



EUROPEAN COMMISSION

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Bundesnetzagentur (BNetzA)  
Tulpenfeld 4  
D-53113 Bonn  
Germany

For the attention of:  
Mr Jochen Homann  
Präsident

Fax: +49 228 14 69 04

Dear Mr Homann,

**Subject: Commission Decision concerning Case DE/2017/2001: Wholesale central access provided at a fixed location for mass-market products in Germany – Remedies (Pricing for Layer-2 Bitstream Access)**

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

## 1. PROCEDURE

On 26 June 2017, the Commission registered a notification from the German national regulatory authority, Bundesnetzagentur (BNetzA)<sup>1</sup>, concerning the Wholesale central access provided at a fixed location for mass-market products in Germany<sup>2</sup>.

The national consultation<sup>3</sup> ran from 31 May to 16 June 2017.

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<sup>1</sup> 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.

<sup>2</sup> Corresponding to market 3b in Commission Recommendation 2014/710/EU of 9 October 2014 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 295, 11.10.2014, p. 79.

<sup>3</sup> In accordance with Article 6 of the Framework Directive.

## 2. DESCRIPTION OF THE DRAFT MEASURE

### 2.1. Background

In 2010, the second round review of the market for wholesale broadband access in Germany was notified to and assessed by the Commission under case DE/2010/1116<sup>4</sup>. At the time, BNetzA defined two separate product markets: (i) the market for Layer-2 Bitstream access (including all xDSL and fibre based infrastructures), and (ii) the market for Layer-3 Bitstream access (including all xDSL and fibre based infrastructures as well as HFC, i.e. cable-based, 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.

In 2013, but related to the market for wholesale local access at fixed location (market 3a), BNetzA notified<sup>5</sup> an amendment to the sub-loop unbundling (SLU) access remedy in order to allow DT, under certain conditions, to deny SLU access, in order to foster the deployment of VDSL2 vectoring at the cabinet by DT or alternative operators. DT was allowed to deny SLU access on the condition that DT or the (protected) third party offered Layer-2 Bitstream access (or, for a transitional period a Layer-3 Bitstream access) as a replacement for the lost SLU access to the access seeker at a transfer point located as close as possible to the street cabinet ('the Vectoring I decision')<sup>6</sup>.

On 18 May 2015 BNetzA notified (under case DE/2015/1735) to the Commission the latest market definition and SMP assessment of its third round review of the market for wholesale central access provided at a fixed location for mass-market products in Germany. BNetzA again defined two separate relevant product markets: (i) the market for Layer-2 Bitstream access, including Bitstream access with handover at the Layer-2 level and including all xDSL and fibre-based access infrastructures but excluding HFC (cable) broadband access, and (ii) the market for Layer-3 Bitstream access, including Bitstream access with handover at the Layer-3 level and including all xDSL, fibre-based access infrastructures as well as HFC (cable) broadband access<sup>7</sup>.

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<sup>4</sup> C(2010) 6215.

<sup>5</sup> Under case DE/2013/1484.

<sup>6</sup> At the time the Commission called on BNetzA to ensure that the features of the substitute Bitstream offer are the closest possible to a physical unbundling product. In this respect the Commission pointed out that the Layer-2 Bitstream offer should in principle be local (i.e. interconnection should occur locally), service-agnostic (i.e. should be able to support a multitude of services), uncontended (i.e. dedicated capacity should be available to the end-user) and allow for sufficient control of the access connection and sufficient control of the customer premises equipment (CPE) to enable access seekers to effectively differentiate their products at retail level. Only the provision of a Bitstream product with such features allowing the access seekers a sufficient degree of flexibility to differentiate adequately its offer from DT would mean that the Bitstream offer could be considered a real alternative to SLU and would justify an exception to the general obligation of providing SLU access.

<sup>7</sup> As in its two previous notification rounds, BNetzA considers Bitstream access via cable (HFC infrastructure) as part of the relevant Layer-3 Bitstream access market.

BNetzA considered that the Layer-2 Bitstream access market was national in scope and designated the incumbent, DT, as having SMP.

On 18 September 2015, BNetzA notified to the Commission (under case DE/2015/1781) the corresponding remedies for the wholesale central access market<sup>8</sup>. BNetzA confirmed<sup>9</sup> at the time that, in its view, a L2-BSA product would fall within the wholesale central access market<sup>10</sup>. The proposals also included the following pricing obligation: Concerning the new Layer-2 Bitstream access product based on Ethernet, BNetzA was of the view that a strict cost-oriented price control would not be necessary to emulate a competitive price. Instead it proposed to apply a margin squeeze test for the wholesale pricing of DT's Layer-2 access product. Prices for the Layer-2 access product would have to be approved by BNetzA *ex ante*, i.e. before the launch of the product.

