, Judgment of 15 September 2016, paragraph 41; CJEU, Case C-352/85, Judgment of 26 April 1988, paragraph 16; Recital 16 EECC.

²¹ See CJEU Case C-484/14, Judgment of 15 September 2016, paragraph 41.

²² Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

²³ See European Commission in the case Apple under the Digital Markets Act: iMessage, Cases DMA.100013 Apple, Decision of 5 September 2023, C(2023) 6100 final, paragraphs 139 and 140 - 142 – Note: Apple filed an appeal against the EU Commission's Designation Decision and the decision to open a market investigation into iMessage (Cases T-1079/23 and T-1080/23); neither appeal has concluded.

²⁴ Explanatory notes on the amended TKG, Bundestag Printed Paper 19/26108, re section 3, re para 24 page 231, Recital 17 EECC.

²⁵ See explanatory notes on the amended TKG, Bundestag Printed Paper 19/26108, re section 3, re para 24 page 231, Recital 17 EECC.

²⁶ See explanatory notes on the amended TKG, Bundestag Printed Paper 19/26108, re section 3, re para 61 page 237, Recital 17 EECC.

works²⁷ and machine-to-machine communications in interpersonal telecommunications services.²⁸ However, the criterion of interactivity is not met solely by posts in a social network only being delivered specifically to individual users (eg only to friends or followers) by using and combining (filter) functions.

2.2.4 Finite number of persons (section 3 para 24 TKG)

Pursuant to section 3 para 24 TKG the exchange of information must take place between two or more persons, but ultimately a finite and **not potentially unlimited number of persons**. This includes both one-to-one and one-to-many communication, which means that group chats are also covered.²⁹

The "finite group of persons" characteristic helps to **differentiate from services similar to broadcasting** (broadcasting functions). Services that do not meet those requirements, such as linear broadcasting, video on demand, websites, social networks and blogs should not be considered to be interpersonal communications services.³⁰

2.2.5 The person initiating the telecommunication determines its recipient(s) (section 3 para 24 TKG)

Under section 3 para 24 TKG the exchange of information must be characterised by the fact that the persons initiating or participating in the telecommunication determine its recipient(s).

This means that the recipient must be determined by the initiator, the sender of the communication, or by persons participating in the telecommunication.³¹ The latter may cover the case of a group chat situation or one-to-many communication.

Also included are cases where **fixed forwarding of email services** are set up. Here the sender of the email determines the recipient in the first act of communication. By forwarding this email (ie the second act of communication) the original recipient determines the new recipient and is now the sender of the forwarded email.

2.2.6 Number-independence (section 3 para 37 TKG)

Under section 3 para 37 TKG a "number-independent interpersonal communications service" can only be referred to as such when it **does not connect with publicly assigned numbering resources**, namely, a number or numbers in national or international numbering plans, **or enable telecommunication with a number or numbers in national or international numbering plans**.

²⁷ Note: while social networks are mentioned here in the explanatory notes, it should nevertheless be noted that many social networks now have response functions. However, social networks are generally not made available to a finite group of persons and therefore should not be categorised as NI-ICS (see point 2.2.4). However, where social networks have a communication function and this communication function meets the criteria of an interpersonal telecommunications service pursuant to section 3 para 24 TKG, this communication function must be classified as NI-ICS unless it is an exception as a "minor ancillary feature" within the meaning of section 3 para 24 half sentence 2 TKG (see point 2.3).

²⁸ See explanatory notes on the amended TKG, Bundestag Printed Paper 19/26108, re section 3, re para 61 page 237, Recital 17 EECC.

²⁹ Explanatory notes on the amended TKG, Bundestag Printed Paper 19/26108, re section 3, re para 24 page 231, Recital 17 EECC.

³⁰ See Recital 17 EECC, see also explanatory notes on the amended TKG, Bundestag Printed Paper 19/26108, re section 3 re para 24 page 231.

³¹ See also: Büning, in Geppert/Schütz etc, in TKG Kommentar (TKG Commentary), 5th edition 2023, TKG section 3 margin number 66.

Under section 3 para 37 TKG a NI-ICS exists only when no end-users numbers have been assigned to the provider of the service. There can be no possibility to connect to publicly assigned numbering resources. Furthermore, the service may in no way, including through the involvement of a wholesaler, enable its customers to communicate with numbers in national or international numbering plans. Normally messenger services meet this criterion, as do email and video conferencing services. The use of numbers only to clearly identify users, ie as an identifier and not for a connection, does not result in classification as a number-based interpersonal telecommunications service (NB-ICS).³²

2.3 Exception for the "minor ancillary feature) (section 3 para 24 TKG)

The definition of interpersonal telecommunications services under section 3 para 24 TKG provides for an exception for services "**which enable interpersonal and interactive telecommunication merely as a minor ancillary feature that is intrinsically linked to another service**". As a result, these services are not to be categorised as interpersonal telecommunications services and are not subject to regulation under the TKG.

