Dear Mr Homann,

Subject: Commission Decision concerning Case DE/2014/1620: Wholesale terminating segments of leased lines in Germany - Remedies

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

I. Procedure

On 6 June 2014, the Commission registered a notification from the German national regulatory authority, the Bundesnetzagentur (BNetzA), concerning proposed charges for wholesale terminating segments of leased lines both with traditional and with Ethernet interfaces in Germany.

The national consultation ran from 20 November to 20 December 2013.

On 17 June 2014, a request for information was sent to BNetzA and a response was received on 23 June 2014.

II. Description of the Draft Measure

II.1. Background

The last round of market analysis (market definition and SMP assessment) for wholesale terminating segments of leased lines in Germany was previously notified to the

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3 In accordance with Article 6 of the Framework Directive.

4 In accordance with Article 5(2) of the Framework Directive.
Commission in November 2011 and was assessed under case DE/2011/1277\(^5\). BNetzA found the relevant product market to comprise all leased lines connections with traditional and Ethernet-based interfaces, which are not attributable to long-distance/core network segments. It found the market to consist of four separate submarkets distinguishable by bandwidth: (i) analogue terminating segments and segments with a bandwidth of less than 2 Mbit/s; (ii) terminating segments with a bandwidth of 2 Mbit/s up 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; and (iv) terminating segments with a bandwidth of more than 155 Mbit/s. Only submarkets (ii) and (iii) were found to be susceptible to ex ante regulation. Deutsche Telekom (DT) was found to have significant market power (SMP) in these two separate markets.

The remedies for submarkets (ii) and (iii) were notified to and assessed by the Commission under case DE/2012/1348\(^6\). BNetzA imposed on DT access, transparency (reference offer), non-discrimination and price control obligations.

In January 2013, BNetzA further notified to the Commission proposed rates for wholesale terminating segments of leased lines with both traditional and Ethernet interfaces (assessed by the Commission under case DE/2012/1417\(^7\) and DE/2013/1423\(^8\) respectively). In both cases, the Commission had no comments. The proposed rates were agreed upon until 31 October 2013.

**II.2. Current draft measure**

The present draft measure proposes new rates for both traditional interface and Ethernet wholesale terminating segments of leased lines with a bandwidth of 2 Mbit/s up to and including 10 Mbit/s, and of more than 10 Mbit/s up to and including 155 Mbit/s.

The notified charges include yearly rental fees and one-off connection costs as well as charges for additional services (such as fault repair, upgrades etc.) and are proposed to apply retroactively from the 1 November 2013 and until 30 June 2015. The notification concerns only those regulated offers, for which charges had previously been notified to the Commission. In response to the Commission's request for information, BNetzA confirmed that it has started the next full round of market analysis, the results of which it intends to notify to the Commission no later than by summer 2015.

In order to calculate the relevant efficient costs BNetzA proposes to use a methodology based on current costs (*Bruttowiederbeschaffungskosten*). As the basis for its calculations BNetzA assumes an SDH network (*Synchronous Digital Hierarchy*) as the efficient network, even concerning the costs for the provision of Ethernet services\(^9\). BNetzA justifies this approach with the fact that the SMP operator, Telekom Deutschland GmbH (DT), is under an obligation to provide access to its network for terminating leased lines on a nationwide basis. According to BNetzA, as soon as one part of the line provided runs over the legacy SDH network, a provision of native Ethernet becomes impossible given the characteristics of the provision of leased lines (in principle as point-to-point connections). As a result, it is appropriate in BNetzA's view to base its cost calculations at this stage of Ethernet roll-out still on the SDH network alone.

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\(^5\) C(2011) 10078.  
\(^6\) C(2012) 5540.  
\(^7\) C(2013) 1033.  
\(^8\) C(2013) 1280.  
\(^9\) This means that for Ethernet services BNetzA assumes in its cost calculations that the most efficient provision of Ethernet is one via SDH and not as native Ethernet.
It is worth noting that, so far, a standard reference offer, which was proposed as a remedy in DE/2012/1348, has not yet been put in place, thus leaving it more difficult to determine with precision the exact components of the regulated services.10

III. COMMENTS

The Commission has examined the notification and the additional information provided by BNetzA and has the following comments:11

**Need to base cost calculations on efficient network provision**

The Commission notes that BNetzA proposes to base its cost calculations for both types of terminating segments of leased lines (i.e. traditional interface and Ethernet interface leased lines) solely on the legacy SDH network of the SMP operator. Whilst the Commission takes note of BNetzA's argument that for technical reasons (and due to the SMP operator's obligation to provide nationwide ubiquitous wholesale access to terminating segments of leased lines) the provision of Ethernet leased lines may in many instances occur based on the SDH network, it is concerned that the approach chosen by BNetzA risks creating inefficiencies, which – ultimately – will have to be paid for by alternative operators. An efficient service provision is guaranteed, where the available resources are deployed in an optimal way, i.e. where technical inputs are used in a combination causing minimal costs. In this respect, the Commission would like to point out, that (native) Ethernet is generally the more innovative and efficient technology, which should (on the basis of a current cost approach) cause lower costs if compared with a legacy SDH technology.

The Commission therefore asks BNetzA to reconsider in its final measure the cost basis for its calculations and to ensure that any cost calculations are based on the efficient provision of the relevant services taking into account a mix of technologies where appropriate and considering the latest technology developments in order to avoid that the SMP operator will be able to recover inefficiencies from access seekers.

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/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

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10 In response to the Commission's request for information, however, BNetzA stated that the present notification only concerns a modification of charges previously approved, i.e. do not concern new offers for wholesale terminating segments of leased lines.

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


13 Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.
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.\textsuperscript{14} You should give reasons for any such request.

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

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