On 7 April 2016 BNetzA notified (DE/2016/1854) its draft decision concerning amendments to remedies for local access, allowing the deployment of VDSL2 vectoring within the near-shore areas of a local exchange in Germany. BNetzA proposed to allow DT to vector and terminate<sup>11</sup> VDSL LLU access at the local exchange, provided that it gives 12 month notice to alternative operators collocated at the exchange, offers either a VULA access at the street cabinet (to one access seeker only, on a "first come first served" basis) or L2-BSA at a higher point in the network (i.e. at BNG-level), and pays compensation for stranded investments and migration costs.

On 10 May 2016 the Commission opened an in-depth, i.e. Phase II, investigation pursuant to Article 7a of the Framework Directive. One of the Commission's main doubts concerned the lack of clarity as to whether the L2-BSA could be an appropriate functional substitute for VDSL LLU. In response to the opening of a Phase II investigation BNetzA withdrew its original draft measure on 16 June 2016 and notified a revised draft measure (DE/2016/1876), on 20 June 2016 (known as 'Vectoring II'), which aimed at addressing the Commission's main concerns. Again, although this draft measure formally concerned the wholesale local access market, BNetzA stated that the alternative access product, which is to be offered for the loss of physical access (VDSL LLU) has to be provided either as a virtual unbundled access (VULA) at the street cabinet (KVz-VULA) or as Layer-2 access product at

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<sup>8</sup> Obligations concerning (i) access, including an obligation to provide Layer-2 Bitstream access at 899 BNGs; (ii) non-discrimination (Equivalence of Outputs); (iii) the publication of a Standard Reference Offer and (iv) a pricing obligation, namely an abuse test, which is to be applied ex-post for the L3-BSA and ex-ante for the L2-BSA.

<sup>9</sup> As it had already suggested in case DE/2015/1735, C(2015) 4242.

<sup>10</sup> In summary, BNetzA concluded at the time that this Layer-2 access product does not meet the criteria set out in the Recommendation on Relevant Markets, which need to be cumulatively fulfilled if a virtual access product is to be included in the wholesale local access market. In BNetzA's view, this type of virtual (Layer-2) access does not occur locally since the number of access points (900) does not match the number of access points at MDF level (7,904) or street cabinet level (approximately 320,000). In addition, the product does not fulfil other criteria such as dedicated capacity, high availability and low contention, necessary to ensure the functional equivalence with a physical unbundled access product.

<sup>11</sup> DT would be allowed to refuse the initial provision of VDSL LLU as of the date of publication of the proposed measure in BNetzA's Official Journal.

the BNG. With regard to the BNG Layer-2 access product, while BNetzA continued to be of the opinion that it is currently attributable to the wholesale central access market, it considered that the BNG Layer-2 access product's characteristics can correspond as closely as possible to a VULA product as set out in the Commission's Explanatory Memorandum to the Recommendation on relevant markets, and therefore be a substitute to physical unbundling.

On 19 July 2016 the Commission commented<sup>12</sup> on BNetzA's proposals highlighting the importance of the L2-BSA product at the BNGs as a very important replacement for the loss of physical VDSL unbundling due to vectoring. The Commission underlined *inter alia*, that – at the very least for those scenarios where it serves as a replacement for the loss of physical unbundling due to the deployment of vectoring – the Layer-2 Bitstream access product should be a functional substitute for physical VDSL LLU, both in terms of technical characteristics and pricing.

On 3 November 2016 BNetzA notified to the Commission changes to the Standard Reference Offer, which set out the technical parameters of the L2-BSA product<sup>13</sup>.

In its letter to BNetzA of 5 December 2016<sup>14</sup>, the Commission welcomed that BNetzA's proposal considerably improved most of the technical parameters for the L2-BSA, in particular compared with the proposal that was consulted upon during the first national consultation. However, the Commission highlighted further areas for improvement, in particular in relation to the scenario where the Layer-2 BSA product will be the main replacement product for the loss of VDSL-LLU and underlined that in this specific context the functional characteristics of such replacement product must, as closely as possible, correspond to the characteristics of physical access.

On 18 November 2016 BNetzA notified proposals concerning the exact pricing of the Layer-2 Bitstream access product (L2-BSA) implementing the approach notified to the Commission in cases DE/2015/1781 and DE/2016/1876 and provisions of the regulatory order of 29 October 2015<sup>15</sup>. In summary, BNetzA proposed to set the standard monthly rental charge for the L2-BSA product in ADSL, VDSL 16/25/50 and VDSL100 variants<sup>16</sup> as well as the discounted prices under a so-called contingent model<sup>17</sup> both for a national and a regional context.

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<sup>12</sup> C(2016) 4834 final.

<sup>13</sup> Notified to the Commission under case number DE/2016/1934. The draft measure also contained proposals on the technical areas in relation to which the Commission had asked for improvements in its July comments letter, namely, (i) an increase in the Maximum Transmission Unit (MTU); (ii) control of the access seekers over the QoS levels and DSL profiles; (iii) the provision of an overall End-to-End line availability; (iv) an obligation on DT to increase the available transmission capacity between the BNG and the MSAN; (v) technical solutions for multicast replication; and (vi) fault management conditions.

