EUROPEAN COMMISSION

Brussels, 22/12/2011
C(2011) 10078

SG-Greffe (2011) D/25152

Bundesnetzagentur (BNetzA)

Tulpenfeld 4
D-53113 Bonn
Germany

For the attention of:
Mr. Matthias Kurth
President

Fax: +49 228 14 69 04

Dear Mr Kurth,

Subject: Commission decision concerning Case DE/2011/1277: Wholesale terminating segments of leased lines

Article 7(3) of Directive 2002/21/EC:[1] No comments

I. PROCEDURE

On 25 November 2011, the Commission registered a notification from the German Regulatory Authority *Bundesnetzagentur* (BNetzA) concerning the second review of the market for wholesale terminating segments of leased lines in Germany[2].

The national consultation[3] was held from 31 August 2011 and lasted for one month. The deadline for the EU consultation under Article 7 of the Framework Directive is 3 January 2012.

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1 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, OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC (Better Regulation Directive), OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12 (Framework Directive).

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.

On 7 December 2011, a request for information[4] was sent to BNetzA and a response was received on 12 December 2011.

BNetzA does not include remedies in its present notification. BNetzA intends to notify remedies by July 2012.

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.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Previous notifications

The market for wholesale terminating segments of leased lines was first notified to and assessed by the Commission under Case DE/2006/0480[5]. 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 of leased lines over alternative interfaces from the market definition and the exclusion of system solutions. BNetzA subsequently withdrew and re-notified draft measures on the relevant market which the Commission assessed under Case DE/2007/0677[6]. 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).

II.2. The notified draft measure

II.2.1. Market definition

In its present notification, BNetzA proposes to define the market for wholesale terminating segments of leased lines so as to comprise all leased line connections, which are not attributable to the long-distance/core network segments. The market comprises wholesale terminating segments with traditional interfaces as well as Ethernet-based interfaces since BNetzA identifies Ethernet leased lines as an appropriate substitute for traditional leased lines exerting significant competitive pressure. Wholesale terminating segments that are part of so-called 'system solutions' (i.e. made to order bundled business products) are also included in the market definition.

'Dark fibre' products are excluded from the market definition based on national market circumstances.

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4 In accordance with Article 5(2) of the Framework Directive.

5 SG-Greffe(2005) D/205459.

6 SG-Greffe (2007) D/205763.

BNetzA divides the relevant market into four segments according to bandwidth[7]:

(i) analogue terminating segments and segments with a bandwidth of less than 2 Mbit/s[8];

(ii) terminating segments with a bandwidth of 2 Mbit/s up to and including10 Mbit/s[9];

(iii) terminating segments with a bandwidth of more than 10 Mbit/s up to and including 155 Mbit/s[10];

(iv) terminating segments with a bandwidth of more than 155 Mbit/s[11].

BNetzA considers the markets to be national in scope.

II.2.2. The "three-criteria test" and finding of significant market power

Analogue terminating segments and segments with a bandwidth of less than 2 Mbit/s

BNetzA observes (i) a widespread migration from this segment to leased lines with higher bandwidths, (ii) only a small number of undertakings who are actually still operating in this segment, and (iii) the exit from this market segment of the sole undertaking with full network coverage. BNetzA is of the view that these facts warrant the conclusion that the second and third criteria, under the 'three criteria test' are no longer fulfilled for this market segment. BNetzA is of the view that any market failure in this segment can be counteracted by using general competition law. Accordingly, it is BNetzA's view that sector-specific *ex-ante* regulation is no longer needed.

Terminating segments with a bandwidth of 2 Mbit/s to 10 Mbit/s and terminating segments with a bandwidth of 10 Mbit/s up to and including 155 Mbit/s

BNetzA is of the view that all three criteria rendering the market susceptible to ex ante regulation are fulfilled for these market segments. The ratio of the absolute market share of Deutsche Telekom and the absolute market shares of its three largest competitors do indicate the presence of significant market power of Deutsche Telekom. BNetzA therefore proposes to designate Deutsche Telekom with SMP on both market segments.

With regard to terminating segments from 2 Mbit/s to 10 Mbit/s, a number of other competitors are active alongside Deutsche Telekom. The market entry hurdles are still, however, deemed to be significant and persistent. This is due to the high fixed and sunk costs for setting up line infrastructures within the terminating segment. For new competitors entering the market, the creation of national and local comprehensive infrastructure constitutes a significant market entry barrier. Only Deutsche Telekom is in a position to connect to termination points through leased lines due to its comprehensive infrastructure provision within Germany. Though there are several competitors with their

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7 BNetzA considers that the majority of suppliers regularly hold not only a single bandwidth level, but an overall portfolio of different leased line capacities, and the undertakings are therefore in genuine competitive relationships with one another over the majority of bandwidths. However, significant differences in demand and intensity of competition still exist between individual bandwidth levels.

8 The market share of Deutsche Telekom […].

9 The market share of Deutsche Telekom […].

10 The market share of Deutsche Telekom […].

11 The market share of Deutsche Telekom […].

own network infrastructures who are present in a number of cities, and other competitors have at least one connection point in different cities. However these networks do not come close to the level of coverage achieved by the network of Deutsche Telekom. This market segment is characterised by significant and persistent structural market entry barriers. This results from the combination of a superior dense network coverage and infrastructure of deutsche Telekom which cannot be easily duplicated. The gap between the alternative network operators and Deutsche Telekom has indeed decreased as a result of the development of alternative access services, especially from competitors as well; the changes brought about are not, however, sufficient to expect any relevant changes for the foreseeable period.

A similar situation can be observed also for the supply of leased lines in the terminating segment from 10 Mbit/s to 155 Mbit/s. However, unlike fixed connections for transmission rates from 2 Mbit/s to 10 Mbit/s, fibre optic based line technology must, as a rule, be implemented in order to achieve these bandwidths. In general, implementing line technology in the form of glass fibres for the provision of bandwidths which do not exceed 155 Mbit/s seems only to be of interest to competitors for cases in which the customer is located close to network termination points operated by the competitors. In order to develop potential customers who are not located near to the connection points, only the infrastructure of an alternative network operator who is active within this field can ordinarily provide this. The gap between the alternative network operators and Deutsche Telekom has indeed decreased as a result of the development of alternative access services, especially from competitors as well; the changes brought about are not, however, sufficient enough to expect any relevant changes for the foreseeable period.

Terminating segments with a bandwidth of more than 155 Mbit/s

BNetzA is of the view that the 'three criteria test' is not fulfilled on this market segment. Accordingly, sector-specific ex-ante regulation is not needed.

According to BNetzA, leased lines with very high bandwidths are predominantly in demand in and between urban areas where many alternative network providers are already represented with their own infrastructures. The advantage held by Deutsche Telekom with its encompassing access network is of little significance in this market segment, in contrast to the significance it holds for markets for the provision of terminating segments between 2 Mbit/s and 10 Mbit/s and more than 10 Mbit/s to 155 Mbit/s, respectively. According to BNetzA, no significant or persistent entry barriers in this market segment can be seen and thus the first criterion under the 'three criteria test' is not met on this market segment.

III. NO COMMENTS

On the basis of the present notification and the additional information provided by BNetzA, the Commission has no comments[12].

Pursuant to Article 7(7) of the Framework Directive, BNetzA may adopt the resulting 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.

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

Pursuant to Point 15 of Recommendation 2008/850/EC[13] 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 Commission[14] within three 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[15]. You should give reasons for any such request.

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

[13] 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.

[14] Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

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