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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/2011/1253: Wholesale broadband conveyance

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

I. PROCEDURE

On 20 September 2011, the Commission registered a notification by the German national regulatory authority, “*Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen*” (“BNetzA”) relating to the wholesale market for IP-broadband conveyance in Germany. This market is not included in the Recommendation on relevant markets².

The national consultation³ on the market definition and the three criteria test ran from 6 April 2011 for one month. BNetzA further consulted on its draft order to withdraw all

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 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 (the Recommendation), OJ L 344, 28.12.2007, p. 65.

³ In accordance with Article 6 of the Framework Directive.

existing regulation for the market of regional IP-broadband conveyance from 17 August 2011 for three weeks. The deadline for the EU consultation under Article 7 of the Framework Directive is 20 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.

II. DESCRIPTION OF THE DRAFT MEASURES

The notified draft measures relate to the second round review of the wholesale market(s) for (regional and supra-regional) IP-broadband conveyance and propose to withdraw all existing regulation.

II.1. Background

The previous market definitions and the assessment of significant market power (SMP) of the wholesale market for IP-broadband conveyance was notified to and assessed by the Commission in June 2007 under case number DE/2007/0639⁴. At the time BNetzA defined two separate wholesale broadband conveyance markets, one for IP-broadband conveyance with handover at the parent Point of Presence (PoP), the regional conveyance market, and the other for IP-broadband conveyance with handover at a distant PoP, the supra-regional conveyance market. Only in relation to the regional conveyance market did BNetzA conclude that the three criteria test was fulfilled and, thus, *ex ante* regulation warranted. BNetzA designated the incumbent, Deutsche Telekom AG (DT), as having SMP in the relevant regional conveyance market.

The remedies currently in place for this market were notified under case number DE/2007/0702⁵ and included a full set of remedies⁶.

In its comments the Commission underlined, at the time, that it considered that the regulation of broadband conveyance services is necessary only for a transitional period, to enable the provision of broadband services in Germany, and that it is likely that such regulation will not be necessary in the future. Furthermore the Commission urged BNetzA to implement and enforce as soon as possible a Bitstream access obligations (on market 5), which it considered likely to change the competitive constraints on the markets for broadband conveyance.

II.2. The notified draft measures

In its now notified draft measures BNetzA proposes to merge the markets for regional and supra-regional IP-broadband conveyance and to withdraw any existing regulation due to the fact that the newly defined market does no longer meet the so-called three criteria test.

⁴ SG-Greffe (2007) D/203598.

⁵ SG-Greffe (2007) D/207152.

⁶ Including an access obligation, an obligation to provide collocation, non-discrimination obligation, transparency obligations, accounting separation and cost-oriented charges, which are subject to an *ex ante* control by the regulator.

II.2.1. Market Definition

According to BNetzA's latest analysis the relevant market now contains both regional and supra-regional IP-broadband conveyance in one single market. This means that there is no further distinction between the conveyance of IP-broadband traffic from the DSLAM⁷ to either the parent PoP or the distant PoP. A merging of the two previously separate markets appeared appropriate to BNetzA due to the recent developments in demand for the two different products and the general observation that the demand for conveyance services has been marginalised over the past years. Despite significant (and increasing) price differences between regional and supra-regional IP-broadband conveyance the demand for the two products appeared not to be affected by the price developments and is falling considerably, probably due to increased migration to (regulated) Bitstream offers. As a result, BNetzA is of the opinion that the changed structures in demand lead to the definition of a single market for both regional and supra-regional IP-broadband conveyance.

II.2.2. Three criteria test

Due to the fact that the newly defined market for IP-broadband conveyance⁸ is not listed in the Commission's Market Recommendation, BNetzA assessed whether the so called "three criteria test"⁹ is (cumulatively) fulfilled and, as a result, whether *ex ante* regulation would still be warranted. Whilst BNetzA was of the opinion that the defined market still displayed high barriers to entry it stated that, in relation to the second criterion, i.e. no tendency toward effective competition, it is not possible to arrive at a final conclusion that this criterion is fulfilled, particularly in light of the fact that the relevant market is a "dying" market. For this reason, BNetzA also concluded that the risk that any potential market failure might not be appropriately addressed by competition law alone is negligible. Against this background far-reaching regulatory interventions are not deemed appropriate and BNetzA, thus, considers that the third criterion is not fulfilled.

As a result, BNetzA is of the view that the defined wholesale market for IP-broadband conveyance does not pass the three criteria test and that, consequently, *ex ante* regulation is not warranted.

II.2.3. Withdrawal of existing regulation

For the reasons set out above, BNetzA concluded that the relevant market should no longer be subject to regulation and proposes, as a consequence, to withdraw all existing regulation currently applicable in the wholesale market for (regional) IP-broadband conveyance.

⁷ In the case of xDSL broadband the relevant market boundary starts at the end of the user's broadband connection which is situated where the concentrator network starts.

⁸ With handover at either the parent or the distant PoP, i.e. including both regional and supra-regional IP-broadband conveyance.

⁹ I.e. whether there are (i) high and persistent barriers to entry, (ii) no tendency to effective competition and (iii) whether competition law alone would not be adequately address the competitive concerns identified; see in particular recital (5) of the Commission's Market Recommendation.

III. NO COMMENTS

The Commission has examined the notifications and has no comments.¹⁰

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/EC¹¹ 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 Commission¹² 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 publication¹³. You should give reasons for any such request.

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

¹⁰ In accordance with Article 7(3) of the Framework Directive.

¹¹ 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.

¹² Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

¹³ The Commission may inform the public of the result of its assessment before the end of this three-day period.