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Bundesnetzagentur für Elektrizität,
Gas, Telekommunikation, Post und
Eisenbahnen
Tulpenfeld 4
D-53105 Bonn
Germany

For the attention of:
Mr Matthias Kurth, President

Fax: + 49.228.14.64.51

Dear Mr. Kurth,

Subject: Case DE/2006/0457: Remedies relating to the Market for IP bitstream access with handover at IP level at different places in the network hierarchy, including HFC broadband access with handover at IP level.

Comments pursuant to Article 7(3) of Directive 2002/21/EC¹:

I. PROCEDURE

The notification was received from the German regulatory authority, Bundesnetzagentur (BNetzA), on 21 July 2006 and became effective on that day. The notification relates to remedies relating to the market for IP-Bitstream access with Handover at IP level at different places in the network hierarchy, including HFC broadband access with handover at IP level ("IP bitstream access").

On 31 July 2006 the Commission sent a request for information to BNetzA. A response was received on 3 August 2006.

The market definition and analysis were undertaken earlier by BNetzA, and have been notified on 11 October 2005 and assessed by the Commission². BNetzA designated

¹ 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.

² Case DE/2005/0262.

Deutsche Telekom ("DT") as having SMP on the markets for IP bitstream access and ATM bitstream access. On 11 November 2005 the Commission indicated to BNetzA that it had serious doubts about the compatibility of the notified measures with Community law due to the exclusion of bitstream via VDSL connections from the relevant market.

On 14 December 2005, BNetzA submitted amendments to the notified draft measures. According to these amendments bitstream access to VDSL connections is included in the relevant market to the extent that it is substitutable with the products in this market. On the basis of these amendments, the Commission withdrew its serious doubts on 23 December 2005.

The current notification covers only remedies that BNetzA intends to impose on DT on the basis of the SMP finding in the market for *IP* bitstream access. BNetzA has not yet notified the remedies on the second market identified, i.e. the market for *ATM* bitstream access.

A national consultation on the proposed remedies started on 22 February 2006 and ended on 5 April 2006.³

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities ("NRAs") and the Commission may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURES

II.1. Proposed draft measures

BNetzA proposes the following remedies to be imposed on DT on the market defined:

- Obligation of access for the purpose of interconnection and collocation.

The obligation refers to all xDSL variants, including also ADSL2, ADSL2+, SDSL⁴ and VDSL⁵.

³ In accordance with Article 6 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 ("the Framework Directive").

⁴ BNetzA confirmed in its answer to the Commission's request for information that the access to SDSL is part of the obligation.

⁵ See p. 16 of the notification: "*Entgegen der Ansicht der Betroffenen ist in der Regulierungsverfügung keine Beschränkung der Zugangsverpflichtung hinsichtlich solcher IP-Bitstrom-Zugangsprodukte, die auf der ADSL2, ADSL2+ bzw. auf der VDSL-Technologie aufsetzen, auszusprechen.*" BNetzA adds that VDSL is to be included to the extent that it is substitutable with the other bitstream access products and that it is only possible to decide which VDSL-based bitstream products are not substitutable once VDSL infrastructure is available and once corresponding end user products are being offered on the market. BNetzA also refers to the requirement to take investment and investment risks into account.

In its response to the Commission's request for information, BNetzA confirmed that stand alone bitstream access⁶ is part of the market and will be introduced in parallel with "the European harmonised development".

HFC cable broadband access is not covered by the access obligation as HFC broadband is not used by DT.

BNetzA confirmed in its response to the request for information that competitors can choose the points of interconnection freely. They are not obliged to interconnect at all points, and are free to interconnect regionally only.

- Non-discrimination obligation
- Accounting separation
- Obligation to issue a reference offer
- Obligation to submit information on internal input and revenues
- Price control obligation

DT's tariffs for IP-bitstream access and the related collocation services are made subject to prior approval by BNetzA.⁷ However, in case the ongoing analysis of the DSL retail market would demonstrate that DT has no (longer) SMP on that retail market, BNetzA will reassess whether the ex ante approval of tariffs should be maintained.

Furthermore it is not clear which method the ex-ante price control will be based upon. According to the German law such price control could be implemented in form of cost-orientation or benchmarking.

III. COMMENTS

The Commission has examined the notification and has the following comments⁸:

Scope of the access obligation

The Commission welcomes the fact that the access obligation as imposed by BNetzA includes bitstream over all variants of infrastructure, including ADSL2, ADSL2+, SDSL and VDSL unless they are not substitutes to other bitstream access products. This corresponds to the practice of all NRAs which have notified their analysis of the wholesale broadband access market so far. The Commission invites BNetzA to apply the appropriate remedies without delay.

⁶ Bitstream access obligation that ensures that competitors' end-customers do not have to rent PSTN telephone access from the incumbent operator.

⁷ See p. 21 of the notification; "*Die Entgelte, die die Betroffene für die Gewährung des Zugangs zum IP-Bistrom und die dafür erforderliche Kollokation erhebt, unterliegen der Genehmigungspflicht nach §31 TKG.*"

⁸ Pursuant to Article 7(3) of the Framework Directive.

