EUROPEAN COMMISSION

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Bundesnetzagentur (BNetzA)

Tulpenfeld 4
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/2014/1566: Wholesale broadband access – Remedies

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

I. PROCEDURE

On 13 February 2014, the Commission registered a notification from the German national regulatory authority, *Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen* (BNetzA)[1], concerning compliance by the SMP operator with remedies relating to the wholesale broadband access market[2] in Germany.

The national consultation[3] ran from 18 December 2013 for one month.

On 18 February 2014, a request for information[4] was sent to BNetzA and a response was received on 21 February 2014.

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 5 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.

3 In accordance with Article 6 of the Framework Directive.

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

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The second round review of the market for wholesale broadband access in Germany was previously notified to and assessed by the Commission under case DE/2010/1116[5]. BNetzA defined two separate product markets: (i) the market for Layer-2 Bitstream access; Bitstream access with handover at the layer-2 level including all xDSL and fibre based infrastructures, and (ii) the market for Layer-3 Bitstream access; Bitstream access with handover at the layer-3 level including all xDSL and fibre based infrastructures as well as HFC broadband access. Both product markets were considered to be national in scope. The incumbent, now Telekom Deutschland GmbH (DT), was designated with SMP and the following remedies were imposed: (i) access (including collocation); (ii) non-discrimination; (iii) transparency; (iv) accounting separation; and (v) an *ex-post* price control.

At the time, the Commission commented *inter alia* on the lack of effective price regulation, reminding BNetzA that *ex-post* price controls are not appropriate to remedy the competition problems identified in the wholesale market in question. In the light of this, the Commission invited BNetzA to impose an *ex-ante* price control based on cost orientation.

In 2012, BNetzA notified to the Commission its proposed decision concerning remedies for Market 5, introducing a so-called "*VDSL-IP-Bitstrom-Kontingentmodell*" (the contingent model), which aimed to facilitate risk sharing and promoting sales volumes when rolling out DT's new NGA network. The pricing model applied to the Layer-3 VDSL Bitstream offer and was available alongside the currently used pricing model[6]. BNetzA stated that the proposed contingent model did not lead to a wholesale margin squeeze. The Commission reiterated its earlier comments that its concerns regarding the lack of efficient price regulation remain.

II.2. Description of the draft measure

The notified draft measure concerns a further proposed decision by BNetzA concerning remedies imposed on DT in Market 5. More precisely, it relates to three agreements between the SMP operator, DT, and an alternative operator, Telefónica Germany GmbH (TF), i.e. (i) an NGA Transformation agreement, (ii) an NGA Migration agreement and (iii) a VDSL 100 (Vectoring) agreement, with which DT and TF commit to a long-term risk sharing between the two parties for NGA-Bitstream.

Under these agreements, TF commits to migrating by 2019 its customer base (ca. […] lines) from an LLU-based ADSL2+ platform currently in use to an NGA-Bitstream-platform. In exchange, DT commits to ensuring an NGA roll-out of 65% VDSL / VDSL vectoring coverage by 2016 and paying a one-off and up-front fee of ca. […] for expected efficiency gains. It has to be noted, at this stage, that an assessment of the exact migration conditions and mechanisms – and whether the agreement in this respect could have a negative impact on the migration experience of other alternative operators – is not part of this notification. BNetzA confirmed in its response to the Commission's request for information that such terms and conditions and their effect on other operators would be the subject of the next amendments to the standard reference offer and notified to the

5 C(2010) 6215.

6 This case was notified to and assessed by the Commission under case number DE/2012/1350; C(2012) 5689.

Commission in this context. As a result, the scope of this particular notification is mainly to assess (i) whether the agreements have a negative impact on the competitive conditions in Germany, (ii) whether the agreed payment conditions (including the considerable up-front payment by DT) could lead to a wholesale margin squeeze and (iii) whether the volume discounts resulting from the agreement are permissible under current regulation.

With regards to the competitive impact of the agreements, BNetzA concluded that – based on the assumption that TF will be able, at a minimum, to maintain its market share in the retail fixed broadband market over the period covered by the agreement – there continues to be sufficient demand by TF for wholesale inputs to its retail customers beyond the contingent committed to DT's NGA-Bitstream[7]. As a result, in BNetzA's view, the competitive position of alternative wholesale operators (e.g. other ADSL wholesalers, national or regional FttX providers) is not unduly impacted by the agreements. Concerning a potential wholesale margin squeeze, BNetzA compared the relevant cost inputs for SLU and LLU unbundlers with those of the NGA Bitstream offer.

Monthly Costs for SLU Access		**Monthly costs for a VDSL Bitstream product**	
Delivery/Termination	EUR 1.15	Supply	EUR 1.16
Access point - subscriber line	EUR 6.79	Delivery	EUR 14.10
DSLAM Costs	EUR 2.00	Upfront	EUR 4.80
Transport Backbone	EUR 0.72	Non-linear run-up	EUR 0.35
Concentrator network transport	EUR 2.27	**IP-BSA Connection**	
Duct Access (50 %)	EUR 1.49	Delivery/Termination	EUR 0.03
Dark Fibre Access (50 %)	EUR 1.02	License	
Street Cabinet Collocation	EUR 1.95	Collocation on PoP	
Total	**EUR 17.38**		**EUR 20.44**

[7] BNetzA assumes this demand to be in the size of over […], i.e. around […] of total demand.

