



EUROPEAN COMMISSION

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Bundesnetzagentur (BNetzA)

Tulpenfeld 4
D-53113 Bonn
Germany

For the attention of:
Mr. Homann
President

Fax: +49 228 14 69 04

Dear Mr Homann,

Subject: Commission Decision concerning Case DE/2012/1348: Remedies for wholesale terminating leased lines with a bandwidth of (i) 2 Mbps up to and including 10 Mbps and (ii) above 10 Mbps up to and including 155 Mbps

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

I. PROCEDURE

On 29 June 2012, the Commission registered a notification from the German national regulatory authority, *Bundesnetzagentur* (BNetzA)¹, concerning the wholesale markets for terminating leased lines with a bandwidth of (i) 2 Mbps up to and including 10 Mbps and (ii) above 10 Mbps up to and including 155 Mbps² in Germany.

The national consultation³ ran from 18 April 2012 to 16 May 2012.

On 6 July 2012, a request for information⁴ was sent to BNetzA and a response was received on 11 July 2012.

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 in 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.

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 of leased lines over alternative interfaces from the market definition and the exclusion of system solutions. BNetzA subsequently withdrew and re-notified 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).

Following the adoption of its market definition and SMP assessment BNetzA then notified a full set of remedies to be applied for the relevant market under Case DE/2007/0687⁷.

In its second round notification for wholesale terminating segments of leased lines under case DE/2011/1277⁸ 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 Mbit/s;
- (ii) terminating segments with a bandwidth of 2 Mbit/s to and including 10 Mbit/s;
- (iii) terminating segments with a bandwidth of more than 10 Mbit/s up to and including 155 Mbit/s;
- (iv) terminating segments with a bandwidth over 155 Mbit/s.

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.

Furthermore, under Case DE/2012/1321⁹ BNetzA notified to the Commission draft remedies for the market of wholesale terminating leased lines irrespective of bandwidth. These proposals were still based on the 2007 analysis (DE/2007/0677). On 4 June 2012 the Commission issued a "serious doubts letter" to BNetzA calling into question the compatibility of the proposals with EU law. On 5 June 2012 BNetzA then withdrew the proposed measures notified under Case DE/2012/1321.

⁵ SG-Greffe(2005) D/205459.

⁶ SG-Greffe (2007) D/205763.

⁷ SG-Greffe (2007) D/206667.

⁸ SG-Greffe (2011) D/25152; the Commission issued a no comments letter.

⁹ SG-Greffe (2012) D/9118.

II.2. Current draft measure – regulatory remedies

The current notification now proposes to set a full set of remedies for the two wholesale markets of terminating leased lines, for which BNetzA has identified DT as having SMP, i.e. the wholesale markets for (i) terminating segments with a bandwidth of 2 Mbps up to and including 10 Mbps and (ii) terminating segments with a bandwidth of more than 10 Mbps up to and including 155 Mbps.

The proposed remedies for these two markets are as follows:

- An obligation to grant access, including an obligation to provide collocation;
- An obligation to publish a reference offer;
- An general non-discrimination obligation¹⁰; and
- An ex-ante price control.

Due to the inclusion of Ethernet based circuits in the defined market (case DE/2011/1277) the proposed remedies now also apply to such new interface circuits.

III. NO COMMENTS

The Commission has examined the notifications and the additional information provided by the BNetzA and has no comments.¹¹

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/EC¹² 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 Commission¹³ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential

¹⁰ Whilst the ERG Common Position on best practice in remedies imposed as a consequence of a position of SMP in the relevant market for wholesale leased lines (ERG (07) 54 final) is stating that NRAs should not rely on an assumption that a traditional (generic) non-discrimination obligation will be sufficient to alleviate the competitive concerns identified, BNetzA considers such a generic non-discrimination obligation to be sufficient for the markets for wholesale leased lines in Germany. In its response to the Commission's request for information, BNetzA stated that on balance and taking account of responses to its national consultation, the relevant market does not display a particular risk of discriminatory behaviour that would need to be addressed with a more specific non-discrimination obligation. BNetzA further pointed out that important elements for tackling discriminatory behaviour, such as Key Performance Indicators (KPIs), Service Level Agreements (SLAs) and Service Level Guarantees (SLGs) would be contained in the envisaged regulatory reference offer.

¹¹ In accordance with Article 7(3) of the Framework Directive.

¹² 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.

¹³ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

information which you wish to have deleted prior to such publication.¹⁴ You should give reasons for any such request.

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

¹⁴ The Commission may inform the public of the result of its assessment before the end of this three-day period.