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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/2011/1254: Details of remedies; approval of rates for collocation at street cabinets, access to cable ducts, and dark fibre

Comments pursuant to Article 7(3) of Directive 2002/21/EC[1]

I. PROCEDURE

On 22 September 2011, the Commission registered a notification from the national regulatory authority of Germany, the *Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen* (BNetzA).

The national consultation[2] ran from 6 July 2011 for two weeks. The deadline for the EU consultation under Article 7 of the Framework Directive is 24 October 2011.

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

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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 In accordance with Article 6 of the Framework Directive.

II. DESCRIPTION OF THE DRAFT MEASURES

II.1. Background

In August 2010 BNetzA presented the Commission with the first part of its most recent market analysis of the market for wholesale network infrastructure access[3] (Market 4) and notified its proposals for the market definition and SMP analysis.[4] BNetzA designated the incumbent, Telekom Deutschland GmbH (DT), as having significant market power (SMP) in the relevant market.

In January 2011 BNetzA submitted a further notification relating to Market 4 setting out which remedies it proposes to impose on DT. These remedies include[5] (i) an access obligation based on unbundled local loop (LLU) access and sub-loop unbundling (SLU) (including co-location); (ii) access to ducts and dark fibre as a backhaul service; (iii) an ex-post price control for access based on FttH and (iv) cost-orientation for access prices other than FttH.

In relation to LLU and SLU access, collocation, access to ducts and dark fibre, BNetzA proposed to use a cost orientation obligation based on a bottom-up long-run-incremental cost model (BU-LRIC), but stated that the exact details of the cost inputs for this model would need to be first submitted by the incumbent, and the results of the model calculations would be notified to the Commission in the second quarter of 2011.

In May 2011 BNetzA[6] notified the results of the model calculations for the LLU.

The current notification sets out the results of model calculations for collocation at the street cabinet, access to ducts and access to dark fibre.

II.2. The notified draft measures

With its current notification BNetzA submits to the Commission its proposed approval of prices for collocation at the street cabinet, access to ducts and access to dark fibre in Germany.

In relation to capital costs BNetzA takes the same approach as in the previously notified decision concerning the access to the LLU and refers to its reasoning contained in that notification.[7] BNetzA proposed to base its calculations within a BU-LRIC methodology solely on the gross replacement costs ("reine Bruttowiederbeschaffungskosten"), i.e. current costs. When applying the principle of cost-orientation it is, in the view of BNetzA, within the discretion[8] of the national regulator to apply in relation to investment

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3 Corresponding to market 4 of the Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and services markets within the electronic communications sector susceptible for 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 (the Recommendation), OJ L 344, 28.12.2007, p. 65.

4 DE/2010/1122, SG Greffe (2010) D/14104.

5 In addition to the remedies listed below, BNetzA also intends to impose, *inter alia*, transparency and non-discrimination obligations.

6 DE/2011/1218, SG Greffe (2011) D/9627

7 DE/2011/1218, SG Greffe (2011) D/9627.

8 BNetzA takes the view that the judgment by the ECJ in C-55/06 ("ARCOR") allows NRAs a broad discretion in the choice of cost model. This discretion would include the ability to choose a cost model based purely on current or gross replacement costs. The ECJ stated in this judgment that NRAs "*have to take account of actual costs, namely costs already paid by the notified operator, and forward*

costs either historical costs or current costs.[9] When exercising this discretion BNetzA undertook a weighting of the interests of access provider, access seekers, other competitors (cable and FTTH providers), end-users and the regulatory objectives of promoting effective competition and efficient investment in NGA infrastructure. BNetzA came to the conclusion that on balance, an approach exclusively using current costs is preferable.

With regard to the imputed interest rate used in the model, BNetzA proposes to change its approach when calculating the Weighted Average Cost of Capital (WACC) by replacing the previously used book value method with a Capital Asset Pricing Model (CAPM). BNetzA decided to apply a single WACC rate for the purpose of calculating the prices in question. With regard to the period of infrastructure depreciation BNetzA proposes to extend, when compared to an initial proposal by DT, the life-time of assets to 35 years for ducts and dark fibre ([…]), and to 20 years for street cabinets[10] ([…]).