The exception can only come into question if another service that is not a telecommunications service but rather a content service has a communication facility that meets the criteria of an interpersonal telecommunications service pursuant to section 3 para 24 TKG.

Recital 17 of the EECC provides initial guidance for interpreting exceptions. Of relevance here is whether the communication facility is a purely ancillary feature to another service and **for objective technical reasons cannot be used without the principal service**. However, its integration should not be a means to circumvent the applicability of the rules governing electronic communications services. As elements of an exemption from the definition, the terms 'minor' and 'purely ancillary' should be interpreted narrowly and from an objective end-user's perspective. An interpersonal communications feature could be considered to be minor where its **objective utility for an end-user is very limited** and where it is in reality barely used by end-users.

The legislators have called upon the Bundesnetzagentur to determine **other exception criteria** in consultation with the authorised bodies and involving the market participants.³³ The Bundesnetzagentur is continuing to work on further specifying the exception criteria and at the same time is taking into account the findings and responses to the assessments so far. At the appropriate time the Bundesnetzagentur will make the results available as an annex to this document.

2.4 Publicly available telecommunications services (section 3 para 44 TKG)

A telecommunications service is publicly available if it is available to a **non-defined group of persons**. This group of persons may include both natural and legal persons.

The public characteristic cannot be interpreted to mean that it must be possible for "everyone" to use it. It is not possible for a publicly available telecommunications service simply not to be called publicly available if it is tailored to the needs of one customer or a group of customers, for it is not absolutely ruled out that the same offer could also be considered for an indeterminate number of other customers.³⁴ Hence it follows that

³² Recital 18 EECC.

³³ See explanatory notes on the new TKG, Bundestag Printed Paper 19/26108, re section 3 re para 24 page 232.

³⁴ Higher Administrative Court of North Rhine-Westphalia ruling of 13 March 2002, file reference no 13 B 32/02.

an offer for a **particular group of customers or an indeterminate number of potential customers** is a publicly available offer.

This prevents a low-priced publicly available telecommunications offer from being ruled out due to the fact that it is provided for a particular group only, eg members of a club, insurance companies or independent insurance agents. Such groups can be defined by type and extent in a number of ways. Membership in a club, for example, is not sufficient to differentiate a certain group of people from the public. Thus also assigning people to a group bound together by certain legal obligations does not rule out the public/publicly available factor. Contractual relationships (eg supply contracts or rental agreements) within a user group are not sufficient on their own for differentiating from the public.

By granting access authorisations or end-to-end encryption, **only access to the system can be restricted** so as to prevent it from being used by unauthorised persons. Such a measure does not differentiate from the public since the composition of the actual user group (defined or non-defined group of persons) remaining through the technical measure is what actually matters.

A service is considered publicly available if, among other things, it is **available to other potential users** who are interested in the business model concerned. These are usually market-focused business models that are aimed at attracting more customers or are open to having more customers and users.

3 Legal obligations for NI-ICS providers under the TKG

Currently NI-ICS providers are **not subject to the same legal obligations under the TKG as number-based interpersonal telecommunications services** (NB-ICS). Legislators only wish to subject NI-ICS to obligations under the TKG when the application of specific regulatory obligations to all types of interpersonal telecommunications services is in the public interest. It is justified to treat NB-ICS differently since they participate in and also benefit from a publicly assured interoperable ecosystem.³⁵ Inclusion of NI-ICS in the regulatory framework of the TKG is hence currently limited mainly to obligations in the areas of public safety (sections 170 et seq TKG), organisational and technical requirements for the designation of security officers, contact persons for security in the EU and for the creation of security concepts (sections 164-168 et seq TKG), customer and consumer protection requirements (sections 51 et seq TKG) and requirements for market monitoring (sections 195-196 TKG).

For NI-ICS the Bundesnetzagentur is responsible for obligations arising from the TKG and any statutory instruments issued on that basis.

Obligations arising from the TKG include:

- interoperability obligations (section 21(2) TKG),
- customer protection requirements (sections 51 et seq TKG),

³⁵ See explanatory notes on the new TKG, Bundestag Printed Paper 19/26108, re section 3, re para 40 page 234, Recital 18 EECC.

