Dear Mr Homann,

Subject: Commission Decision concerning Case DE/2018/2133: Wholesale high-quality access provided at a fixed location in Germany – remedies

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

1. Procedure

On 16 November 2018, the Commission registered a notification from the German national regulatory authority, Bundesnetzagentur (BNetzA), concerning remedies in the market for wholesale high-quality access provided at a fixed location in Germany.

The first national consultation ran from 23 August 2017 to 4 October 2017. The second national consultation ran from 11 July 2018 to 13 August 2018.

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3 In accordance with Article 6 of the Framework Directive.
On 28 November 2018 the Commission sent a request for information to BNetzA to which an answer was received on 3 December 2018.

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.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

In the last market analysis notified to the Commission (case DE/2016/19334), BNetzA defined a wholesale high-quality access market comprising all leased line connections that are not attributable to the long-distance/core network segments. The market comprises wholesale terminating segments of leased lines with traditional interfaces, Ethernet-based interfaces or based on native Ethernet as well as terminating segments that are provided as part of system solutions contracts5. BNetzA also introduced a general clause concerning the requirements that a wholesale high-quality product must meet in order to be included in the market definition, regardless of whether such a product would only come into existence or become commercially available during the regulatory period6. BNetzA further divided the relevant market into three market segments according to bandwidth: (i) terminating segments with a bandwidth of 2 Mbit/s up to and including 10 Mbit/s; (ii) terminating segments with a bandwidth of more than 10 Mbit/s up to and including 155 Mbit/s; (iii) terminating segments with a bandwidth of more than 155 Mbit/s. BNetzA considered the relevant market to be national in scope.

BNetzA designated Deutsche Telekom with significant market power (SMP) on the market for terminating segments with a bandwidth of 2 Mbit/s to 10 Mbit/s and the market for terminating segments with a bandwidth of 10 Mbit/s up to and including 155 Mbit/s. In contrast, BNetzA considered that the market for terminating segments with a bandwidth of more than 155 Mbit/s failed the three criteria test and proposed to deregulate it. The Commission had no comments.

Following the above market analysis, BNetzA notified to the Commission two draft measures concerning remedy details (cases DE/2016/19437 and DE/2017/19898), which however were still based on an outdated (i.e. not the

4 C(2016) 7879.
5 The latter are framework contracts covering the combination of various solutions or various price models and other conditions.
6 Dark fibre products were excluded from the market definition.
7 C(2016) 8765.
8 C(2017) 4561.
latest) market analysis and general remedies decision. In both cases, the Commission urged BNetzA to notify a new remedies decision based on the most recent market analysis as soon as possible, in order to assure regulatory certainty for the period under consideration.

2.2. Current proposal

In the present notification, BNetzA envisages imposing the same set of remedies on both the market segment for bandwidths of 2 Mbit/s to 10 Mbit/s and the one for bandwidths of 10 Mbit/s up to and including 155 Mbit/s. In particular, Deutsche Telekom will be subject to:

(a) (i) an obligation to provide access and collocation services;

(b) (ii) non-discrimination, including the obligation to provide access seekers (on request) and the ruling chamber (without separate request) with quarterly evaluations of key performance indicators (KPIs);

(c) (iii) transparency, including in particular the obligation to submit to BNetzA all existing agreements on access services and facilities to which Deutsche Telekom is a party as provider;

(d) (iv) the obligation to publish a reference offer; and

(e) (v) cost-oriented price control, as described in more detail hereafter.

BNetzA intends to continue applying an ex ante type of price control (i.e. prior approval of rates) to access to terminating segments of leased lines, irrespective of whether the interface is traditional or Ethernet-based, as well as to any new substitute high-quality access product using a P2P (Point-to-Point) architecture introduced on the market by Deutsche Telekom. Conversely, BNetzA proposes that Wholesale Ethernet P2MP (Point-to-Multipoint), Wholesale Ethernet P2MP HBS, Wholesale Ethernet VPN, Wholesale Ethernet VPN 2.0 as well as any new substitute high-quality access product with P2MP or VPN characteristics introduced on the market by

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9 These older measures were notified to the Commission under cases DE/2011/1277 (C(2011) 10078) and DE/2012/1348 (C(2012) 5540), respectively.