The Commission recalls that in case DE/2005/0262 concerning the market definition and analysis of the wholesale broadband access market in Germany it was originally disputed between BNetzA and the Commission to which extent the recently established VDSL connections of the incumbent were included in the relevant market. The Commission refers to the withdrawal of its serious doubts letter of 23 December 2005 where it is stated that bitstream access to VDSL connections is included in the wholesale bitstream access markets unless it proves not to be a substitute for the existing kinds of bitstream access.

Against this background and in order to provide regulatory certainty the Commission finds it appropriate for BNetzA to set out explicitly that remedies in the present case also relate to the VDSL network. In view of the VDSL-based retail products that DT has recently launched, such an application of remedies should no longer be postponed.

As indicated in the Commission's serious doubts letter of 11 November 2005, the Commission has at present no indication of a lack of substitution between VDSL and other xDSL products, whether at retail or at wholesale level. It is recalled in particular that a mere upgrade of an existing service (such as an offering with a higher bandwidth) is not considered in itself to constitute a new market. The Commission hence considers that the question about the substitutability between bitstream access to VDSL connections and other forms of bitstream access should be answered positively from the outset.

Excluding DT's VDSL-based infrastructure from the access obligation would jeopardise the effectiveness of that obligation to the detriment of competition in the downstream market and of the consumer. In the presence of such exclusion, if DT upgrades its ADSL infrastructure in a given city to VDSL technology by rolling out its fibre to the remote concentrators or street cabinets and dismantling its ADSL equipment, there is a risk that end users in that city become unreachable for any alternative DSL-operator as the alternative operators could not rely on DT's wholesale access product to provide retail broadband access services in that city. Even if DT were required to keep its ADSL infrastructure operational throughout Germany in parallel to its VDSL infrastructure being rolled out, there may be a risk that without giving access to its VDSL infrastructure, alternative DSL-operators may be prevented from competing effectively with DT at the retail level in the relevant market.

Finally, the requirement to take into account the investment undertaken by DT when upgrading its broadband network to VDSL technology should not prevent the imposed access obligation from covering DT's VDSL-based infrastructure. The costs incurred by DT can and should be compensated for through the setting of an appropriate access price (including cost of capital), but cannot justify an exclusion from the access obligation.

Therefore, when the infrastructure is in place, access to VDSL-based infrastructure is to be included in this remedy imposed. Any change to this access obligation has to be notified to the Commission under Article 7(3) of the Framework Directive.

Stand alone bitstream access

The Commission welcomes that in its answer to the request for information BNetzA confirms the future imposition of access to stand alone bitstream.

The Commission asks BNetzA to impose this remedy without delay in order to enable competitors to offer broadband connections to end customers without an obligation to buy a telephone connection from DT. This would stimulate competition in particular in rural areas less susceptible to local loop unbundling, where competition on the retail services is particularly weak in Germany. Such an offer will also provide an adequate means to increase competition in the retail voice markets via Voice over IP⁹

Effective price regulation

The Commission points out that a finding of non-SMP on the retail broadband access market is not per se sufficient to remove the ex ante price control obligation at the wholesale level.

In line with the practice of other Member States and given DT's refusal to offer bitstream access in the past, the Commission notes that ex-post price control is not appropriate to remedy the competition problem identified in the wholesale market in question. The Commission underlines moreover that when assessing the incumbent's market power at retail level, it should be taken into account that part of the retail market share of alternative operators represents pure reselling of DT's broadband access products.

Concerning the implementation of the ex ante price control, the Commission invites BNetzA to indicate in the definitive measure which method the price control will be based upon in order to ensure transparency and legal certainty in the market. The Commission notes that the German law provides that price control can be implemented in form of cost-orientation or benchmarking. In this context, the Commission is concerned that benchmarking may not allow for the specific national circumstances that may have an impact on costs to be taken into account, in particular network topology and differences in the point of interconnection. Benchmarking may also not ensure an appropriate margin with the retail prices applicable in the German market, on the one hand, and with the regulated local loop unbundling rates in Germany, on the other hand, which margins are essential to encourage alternative operators to climb the ladder of investment and to avoid a price squeeze between the various rungs of the ladder. Therefore, the Commission asks BNetzA to impose either retail minus or cost-oriented price control. If BNetzA chooses cost-orientation, it is invited, in order to increase transparency, to communicate to the market players a cost model on which cost-orientation will be based.

Notification of remedies concerning ATM bitstream access to be submitted without further delay

The Commission reminds BNetzA that bitstream access has already been available in the vast majority of EU Member States for a number of years.

⁹ BNetzA pointed to the importance of stand alone bitstream access for the success of VOIP in its "Eckpunktepapier", Eckpunkt 3, of 9 September 2005.

BNetzA notified the market definition and market analysis of the bitstream market only in October 2005 after a reminder from the Commission services. The Commission notes that eight months have elapsed since the Commission's withdrawal of serious doubts in this case asks BNetzA to notify the related remedies for ATM bitstream access without further delay.

Pursuant to Article 7(5) of the Framework Directive, BNetzA shall take the utmost account of comments of other national regulatory authorities and the Commission and may adopt the resulting 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 12 of Recommendation 2003/561/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 Community and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication. You should give reasons for any such request.

Yours faithfully,

For the Commission,
Fabio Colasanti
Director General

¹⁰ Commission Recommendation 2003/561/EC of 23 July 2003 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC, OJ L 190, 30.7.2003, p. 13.

¹¹ Your request should be sent either by email: INFOS-COMP-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.