



EUROPEAN COMMISSION

Brussels, 08/10/2012
C(2012) 7165

Bundesnetzagentur (BNetzA)

Tulpenfeld 4
D-53113 Bonn
Germany

For the attention of:
Mr. Jochen Homann
Präsident

Fax: +49 228 14 6904

Dear Mr Homann,

Subject: Commission Decision concerning Case DE/2012/1363: Wholesale access to the local loop for broadband and/or voice services in Germany - Remedies

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

I. PROCEDURE

On 7 September 2012, the Commission registered a notification from the German national regulator, the *Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen* (BNetzA), concerning the proposed remedies for wholesale (physical) network infrastructure access in Germany¹.

The national consultation² ran from 11 July 2012 for two weeks. The deadline for the EU consultation under Article 7 of the Framework Directive is 8 October 2012.

On 18 September 2012, a request for information³ was sent to BNetzA and a response was received on 21 September 2012. Additional information was received from BNetzA on 25 September 2012.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and

¹ Corresponding to Market 4 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 of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Market Recommendation), OJ L 344, 28.12.2007, p. 65.

² In accordance with Article 6 of the Framework Directive.

³ In accordance with Article 5(2) of the Framework Directive.

the Commission may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The market for wholesale network infrastructure access in Germany was previously notified to and assessed by the Commission under cases DE/2011/1122⁴, DE/2011/1177⁵, DE/2011/1218⁶ and DE/2011/1254⁷. Case DE/2011/1122 concerned the third-round review of the market while in case DE/2011/1177 BNetzA imposed a full set of remedies on Deutsche Telekom (DT). Notification DE/2011/1218 specified current costs based prices for LLU (10.02€) and SLU (7.17€), whereas DE/2011/1254 set prices for collocation at street cabinet, access to ducts and dark fibre resulting from the application of a BU-LRIC costing model.

II.2. Current proposal - Regulatory remedies

The present draft measures set: (i) one-off activation and cancellation fees for full LLU, and (ii) one-off activation/cancellation as well as monthly rental fees for shared access, i.e. Carrier Line Sharing (CLS).

BNetzA confirms in its reply to the RFI that the cost determination is (i) based on replacement costs and (ii) in accordance with a BU-LRIC model⁸, as announced in notification DE/2011/1177, which sets the framework for remedies on market 4.

The draft measure provides a detailed tariff list for a series of LLU-related services, e.g. activation, cancellation, change of use, but not line rental. BNetzA highlights two access tariffs in particular: the activation fee of 31.01€ for take-over without work at the end-customer's premises and the tariff of 54.17€ for the new high-bit-rate two wire copper pair line (without work at the street cabinet and with work at the end customers' premises) which appears to be the most used LLU-based access option.

These two figures represent a slight increase⁹ as compared to the currently applied tariffs

⁴ C(2010)6617. BNetzA defined the relevant market (including fibre access) and designated DT as operator with significant market power (SMP).

⁵ C(2011)1338. BNetzA proposed to impose the following set of remedies: (i) obligation to provide unbundled access for both copper and fibre (including co-location), (ii) duct access (and subsidiary dark fibre access) to backhaul traffic from the street cabinet, (iii) a non-discrimination obligation, (iv) transparency obligations, (v) accounting separation for prices related to fibre access, (vi) ex-ante price control for access prices with the exception of fibre base access in the case of FttH for which BNetzA proposed to apply an ex-post price control. The Commission commented *inter alia* on the notification requirements for copper based access prices.

⁶ C(2011)4375. This notification dealt with the LLU cost results of a BU-LRIC model.

⁷ C(2011)7809.

⁸ With respect to the BU-LRIC model, BNetzA clarifies that while previous notifications were based on the cost model both the currently applicable and the present draft decision on one-off fees use DT's actual data. The main reason for this is that according to BNetzA, cost models other than DT's data proved to be incompatible with German telecommunications law. BNetzA further explains that although DT's actual data is used, the items taken into consideration are such that the model could be considered as BU-LRIC. Also, BNetzA further considers that the use or not of BU-LRIC is of less relevance for the presently proposed measure as it sets one-off fees only.

⁹ BNetzA explains in its reply to the RFI that the currently proposed tariffs are higher when compared to the tariffs in decision BK3c-10-087. This overall slight increase in tariffs is, in particular, due to the introduction of a new WITA system (used for revision of applications), the increased number of

of 30.83€ for the one-off activation fee and 53.35€ for the new high-bit-rate two wire copper pair line¹⁰. As to these currently applied tariffs, stemming from decision BK3c-10-087 and valid for the period from 30/06/2010 to 30/06/2012, BNetzA confirms in its response to the RFI that they have not been notified to the Commission, since at the time BNetzA did not have the practice to notify price decisions.

With regard to CLS, there are two types of products: the old CLS on HVt (main distribution frame) type of shared access and the new CLS on KVz (street cabinet) niche product¹¹.

BNetzA specifies that the most used access option is line sharing without work at the street cabinet and with work at the end customer's premises (€44.80). The monthly rental fee for CLS on HVt is €1.68.

III. COMMENTS

The Commission has examined the notification and the additional information provided by the BNetzA and has the following comments:¹²

Notification of amendments to the price control obligations

The Commission notes that some price decisions taken by BNetzA with regard to the SMP operator DT have not been notified under the Article 7 consultation procedure.