Monthly Costs for LLU Access (local access)		Monthly costs for a VDSL Bitstream product	
Delivery/Termination	EUR 1.32	Supply	EUR 1.16
TAL License	EUR 10.19	Delivery	EUR 14.10
DSLAM Costs	EUR 1.30	Upfront	EUR 4.80
Transport Backbone	EUR 0.72	Non-linear run-up	EUR 0.35
Concentrator network transport	EUR 2.27	**IP-BSA Connection**	
		Delivery/Termination	EUR 0.03
		License	
MDF Collocation	EUR 1.02	Collocation on PoP	
Total	**EUR 16.82**		**EUR 20.44**

BNetzA concluded that for SLU access there is a delta of € 3.06 and for LLU access the delta is € 3.62, which – so the conclusion of BNetzA – results in a weighted delta of € 3.20. In essence, even where an efficiency contribution resulting from the one-off payment by DT, which amounts, in BNetzA's calculation, to […] per line, is taken into account, there remains a positive delta of […], i.e. that there is no wholesale price squeeze.

In relation to a comparison with an ADSL Bitstream offer the delta calculated by BNetzA, although still positive, is reduced to only […] in favour of the unbundler. However, in BNetzA's view there is no risk of a wholesale price squeeze, in particular since it considers that a surplus is not essential for each and every individual product variant. It assumes that an efficient competitor may make mixed calculations in the case of any deficit, resulting in the fact that in any wholesale price squeeze assessment, the ADSL product should not be considered in isolation but that the VDSL offers should also need to be taken into account. From such an overall perspective, BNetzA concludes that – even though there is only a minimal positive delta for ADSL products – there is no risk of an overall wholesale price squeeze.

Lastly, in relation to the volume discounts, BNetzA concluded that, whilst the agreements lead in effect to a volume discount granted to TF, this is objectively justified in light of the fact that (i) it leads to an appropriate and adequate long-term risk sharing of the higher investment risk for NGA roll-out and (ii) existing and potential access seekers are treated equally in relation to this type of risk-sharing. In setting out its reasons, BNetzA *inter alia* referred to points 7 and 8 of Annex I of the Commission's 2010 NGA Recommendation[8], which sets out criteria for permissible long-term access pricing (point 7) and volume discounts (point 8) for FttH. According to BNetzA these criteria have to be applied in the German context analogous to VDSL and VDSL vectoring investment, also in light of recital 49 of the 2013 Commission

[8] Commission Recommendation of 20 September 2010 on regulated Access to Next Generation Access Networks (NGA), OJ L 251 p. 35, 25.09.2010.

Recommendation on Non-Discrimination remedies and Costing Methodologies[9].

III. COMMENTS

The Commission has examined the notification and the additional information provided by BNetzA and has the following comments:[10]

Further justification that the agreed long-term pricing arrangements and volume discounts are appropriate

The Commission takes note that BNetzA justifies the appropriateness of the agreed risk-sharing agreement between DT and TF, in particular the long-term access pricing and the volume discounts it contains, with an analogous application of points 7 and 8 of the NGA Recommendation. In this respect the Commission would like to point out that the criteria set out in those points were drawn up with the specific investment risk of FttH investment in mind. Whilst the Commission recognises that under certain circumstances other NGA investment, such as VDSL/FttC investment can display similar risks, which could justify an analogous application, the Commission invites BNetzA to set out in more detail, in its final measure, why it considers that investment in VDSL/VDSL vectoring in Germany face risk profiles of a similar magnitude as the risk attached to FttH investment.

Need to impose an effective price control mechanism

The Commission notes that BNetzA still applies an *ex post* approach to price controls in Market 5, which the Commission, in cases DE/2010/1116 and DE/2012/1350, considered as not the most appropriate and effective remedy for the market in question. Since NRAs are bound to take utmost account of Commission comments, the Commission reiterates that the concerns which the Commission had regarding the lack of an efficient price regulation remain. In particular, in order to ensure regulatory certainty for access seekers and promote efficient investment by all operators, access prices would in principle need to be cost-oriented and transparent on an *ex-ante* basis. In accordance with the regulatory framework, such prices can be appropriately adjusted for investment risk, in order to drive both competition and investment in (next generation) infrastructure. As a result, the Commission reminds BNetzA to reconsider as soon as possible its overall pricing approach for Market 5 and to adopt a methodology in line with the 2013 Commission Recommendation on Non-Discrimination remedies and Costing Methodologies.

Pursuant to Article 7(7) of the Framework Directive, BNetzA shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; 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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9 Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, OJ L251 p.13, 21.09.2013.

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

Pursuant to Point 15 of Recommendation 2008/850/EC[11] 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[12] 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.[13] You should give reasons for any such request.

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

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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: CNECT-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.