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Bundesnetzagentur (BNetzA)

Tulpenfeld 4
D-53113 Bonn
Germany

For the attention of:
Mr. Jochen Homann
President

Fax: +49 228 14 69 04

Dear Mr Homann,

Subject: Commission decision concerning case DE/2012/1321: Price control for wholesale terminating segments of leased lines in Germany

Opening of Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC

I. PROCEDURE

On 4 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 14 March 2012 and lasted four weeks.

On 7 May 2012, a request for information⁴ was sent to BNetzA and a response was

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

received on 10 May 2012.

Pursuant to Article 7a(1) of the Framework Directive, the Commission may notify the national regulatory authority (NRA) and the Body of European Regulators for Electronic Communications (BEREC) of its reasons that the draft measure would create a barrier to the internal market or its serious doubts as to its compatibility with EU law.

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 (the latter being termed in the following as "very high bandwidth leased lines"). Thus, the market definition notified in 2011 was insofar different from the market definition notified in 2007 as it contained a definition of

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.

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 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. The final measure has not yet been formally adopted because under German law adoption will only take place together with the adoption of remedies.

II.2. The notified regulatory remedies

In its notified measures BNetzA proposes 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 from 1 November 2011 until 31 October 2013. In particular, BNetzA proposes 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.

Given that BNetzA in 2011 notified to the Commission the market for terminating segments of leased lines above 155 Mbps as prospectively competitive and declared it as no longer susceptible to ex ante regulation, the scope of price regulation proposed by BNetzA does not correspond with the scope of BNetzA's recent draft SMP finding. . In its reply to the Commission's request for information BNetzA stated that it recently undertook a national consultation on remedies relating to its most recent 2011 market analysis. This consultation ended on 16 May 2012. Furthermore, BNetzA elaborated that the subsequent draft remedies will be notified to the Commission under Article 7 in July 2012, and are planned to be adopted together with the market analysis notified under case DE/2011/1277. In addition, BNetzA does not propose to set prices for Ethernet leased lines, which in its 2011 market review it included into the relevant SMP markets. It justifies this omission with the annulment of its 2007 decision in this respect in German courts, which has as a consequence that, at national level, there is currently no legal basis for price controls for this type of leased lines.

In its answer to the Commission's request for information BNetzA indicates that it will adapt and amend the scope of its price control, as soon as the national and EU consultation for the new remedies have been completed and it can adopt its final measures following the 2011 market analysis.

III. ASSESSMENT

The Commission has examined the notification and the additional information provided by BNetzA. BNetzA's draft measures concerning the wholesale market for terminating leased lines in Germany fall within Article 7a(1) of the Framework Directive as they fall under the Commission's powers of ensuring consistent application of remedies. In addition, BNetzA's draft measures are in application of Article 16 of the Framework

Directive and aim at the imposition of obligations set out in Articles 9-13 of the Access Directive.

The Commission has serious doubts as to the compatibility with EU law of BNetzA's draft measures in its current form regarding all bandwidths of the proposed price regulation. Regarding leased lines above 155 Mbps, the Commission's serious doubts are based on BNetzA's duty to remove regulatory obligations in markets found to be competitive, while for all other bandwidths concerned, the Commission's serious doubts are due to the fact that BNetzA basis its draft regulatory measures on an outdated analysis of the need for a price control, which does not seem to be compatible with the requirements referred to in Article 16(4) of the Framework Directive and Articles 8(4) and 13(2) of the Access Directive¹¹ in conjunction with Article 8 of the Framework Directive. Furthermore, the Commission considers that BNetzA's draft measures may create a barrier to the internal market.

On the basis of the notification and the additional information provided by BNetzA, the Commission has identified the following issues which raise concerns:

Need for an appropriate and proportionate price control based on the prevailing nature of the problem identified in the relevant market

Compliance with Articles 8(4) and 13(2) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16 (3) and (4) of the Framework Directive.

The Commission refers to Articles 8(4) and 13(2) of the Access Directive, which require NRAs (i) to impose remedies, which are based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive and (ii) in relation to the imposition of price controls to ensure that the chosen cost recovery mechanism serves to promote efficiency and sustainable competition and maximises consumer benefits. In particular, when imposing remedies NRAs are required under Article 8 (5)a of the Framework Directive to promote regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods, and, under Article 8(2)b of the Framework Directive, to ensure that there is no distortion or restriction of competition in the electronic communications sector, including the transmission of content.

Moreover, the Commission refers to Article 16(3) of the Framework Directive, which requires NRAs to withdraw regulation in markets found to be competitive and to Article 16(4) of the Framework Directive, which requires NRAs to impose on SMP undertakings appropriate regulatory obligations in markets which are not effectively competitive.

Regarding the proposed price control for leased lines above 155 Mbit/s the Commission recalls that Article 16(3) of the Framework Directive provides that

"where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 of this Article. In cases where sector specific regulatory obligations already

¹¹ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108, 24.04.2002, p.7, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p.37.

exist, it shall withdraw such obligations placed on undertakings in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations".

The Commission emphasises that Article 16(3) of the Framework Directive unambiguously requires NRAs to withdraw ex ante regulation in markets, which the NRA, on a forward-looking basis, considers to be effectively competitive. The only appropriate and justifiable proposal regarding a competitive market is to propose the withdrawal of regulation and to give an appropriate period of notice to parties affected by such a withdrawal of obligations.