<sup>14</sup> C(2016) 8366 final.

<sup>15</sup> Which was notified to the Commission under case DE/2015/1781.

<sup>16</sup> See sections 2.2.2 and 2.2.3 below.

<sup>17</sup> For a detailed description of the contingent model, see also case number DE/2012/1350 and for further details of the current proposal see also 2.2.3 below.

In relation to the contingent model (a volume discount scheme) applied by BNetzA it was proposed that alternative access seekers were to receive a discounted monthly rental price for the L2-BSA VDSL variants following an up-front one-off payment and the commitment to take-up a minimum volume of lines. This approach is designed as a risk sharing model granting increased predictability and setting incentives for infrastructure investment.

At the time, however, BNetzA proposed not to authorise the request of the SMP operator that, in the case of migration from a Layer-3 (IP based) to a Layer-2 BSA contingent, one competitor (Vodafone) should be allowed to credit the up-front payments made for one contingent (Layer-3) against the up-front payments due for the other (Layer-2), whereas any such crediting would not be available to any other competitor. In BNetzA's view at the time was that a granting of the request would have led to an undue positive discrimination of Vodafone, despite the fact that the SMP operator and Vodafone signed a Memorandum of Understanding in 2013, which would allow for such a migration without a second up-front payment<sup>18</sup>.

The Commission criticised this particular proposal and recalled that under DE/2013/1484 ('Vectoring I') it was envisaged that a L2-BSA would be the main replacement product for loss of SLU in the case of vectoring (outside the nearshore areas). However, at the time only a L3-BSA was available and was proposed as an interim replacement product until the commercial availability of L2-BSA. The Commission noted further that due to this fact an alternative operator may have entered into contingent agreements for a L3-BSA product with the plan and understanding to migrate its customers from L3-BSA to L2-BSA once the latter had been introduced into the market as foreseen by the Vectoring I decision. The Commission stressed, that in such a case it would be inappropriate, in particular where the lack of availability of the L2-BSA product was not influenced by the relevant alternative operator, to require a full second up-front payment for the migration of an existing customer base.

As a result, the Commission urged BNetzA to address the situation of those alternative operators, which only entered into contingent agreements for L3-BSA due to the lack of availability of the main replacement product, a L2-BSA, and to find a regulatory solution that takes due account of the previously expressed plans of alternative operators to migrate in due course from the then sole available BSA product at Layer-3 as soon as the intended main replacement product (L2-BSA) would become available.

Following the Commission's intervention and subsequent close co-operation BNetzA initiated national proceedings under § 29 (3) TKG in order to assess whether up-front payments made for the L3-BSA contingent could be credited against the up-front payments due for the L2-BSA contingent (applicable to more than one operator). Subsequently, the SMP operator reached an agreement with a number of access seekers and submitted to BNetzA an application for the approval

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<sup>18</sup> BNetzA states further that an objective justification of granting one operator a preferential treatment, would have to be in line with the regulatory objectives set out in Article 8 of the Framework Directive (implemented by § 2 (2) TKG). In BNetzA's view the SMP operator carries the burden of proof that this is the case and, in the present notification, the case could not be made that the preferential treatment of Vodafone would promote competition ensuring that end users derive maximum benefits in terms of choice, price and quality.

of the rates set out in the various agreements, which recognise the ability to credit up-front payments made for the L3-BSA contingent against a L2-BSA contingent<sup>19</sup>.

## 2.2. The notified draft measure

The notified draft measure concerns the proposed approval of the rates set out in two modifications of the *Kontingentmodell* (for a national and regional contingent – the so-called *Kontingentmodell PLUS*) as well as the rates specified in three individual agreements<sup>20</sup>. The modification of the contingent model allows for a common contingent of IP-based L3-BSA and L2-BSA. In essence, the proposal has the effect that up-front payments made for a L3-BSA contingent for the parties to the relevant agreements can now be credited against up-front payments to be made for a L2-BSA contingent, as was called for by the Commission in DE/2016/1954. As a result, this should facilitate for access seekers, a migration of their customers from L3-BSA to the new (more performant) L2-BSA.

The new rates are approved for application until 30 November 2017.

## 3. NO COMMENTS

The Commission has examined the notification of BNetzA and has no comments<sup>21</sup>.

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/EC<sup>22</sup> 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<sup>23</sup> 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<sup>24</sup>. You should give reasons for any such request.

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<sup>19</sup> As a result of this application, which the current proposal intends to approve, BNetzA formally closed the proceedings opened *ex officio* under § 29 (3) TKG.

<sup>20</sup> Agreements were entered into by Deutsche Telekom with (i) Vodafone, [...].

<sup>21</sup> In accordance with Article 7(3) of the Framework Directive.

<sup>22</sup> 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.

<sup>23</sup> Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

<sup>24</sup> The Commission may inform the public of the result of its assessment before the end of this three-day period.

Yours sincerely,

For the Commission,  
Roberto Viola  
Director-General