



EUROPEAN COMMISSION

Brussels, 6/07/2012
C(2012) 4858

Bundesnetzagentur (BNetzA)

Tulpenfeld 4
D-53113 Bonn
Germany

For the attention of:
Mr. Homann
President

Fax: +49 228 14 69 04

Dear Mr Homann,

Subject: Commission Decision concerning case DE/2012/1337: Withdrawal of price control for very high bandwidth wholesale terminating segments of leased lines in Germany

Article 7(3) of Directive 2002/21/EC: No comments

I. PROCEDURE

On 7 June 2012, the Commission registered a notification from the German national regulatory authority, *Bundesnetzagentur* (BNetzA)¹, concerning wholesale terminating segments of leased lines² in Germany.

The national consultation³ ran from 31 August 2011 and lasted for one month⁴.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

¹ Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Corresponding to Market 6 of the Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

³ In accordance with Article 6 of the Framework Directive.

⁴ This national consultation related to the assessment of the 3 criteria test and SMP the findings of which were notified under case DE/2011/1277, see below for details.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The market for wholesale terminating segments of leased lines was first notified to and assessed by the Commission under case DE/2006/0480⁵. The Commission opened a second-phase investigation under Article 7(3) of the Framework Directive on the grounds that the evidence provided by BNetzA did not support the market definition proposed by BNetzA, in particular the proposed split according to bandwidth, the exclusion from the market definition of leased lines over alternative interfaces, and the exclusion of system solutions. BNetzA subsequently withdrew and re-notified its draft measures on the relevant market which the Commission assessed under case DE/2007/0677⁶. Following its re-assessment of the relevant market BNetzA included into its market definition also leased lines with alternative interfaces (in particular based on Ethernet and ATM) and did not segment the market according to different bandwidths. BNetzA designated Deutsche Telekom AG (Deutsche Telekom) as having significant market power (SMP). Furthermore, BNetzA notified the respective remedies under case DE/2007/0687 and proposed to impose obligations regarding access, the publication of a reference offer, non-discrimination and an ex ante price control.⁷ However, BNetzA stated that the remedies regarding leased lines above 2 Mbps were annulled in the German courts⁸. As a result, BNetzA currently relies on a decision of 2004 setting such remedies⁹. In its answer to the Commission's request for information BNetzA clarified that under this decision Deutsche Telekom was transitionally obliged to continue to provide leased lines under the conditions of the former Telecoms Law of 1996 (TKG 1996). This decision had not been notified to the Commission under the current regulatory framework.

In addition, in its second round notification for wholesale terminating segments of leased lines under case DE/2011/1277¹⁰ BNetzA divided the relevant product market into four segments according to bandwidth: (i) analogue terminating segments and digital terminating segments with a bandwidth of less than 2 Mbps; (ii) terminating segments with a bandwidth of 2 Mbps to and including 10 Mbps; (iii) terminating segments with a bandwidth of more than 10 Mbps up to and including 155 Mbps; (iv) terminating segments with a bandwidth over 155 Mbps. Thus, the market definition notified in 2011 was insofar different from the market definition notified in 2007 as it contained a definition of different markets, not all of which were considered as being susceptible to ex ante regulation. In contrast, the 2007 notification defined one single market comprising all bandwidths and Ethernet based leased lines, which had been found not to be effectively competitive. The 2004 decision comprised all bandwidths of traditional interface leased lines, not including, however, Ethernet leased lines. This decision was however, not based on a market analysis under the regulatory framework but only prolonged regulation under the former 1996 TKG on a preliminary basis.

Under case DE/2011/1277, BNetzA proposed not to regulate the segments mentioned

⁵ SG-Greffe (2005) D/205459.

⁶ SG-Greffe (2007) D/205763.

⁷ SG –Greffe (2007) D/206667; the Commission issued a no comments letter.

⁸ Judgment of 26 March 2009 of the Administrative Court of Cologne (Az.: 1K 5114/07), Judgment of 1 September 2010 of the Highest Administrative Court (Bundesverwaltungsgericht) (6 C 13.09).

⁹ Decision Bk2b 04/027 of 30 November 2004.

¹⁰ SG-Greffe (1011) D/25152; the Commission issued a no comments letter.

under (i) and (iv) above based on its view that the 'three criteria test' is not met and that the relevant markets are prospectively competitive. BNetzA concluded, however, that segments (ii) and (iii) above are susceptible to ex-ante regulation. BNetzA considered that these two segments are not effectively competitive and proposed to designate the incumbent, Deutsche Telekom, with SMP. However, the 2011 notification only related to market definition and SMP and not to remedies.

Under Case DE/2012/1231, BNetzA proposed to set prices for terminating segments of leased lines on the basis of its first review of the market for terminating segments of leased lines in Germany (case DE/2007/0687), to be applicable retrospectively from 1 November 2011 until 31 October 2013. In particular, BNetzA proposed modified tariffs for terminating segments of leased lines of a bandwidth of (i) 2 Mbps to 10 Mbps, (ii) more than 10 Mbps up to 155 Mbps and (iii) also for bandwidths over 155 Mbps. Following the opening of a second phase under Article 7a¹¹ BNetzA withdrew its proposed measures. Regarding leased lines above 155 Mbps, the Commission had based its serious doubts on BNetzA's duty under Article 16(3) of the Framework Directive to remove regulatory obligations in markets found to be competitive.

II.2. Regulatory remedies

The notified measures concern the withdrawal of regulation for leased lines of bandwidths of above 155 Mbps, together with the adoption of the final measure based on BNetzA's finding that the 'three criteria test' is not met for this market and that the relevant markets are prospectively competitive, in line with Article 16(3) of the Framework Directive. The notified draft measure does not include proposals for regulation of the leased lines of a bandwidth of 155 Mbps and less which will be notified at a later stage¹².

III. NO COMMENTS

The Commission has examined the notifications and has no comments.¹³

Pursuant to Article 7(7) of the Framework Directive, BNetzA may adopt the draft measure and, where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC¹⁴ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission¹⁵ within three

¹¹ SG-Greffe (2012) D/9118.

¹² The regulatory measures for all terminating segments of leased lines have been consulted at national level and the consultation period ended on 16 May 2012; in its national consultation BNetzA proposed to impose the full set of obligations for all bandwidth where it had notified SMP in case DE/2011/1277.

¹³ In accordance with Article 7(3) of the Framework Directive.

¹⁴ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

¹⁵ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.¹⁶ You should give reasons for any such request.

Yours sincerely,
For the Commission,
Robert Madelin
Director-General

¹⁶ The Commission may inform the public of the result of its assessment before the end of this three-day period.