- organisational and technical requirements in the area of public safety for the designation of security officers, contact persons for security in the EU and for the creation of security concepts and emergency preparedness (sections 164 - 168 and sections 184 et seq TKG),
- notification obligations in the event of a personal data breach (section 169 TKG),
- obligations for telecommunications interception, for the storage of operationally collected access holder data and for the information procedures in the area of public safety (sections 170, 174 TKG, the TKÜV and section 172(3) TKG), which serve as the basis, for example, for the investigative activities of the law enforcement authorities,
- information requests to undertakings (sections 203, 204 TKG) notably in respect of market monitoring for public reporting purposes (sections 195, 196 TKG) and
- Sharing mechanism relating to the right to be supplied with telecommunications services: obligation at the Bundesnetzagentur's discretion, if certain preconditions are met, to contribute to compensation as part of the sharing mechanism (section 163(6) TKG in conjunction with section 21(2) para 1 TKG).

Different departments and sections within the Bundesnetzagentur are responsible for these topics and act independently within the framework of their responsibilities.

4 Legal obligations under other legal regimes

NI-ICS is also subject to **other obligations outside the TKG**, for example on the basis of European legal instruments and German legislative acts.

Particularly in the area of **data protection**, the obligations under the Telecommunications Digital Services Data Protection Act (TDDDG) are linked to the concept of telecommunications service.

For example, **European law has interoperability obligations under Article 7 of the Digital Markets Act**, which are linked to the NI-ICS characteristics.³⁶

It should be noted that NI-ICS may be subject to **different legal regimes**. Thus it is possible that certain NI-ICS may also fall under the definition of an "**information society service**" as set out in Article 1 of Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services³⁷ (Directive 2015/1535).³⁸ For its part the concept of information society services is a connecting point for obligations in other European legal instruments such as Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the

³⁶ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

³⁷ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Directive (EU) 2015/1535).

³⁸ Recitals 10 and 11 EECC.

free movement of such data³⁹ (**General Data Protection Regulation**) and Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).⁴⁰ In these cases the legal regimes apply side by side in relation to each relevant regulatory area. With this in mind Recital 11 of the EECR also states that an undertaking, for example a cable operator, may be subject to additional obligations in relation to its activity as a content provider or distributor under provisions other than those of the EECR, without prejudice to the conditions laid in an annex to the EECR. The same applies to NI-ICS, some of which are categorised as Information Society services.

The same applies to the relationship between the TKG and Regulation (EU) 2022/2065 on a Single Market for Digital Services (**Digital Services Act - DSA**).⁴¹ NI-ICS, which enable the storage of information provided by a user on the user's behalf, are generally to be categorised as "**hosting services**" within the meaning of Article 3(g)(iii) DSA. This is the case when user profiles can be created with additional information (such as profile photo or status) that goes beyond pure customer data or when the storage of photos and videos is made possible. However, NI-ICS may also fall under the definition of "**mere conduit**" services within the meaning of Article 3(g)(i) DSA if they do not offer additional related functions (see Recital 29 DSA). If NI-ICS also offer open channels and public groups (beyond messaging and storing information) these parts of the service may constitute an online platform offering within the meaning of Article 3(i) of the DSA (see Recital 14 DSA). Interpersonal communication is not possible through open channels (information can only be retrieved), whereas interpersonal communication is possible through public groups. With regard to the relationship between these different legal regimes, it is made clear in the recitals of the EECR that it is necessary "to separate the regulation of electronic communications networks and services from the regulation of content".⁴² The regulatory regimes are applied here side by side because they regulate different obligations and aspects of life.

In the case of **combined or mixed services**, which contain elements both of content services and of communications services, it should also be noted that the requirements of the TKG apply only to the communication functions that meet the criteria of an NI-ICS. This is made clear in the definition of telecommunications services. "Services providing content transmitted using telecommunications networks and telecommunications services or exercising editorial control over content" are not telecommunications services. With combined services there may also be a need to examine on a case-by-case basis whether the communication facility constitutes an ancillary function intrinsically linked to the content service, which as an exception is not to be treated as such despite the fact that the criteria for an NI-ICS have been met (section 3 para 24 TKG, see also 2.3).

³⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

⁴⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

⁴¹ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

⁴² Directive (EU) 2018/1972, Recital 7.

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List of abbreviations

CJEU	Court of Justice of the European Union
EECC	European Electronic Communications Code
Email	Electronic Mail
EU	European Union
GPS	Global Positioning System
IP address	Internet Protocol Address
NB-ICS	Number-Based Interpersonal Communications Service
NI-ICS	Number-Independent Interpersonal Communications Service
SMS	Short Message Service
TDDDG	Telecommunications Digital Services Data Protection Act
TFEU	Treaty on the Functioning of the European Union
TKG	Telecommunications Act
TKÜV	Telecommunications Interception Ordinance
VwVfG	Administrative Procedure Act

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