10 BNetzA considers that EoO (Equivalence of Outputs) is a sufficient safeguard and as efficient in preventing discriminatory behaviour as EoI (Equivalence of Inputs), which would however entail disproportionate costs for Deutsche Telekom.

11 The reference offer should be published within three months from the entry into force of the notified regulatory measure for products that are already offered, or within three months from the marketing of new products.

12 BNetzA refers to either Ethernet or Bitstream access products that comply with certain minimal technical requirements.
Deutsche Telekom\textsuperscript{13} should be subject to a lighter form of (ex post) price control combined with a notification requirement\textsuperscript{14}.

BNetzA explains that, as long as it continues offering a P2P product (i.e. the base wholesale high-quality product), Deutsche Telekom has limited scope to price more complex products at abusive levels. The main reason is that access seekers that buy the strictly price regulated P2P product can use the latter input to create the switching function on their own, thereby significantly reducing their reliance on Deutsche Telekom’s P2MP solutions (which consist of several connecting lines and a switching function). The legal prohibition of margin squeeze (‘Preis-Kosten-Schere’ and ‘Kosten-Kosten-Schere’) and BNetzA’s related powers further constrain the prices of such complex products.

3. COMMENTS

The Commission has examined the notification and the additional information provided by BNetzA and has the following comment:\textsuperscript{15}

**Timeline and consistency of market analyses and remedies**

Under Article 16(2) of the Framework Directive, NRAs are required to determine whether to maintain, amend or withdraw obligations on undertakings based on a market analysis.

The Commission notes that BNetzA’s latest market analysis for wholesale high-quality access provided at a fixed location in Germany has been notified and assessed by the Commission under case DE/2016/1933, i.e. over two years prior to the present notification concerning remedies. Following the latest market analysis mentioned above, the Commission received two notifications (cases DE/2016/1943 and DE/2017/1989) concerning price control details based on an outdated market analysis and general remedies decision. While the latter price control decisions remain applicable, the Commission still awaits a notification specifying the price control obligation proposed in the current measure, which is based in turn on the 2016 market analysis.

The Commission takes note of BNetzA’s explanation according to which such a significant time lag is mainly due to internal reorganisation issues together with the particularly lengthy inquiries (including two rounds of national public consultation)

\textsuperscript{13} BNetzA sets the condition that a corresponding P2P solution is offered by Deutsche Telekom. If this is not the case, these products will continue to be subject to the stricter form of (ex ante) price control applicable to the less innovative products.

\textsuperscript{14} Under this price control regime Deutsche Telekom is required to notify BNetzA of new rates at least two months ahead of their application. Only in the case of a manifest price abuse can BNetzA prohibit the entry into force of such prices. In all other cases, BNetzA can only order the withdrawal of abusive prices following an in-depth investigation, i.e. in practice after their introduction and with no retroactive effects.

\textsuperscript{15} In accordance with Article 7(3) of the Framework Directive.
that were necessary to answer the complex questions linked to the extension of the market definition in the last market analysis.

However, in line with its position in cases DE/2016/1943 and DE/2017/1989, the Commission reminds that carrying out a new market analysis and imposing the appropriate remedies without undue delay is essential in order to allow for a proper assessment of whether the currently imposed regulatory measures are proportionate and justified in the present market environment.

The Commission therefore urges BNetzA to notify the new price control details as soon as possible, in order to assure regulatory certainty for the period under consideration. Furthermore, the Commission urges BNetzA to take all necessary and useful steps in the future to align the timing of its notifications and decisions concerning remedies with the most recent market analysis as much as possible.

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/EC\textsuperscript{16} 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\textsuperscript{17} 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.\textsuperscript{18} You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General


\textsuperscript{17} Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

\textsuperscript{18} The Commission may inform the public of the result of its assessment before the end of this three-day period.