In addition, Article 16(4) of the Framework Directive requires NRAs to assess the appropriateness of the remedy for the entire period for which it will be applicable. Article 8 (4) of the Access Directive requires NRAs only to impose such remedies, which are based on the nature of the problem identified and proportionate. As a result, an NRA which wishes to prolong existing or continue to apply amended remedies should present the Commission with a renewed or updated analysis of the appropriateness and proportionality of the respective remedy, which is pertinent for the envisaged period of application.

The Commission notes that BNetzA notified the Commission, under case DE/2011/1277 its proposal that the market for leased lines above 155 Mbps does not further warrant ex ante regulation and that the notification procedure under Article 7 of the Framework Directive was completed on 22 December 2011. Based on the fact that BNetzA has proposed to conclude following its 2011 market analysis that the market for terminating segments of leased lines with very high bandwidth is prospectively competitive, BNetzA should also propose to remove the price control obligation for leased lines above 155 Mbps without any delay. BNetzA has not presented the Commission in its current notification with any evidence as to why its 2011 conclusion on the competitiveness, or lack thereof, of this market should be reconsidered. Against this background, the Commission has serious doubts as to whether continued price regulation for terminating segments above 155 Mbps for a period until 31 October 2013 is compatible with Article 16 (3) of the Framework Directive and Articles 8(4) and 13(2) of the Access Directive.

In addition, even if it could be accepted to base continued price regulation of terminating segments of leased lines on BNetzA's analyses prior to 2011, the Commission would expect BNetzA to demonstrate to the Commission in its current proposal why it considers that price regulation for the relevant markets remains appropriate and proportionate based on the currently prevailing market conditions¹².

The market analysis notified to the Commission in late 2011 (DE/2011/1277) suggests that the 2007 analyses of the appropriateness and proportionality of price regulation are outdated and cannot – without at least being up-dated or renewed – any longer be used as a basis to continue to impose price regulation. This is evident, in particular, since BNetzA, under case DE/2011/1277, notified the Commission of the results of its market analysis demonstrating that (1) terminating leased lines above 155 Mbps are no longer susceptible to ex ante regulation and that (2) Ethernet leased lines of bandwidth from 2 Mbps up to and

¹² As required by Article 16(4) of the Framework Directive and Article 8(2) of the Access Directive.

including to 155 Mbps should be regulated. Whilst the Commission takes note of BNetzA's argument that – based on national law – it is not in a position to withdraw price regulation for (1) nor to impose price regulation for (2), the Commission would like to point out, that the specific national situation does not exempt the NRA from its obligation to assess the appropriateness and proportionality of a price control obligation. As a result, the Commission would have expected BNetzA, at the very least, to provide the Commission with up-to-date evidence and arguments as to how it considers the extension of price regulation for the relevant markets to be appropriate and proportionate for the period of their proposed validity, i.e. until 31 October 2013.

For the reasons set out above, the Commission has serious doubts that the measures proposed by BNetzA for price regulation in the market(s) for terminating segments of leased lines are compatible with Articles 8(4) and 13(2) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16 (3) and (4) of the Framework Directive.

Creation of barriers to the internal market

Given (i) the lack of justification provided by BNetzA as to the appropriateness and proportionality of the proposed regulatory measures and (ii) the fact that BNetzA proposes to impose regulatory measures for a market it recently notified to the Commission as prospectively competitive (i.e. the market for very high bandwidth leased lines) the Commission further notes that BNetzA's proposed measures may also lead to a situation, in which inappropriate or disproportionate regulation is applied or, more severely, regulatory measures are imposed for a competitive market, Draft measures imposing regulatory obligations on undertakings with SMP in Germany may have an influence, direct or indirect, actual or potential, on the ability of undertakings established in other Member States to offer electronic communication services. In particular, price regulation of leased lines directly impacts on the conditions under which services for leased lines, and thereby business services are provided within the EU. BNetzA's proposal comprises measures which, *inter alia*, affect prices and which, therefore, may have a significant impact on operators or users in other Member States. Consequently, such draft measures may affect the patterns of trade between Member States¹³.

Inappropriate, disproportionate or unjustified price regulation of leased lines could lead to a market situation where either the regulated company is inappropriately constrained in reacting to competitive pressure from access seekers from other Member States intending to provide trans-European business services or where access seekers are not in a position to rely on regulated access prices set at an appropriate level in order to build competitive retail offers for trans-European business services. In both cases the lack of a proper justification, and analysis of the appropriateness and proportionality of the continued application of a price control remedy not only distorts and restricts competition but has a significant detrimental effect on the development of the internal market, i.e. creates a considerable barrier to the single market, and, therefore, results in a violation of the principles and objectives of Article 8(2) and (3) of the Framework Directive.

¹³ See recital 38 of the Framework Directive.

Consequently, the Commission also believes, at this stage, that the draft measure would create barriers to the internal market.

The above assessment reflects the Commission's preliminary position on this particular notification, and is without prejudice to any position it may take vis-à-vis other notified draft measures.

The Commission points out that, in accordance with Article 7a of the Framework Directive, the draft measure regarding the wholesale markets for terminating segments in Germany shall not be adopted for a further three months.

Pursuant to Recital 17 of Recommendation 2008/850/EC¹⁴, the Commission will publish this document on its website, together with a notice inviting third parties to submit observations on this serious doubts letter within ten working days. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission¹⁵ within three working days following receipt whether you consider that, in accordance with European Union and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication. You should give reasons for such request.

Yours sincerely,
For the Commission,

Neelie Kroes
Vice-President of the Commission

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, OJ L 301, 12.11.2008, p. 23.

¹⁵ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.