



EUROPEAN COMMISSION

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Bundesnetzagentur (BNetzA)

Tulpenfeld 4
D-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/2012/1350: Wholesale broadband access in Germany – Modification of price remedies

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

I. PROCEDURE

On 5 July 2012, the Commission registered a notification from the German national regulatory authority, *Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen* (BNetzA)¹, concerning the market for wholesale broadband access² in Germany.

The national consultations³ ran from 18 April 2012 to 2 May 2012 and 27 June 2012 to 4 July 2012.

On 13 July 2012, a request for information⁴ was sent to BNetzA and a response was received on 18 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 5 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.

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.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The second review of the market for wholesale broadband access in Germany was previously notified to and assessed by the Commission under case DE/2010/1116. 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, Deutsche Telekom, 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.

The Commission commented on the inclusion of cable into the market for Layer-3 Bitstream access⁵, however, the Commission recognized that the inclusion did not lead to a different result regarding the SMP analysis or the scope of the remedies. Further, the Commission invited BNetzA to clarify that the proposed non-discrimination obligation required the incumbent to up-date its wholesale Bitstream offer in time before launching new retail services based on fibre.

The Commission, moreover, commented 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 and in its final measure set out a cost model.

II.2. Regulatory remedies

In the draft measure, BNetzA has analysed a new pricing model, called the "*VDSL-IP-Bitstrom-Kontingentsmodell*" (the contingent model), proposed by Deutsche Telekom to facilitate risk sharing and promoting sales volumes when rolling out its new NGA network. The pricing model applies to the Layer-3 VDSL Bitstream offer and would be available alongside the currently used pricing model.

The contingent model was first presented by Deutsche Telekom 17 January 2012, and on 2 April 2012, BNetzA adopted provisional measures to prohibit the operator from selling VDSL bitstream access under the proposed model. The prohibition was based on the fact that BNetzA found that the volume-based discount in the model in conjunction with the term of the lease would make it unattractive for alternative operators to invest in their own fibre infrastructure. BNetzA stated that the model, as originally proposed, could further not be justified by investment-related risks or capacity utilisation risks. In addition, BNetzA was concerned that the originally proposed price under the model could lead to a margin squeeze between the Layer-3 Bitstream offer and unbundled access.

Following BNetzA's examination of the proposed contingent model, which included

⁵ Repeating its comments from the first market review in 2005, case DE/2005/0262, that BNetzA had not provided sufficient evidence to justify the inclusion of HFC cable in the market.

meetings and consultations with the industry, Deutsche Telekom in May and June 2012, changed the terms of the original contingent model. The main changes to the contingent model were: (i) the monthly fee per line increased by 50 €ct; (ii) termination of the contract is possible every two years without having to re-negotiate with Deutsche Telekom or whenever the access seeker wishes to migrate its customers to a new⁶ NGA network rolled out by itself or a third party⁷, and (iii) the minimum volume of the contingent is decreased from 4% to 3% of total lines in the national market or in the regions, for which the access seeker wishes to sign up.

The table below illustrates the prices with the different pricing models. For the contingent models, BNetzA annualises the upfront payment of 161.11 € per line and calculates a monthly upfront payment of approximately 5.15 € per connection⁸.

	Standard offer – monthly fee	1 st Contingent model - monthly fee	1 st Contingent model – incl. upfront payment	2nd Contingent model - monthly fee	2nd Contingent model – incl. upfront payment
VDSL - Classic	25.32 €	12.88 €	18.03 €	13.38 €	18.53 €
VDSL 50 Mbit/s	26.04 €	13.60 €	18.75 €	14.10 €	19.25 €

Following the amendment of the contingent model, BNetzA now proposes to lift its objections underlying the provisional measure from 2 April 2012. The wholesale margin squeeze that earlier was found to occur, and the prolonged binding of bitstream demand, which would have had negative effects on competitive possibilities in the market, are according to BNetzA following the introduced changes of the model no longer a concern.

III. COMMENTS

The Commission has examined the notification and the additional information provided by BNetzA and has the following comments:⁹

Need to impose an effective price control mechanism

The Commission notes that BNetzA still applies an approach to price control which the Commission, in case DE/2010/1116, considered as not the most

⁶ Article 6.2 of the supplemental contract, as outlined in the notified draft decision, p.7 "Customers of Deutsche Telekom may terminate the contingent model at short notice when switching to a new infrastructure created on or after 30 June 2012 as referred to in paragraph 11 of the Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks".

⁷ Following the amendments to the migration rules in particular, the contingent model does no longer seem to have detrimental effects on investments by alternative operators by binding access seekers in long term contracts with Deutsche Telekom.

⁸ According to Deutsche Telekom, assuming a full linear load duration of the contingent the upfront payment would result in an additional monthly charge of 4.80 € on top of the monthly fee. However, BNetzA agrees with some of the parties involved in the consultation that instead of assuming a linear load of the contingent during the contract term, one might assume a certain exponential progress for the load of the quota model to the end of the contract term. This would lead to the monthly rate of the upfront share to rise by between 0.20 € and 0.50 €. The Commission therefore uses the assumption of an average of 5.15 € for the monthly rate of the annualised upfront fee.

⁹ In accordance with Article 7(3) of the Framework Directive.

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 its overall pricing approach.

Need to monitor the effects of the proposed measure

The Commission takes note that both BNetzA and access seekers recognize that the amended contingent model could have a positive effect on VDSL investment and roll-out. However, as it is yet unclear how the measure will affect infrastructure investment of operators other than the SMP operator, and how it will more generally influence the further development of competition in the wholesale broadband access market, the Commission invites BNetzA to set out in its final measure a mechanism by way of which the effects of the proposed model on the market would be monitored, particularly with regard to ensuring non-discrimination and assessing whether the proposed measure may work to the disadvantage of smaller and/or only regionally active alternative operators.

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/EC¹⁰ 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 Commission¹¹ 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.¹² You should give reasons for any such request.

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

¹⁰ 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.

¹¹ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

¹² The Commission may inform the public of the result of its assessment before the end of this three-day period.