As a result of its calculations BNetzA approved the following charges:

a) Collocation at the street cabinet

- Euro 1589.03 annually (i.e. Euro 132.42 monthly) for costs related to lease of the collocation space, capital costs, joint costs, operational costs and expenditures pursuant to § 31 (3) TKG; this amount shall be divided pro-rata between all collocating operators;
- Euro 63.28 annually (i.e. Euro 5.27 monthly) for individual costs related to the provision of this service (such as complaints handling, prebilling, invoicing);
- In addition the costs of the use of electricity is approved by BNetzA in advance; currently it is set at Euro 0.1650 per kWh;

b) Ducts

- Euro 0.09 per meter for costs related to lease, capital costs, operational costs and expenditures pursuant to § 31 (3) TKG;
- Euro 0.60 for specific one-off costs (availability checks, calibration);
- Euro 109.11 annually (i.e. 9.09 monthly) for individual costs related to the provision of this service (such as complaints handling, prebilling, invoicing);

c) Dark fibre

- Euro 69.22 as a flat-fee for two unlit fibre lines, irrespective of their length.

In addition, BNetzA carries out a margin squeeze test, as required under national law, in order to assess whether the calculated cost-oriented wholesale prices allow competitors a sufficient margin to compete at the retail level. As in the recently notified decision concerning the LLU prices (and contrary to its previous practice), BNetzA only takes account of retail prices for bundled services offered by the SMP operator. The results of the margin squeeze analysis can be summarised as follows:

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looking costs" when applying the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation (cf. paragraph 119 of the judgment). The court therefore appears to make a reference to both historical and current costs.

9 Or, alternatively, variations of these two models by determining current new values and subsequently residual book values by using “net replacement costs” up to the end of the service life or by taking into account the respective current (used) value.

10 Except for electrical transformers which have a shorter life-time of 15 years.

Monthly cost of a VDSL provider (access seeker)		Monthly retail price of incumbent's VDSL broadband bundle product
Supply / termination of service	1.75 €	
Line lease **Transport (local level)** **Costs for the splitter**	7.17 € 4.00 € 0.00 €	
Costs for the DSLAM	2.44 €	
Ducts access (50%)	1.83 €	
Dark fibre access (50%)	1.22 €	
Co-location at street cabinet	2.57 €	
Transport IP Backbone Network	1.44 €	
Additional costs (retail level)	5.13 €	
Telephony	2.50 €	
Common costs	1.95 €	
Total	**32.02 €**	**37.77 €**

For the purpose of the margin squeeze test BNetzA looked only at a premium product, namely the VDSL 50, but did not establish whether a sufficient margin could be achieved also in case the access seeker offered other bundles (for example a basic bundled product, equivalent to DT's Call&Surf package at €29.95)[11] or stand-alone retail broadband products.

Moreover, the Commission services note that for the purpose of the margin squeeze calculations BNetzA considered only the non-promotional listed prices ("VDSL 50" offer priced at Euro 44.95 (37.77 net)), despite the fact that DT offers long-lasting promotions. It, therefore, seems that BNetzA disregards the effects of promotional offers in its calculations.

III. COMMENTS

On the basis of the present notification the Commission has the following comments:[12]

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[11] Given BNetzA's decision to undertake the margin squeeze test only in relation to bundled products the notification did not contain any information as to possible margins for stand-alone broadband products.

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

Use of current costs for setting the access prices to non-replicable assets

The Commission refers to the comment expressed in response to the recent notification from BNetzA, concerning the price setting for LLU (DE/2011/1218). The Commission reminds BNetzA that due to the choice of current costs for the valuation of assets such as ducts, the wholesale input costs may be higher than could be expected with an approach based on actual costs or a mixed approach. Given the importance of regulating key wholesale access products in the transition period to NGA networks in an effective and consistent manner across the EU the Commission is currently undertaking a public consultation on costing methodologies for such products, including ducts. In the light of this, the Commission invites BNetzA to review its analysis upon entry into force of any relevant recommendations.

Potential margin squeeze

BNetzA concludes that there is a sufficient margin for access seekers to compete at the retail level. This conclusion is based on the calculations relevant for a premium bundled product. The Commission would like to encourage BNetzA to monitor the development of the market and to ensure that there is a sufficient margin to compete for all access seekers, and not only for those who bundle beyond a basic product.

Furthermore, the Commission points out the need for appropriate consideration of DT's promotional offers at the retail level in the margin squeeze calculations. In case of long-lasting and/or overlapping promotions, it is more appropriate to base the margin squeeze calculations on the promotional prices only. In case of short term promotions, their effect should be taken into account, for example by averaging the promotional and standard prices.

In light of the above the Commission invites BNetzA to set out in its final measure how it intends to safeguard effective competition in the overall retail market by ensuring that access seekers can expect to make a sufficient margin where they wish to compete only on a lower revenue segment of the market.

Pursuant to Article 7(7) of the Framework Directive, BNetzA shall take the utmost account of comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measures and, where it does so, shall communicate them 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/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

[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.

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

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