Price control constitutes a regulatory obligation referred to in Article 16 of the Framework Directive and has an effect on trade between Member States. Therefore, tariffs-related draft measures are required to be notified under Article 7(3) in conjunction with Recital 15 of the Framework Directive.

Furthermore, according to the Commission Recommendation on notifications, time limits and consultations provided for in Article 7 of the Framework Directive¹³, price levels and amendments to the methodologies used to calculate costs or prices are considered to be material changes to the nature or scope of a remedy that have an appreciable impact on the market and should therefore be notified to the European Commission under the standard notification procedure.

applications for high-bit rate access and the introduction of improvements in the documentation system. BNetzA assumes that the observed upward trend would be counteracted by future avoidance of high deployment costs, which in medium term would result in savings for the operator.

¹⁰ Given that the EU average LLU connection cost of October 2011 was 38.99 € it may be expected that the newly proposed fees remain below the EU average.

¹¹ BNetzA explains in its reply to the RFI that CLS on (via) HVt has been offered for around 10 years. The highest number of connections was reached in 2008 ([...] connections). Since then this number has been gradually decreasing and is currently of [...] connections, which results from the fact that nowadays the broadband market is dominated by bundled offers (broadband connection and voice calls). As to CLS on KVz, it has been offered only since 2011. It is so far requested by [...] small regional operators who are both at the moment not able to offer voice calls when connected via KVz. A significant increase of the CLS on KVz type offer is not expected in the coming years.

¹² In accordance with Article 7(3) of the Framework Directive.

¹³ See recital 14 of the Commission Recommendation of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of the Framework Directive, OJ L 301, 12.11.2008, p. 23.

Therefore, the Commission welcomes the current notification and reiterates the need for BNetzA to notify any future modification of costing methodologies and/or price levels.

Consistency of access prices across the EU

Following the Commission's recent comments related to the price setting for LLU products¹⁴, the Commission stresses the importance of consistent regulation across the EU of key wholesale access products in the transition period to NGA networks. In the light of the current Commission's work on non-discrimination and costing regulatory approaches to a number of access products, including LLU, the Commission invites BNetzA to review its analysis upon entry into force of any relevant recommendations.

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.

Pursuant to Point 15 of Recommendation 2008/850/EC¹⁵ 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 Commission¹⁶ 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.¹⁷ You should give reasons for any such request.

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

¹⁴ In particular the Commission commented in case: (i) DE/2010/1177 on the need to reconsider the different access obligations, on the lack of cost-oriented FTTH-based access, and on the need to notify the costing methodology where cost-orientation is applied; (ii) DE/2011/1218 on the application of the margin squeeze test; (iii) DE/2011/1254 on the use of current costs for setting access prices for non-replicable assets and on a potential margin squeeze test.

¹⁵ 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.

¹⁶ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

¹⁷ The Commission may inform the public of the result of its assessment before the end of this three-day period.



EUROPEAN COMMISSION

Brussels, 24/10/2012
C(2012) 7694

Bundesnetzagentur (BNetzA)

Tulpenfeld 4
D-53113 Bonn
Germany

For the attention of:
Mr. Jochen Homann
Präsident

Fax: +49 228 14 6904

Dear Mr Homann,

Subject: Corrigendum of Commission Decision SG-Greffe (2012) D/15982 of 8 October 2012 concerning Case DE/2012/1363: Wholesale access to the local loop for broadband and/or voice services in Germany - Remedies

Comments pursuant to Article 7(3) of Directive 2002/21/EC¹⁸

Please note that the above decision is amended as follows:

1. **Under paragraph II.1., the sentence** " Notification DE/2011/1218 specified current costs based prices for LLU (10.02€) and SLU (7.17€), whereas DE/2011/1254 set prices for collocation at street cabinet, access to ducts and dark fibre resulting from the application of a BU-LRIC costing model." **is modified as follows:** " Notification DE/2011/1218 specified current costs based prices for LLU (10.08€) and SLU (7.17€), whereas DE/2011/1254 set prices for collocation at street cabinet, access to ducts and dark fibre resulting from the application of a BU-LRIC costing model."
2. **Footnote 9:** "BNetzA explains in its reply to the RFI that the currently proposed tariffs are higher when compared to the tariffs in decision BK3c-10-087. This overall slight increase in tariffs is, in particular, due to the introduction of a new WITA system (used for revision of applications), the increased number of applications for high-bit rate access and the introduction of improvements in the documentation system. BNetzA assumes that the observed upward trend would be counteracted by

¹⁸ 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 (the Framework Directive), OJ L 108, 24.4.2002, p. 33.

future avoidance of high deployment costs, which in medium term would result in savings for the operator." **is modified as follows:**"BNetzA explains in its reply to the RFI that the currently proposed tariffs are higher when compared to the tariffs in decision BK3c-10-087, which could be the result of several opposing effects. The introduction of a new WITA system (used for the revision of applications) leads to a cost reduction. The overall slight increase in tariffs is, inter alia, due to the increased number of applications for high-bit rate access and the introduction of improvements in the documentation system. BNetzA assumes that the observed upward trend would be counteracted by future avoidance of high deployment costs, which in the medium term would result in savings for the operator."

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