

Per E-Mail: CNECT-MARKETS-NOTIFICATIONS@ec.europa.eu

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Notification of draft measures according to Article 32 (3) (2018/1972 EU) regarding Market 1 of Recommendation 2020/2245 EU

here: Position Paper of VATM e.V. Germany (does not include business and trade secrets)

Dear Sir/Madam,

The Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (Bundesnetzagentur/BNetzA, in the following BNetzA) has notified to the European Commission, to the Body of the European Regulators of Electronic Communications (in the following BEREC) and to the other national regulatory authorities a draft measure (so-called "regulatory order", of section 13 (1) sentence 1 TKG) in accordance with Article 32 (3) of the European Electronic Telecommunications Code, transposed into German law by sections 14 (3) and 12 TKG.

The draft regulatory order is based on a market analysis performed by BNetzA assessing the conditions of the market and determining the position of Telekom, including its affiliated companies, as the telecommunication provider with significant market power (in the following SMP-provider) on the market for wholesale services regarding both traditional copper lines as well as to the provision of fibre connections (FttH). We see the presently notified regulatory order to be with great significance for the entire market, as it is bound to set the course for future access to the fibre market. We, therefore, would like to open by indorsing this long-awaited regulatory framework.

We recognize the importance of these regulatory measures as they are expected to provide stable regulatory environment for the future fiber deployment while securing the access to the inherited passive infrastructure of the incumbent and its affiliated companies sustaining a successful access-based competition in an FttH-dominated future. We, therefore, see the notified regulatory order as the basis of the future copper-fiber migration.

Having said that, we note with concern that the notified draft only addresses the Telekom Deutschland GmbH itself but leaves their affiliated companies outside of its scope, despite the most recent market analysis performed by the regulatory authority in 2019 explicitly recognizes their SMP-position. Until this day, BNetzA has not introduced any remedy on neither of the affiliated companies with SMP. This provides for serious uncertainty since several affiliated companies are currently rolling out fibre connections in significant numbers – only to the benefit of Telekom Deutschland.

Having that in mind, VATM would like to express the concern that the draft regulatory order does not contain the necessary measures to safeguard competition and it is thus not fit for the task to prepare the telecommunications sector for the transition into the fiber age. If urgent adjustments to the notified measures are not to be made at this stage, this is going to be the cause of a considerable and, above all, avoidable damage for Telekom's competitors in Germany. We would like to emphasize that many in their number and significance suggestions, criticisms and comments had been submitted by the access seekers and competitors during an exceedingly long open consultation on a national level, but most of them have not been even merely considered by BNetzA.

We are now counting on the EU-Commission as our last resort to intervene in the notification procedure and initiate Phase 2 investigation in order to prevent damage to the companies and to aid the means by which the copper-fiber migration is going to be defined. Although the regulatory order also contains some positive considerations, there are significant aspects to criticize, as outlined above. These relate not only to conventional copper-based access services, but also to the planned access to the fiber market. In particular, the draft regulatory order is based on the guiding principle of "*regulation light*". A key feature of "*regulation light*" is a deliberate regulatory restraint, which we do not consider appropriate due to the specific conceptualising it is based on and, therefore, urgently needs to be aided.

Our main concerns entail:

Access to the copper local loop and the FttH local loop (VULA):

BNetzA insists that access to the virtually unbundled copper local loop - designated to be the "*price anchor*" for the fibre roll-out as defined by BNetzA - would not be considered as a subject to cost orientation and that access would not be subject to any additional price regulation in view of the long-term price stability agreed upon in the market (commitment contracts acting until 2031).

Going in the opposite direction of the previous regulatory order, BNetzA now sustains that a simple notification is the sufficient and appropriate instrument to define prices in the above-mentioned time period. This is an approach which we decisively disagree with. It is worth noting that the purpose of these commitment contracts has been to set regulatory stability and predictability. Giving the incumbent the opportunity to single-handedly alter the price of the copper local loop product defining the market dynamics provides for the very opposite.

Although the approach has been met with disapproval also by the Federal Cartel Office as part of the review of the regulatory order, BNetzA sustains that the „*market consensus*“ reached by the market players and the prices negotiated in alternative to the primary pricing instrument must be regarded as a guiding understanding of the market on the future. In our view as VATM, a major point of criticism to these considerations is that too much weight is put into those agreements made by only four companies on the market (three alternative providers and Telekom).

We are, therefore, convinced that these agreements are rather the result of lack of regulatory certainty dominating the German market than an indication for the so called "*market consensus*". Thus, they cannot and must not be accepted as a universal solution replacing the need for official regulation of fees.

In the light of this argument raised by BNetzA and justifying its approach, we would like to bring to the attention of the Commission that not all negotiations started by Telekom regarding price arrangements have had the same successful outcome. This alone suggests that the terms and conditions demanded by Telekom were by no means acceptable for the wide market. We, therefore, would like to underline those agreements between a few (especially nationwide) companies must not lead to a situation where the interest of the majority of companies, notably companies with a limited geographical scope of market activities, is neglected.

In addition, it should be noted that the agreements in question are the result of negotiations between a company classified by the regulatory authority as dominant and significantly smaller

access seekers. They, by default, are characterized by asymmetry, which cannot be understood as a signal of healthy market dynamic, but rather as another sign of abuse of a dominant position, given the correlation between the considerable amount of purchased connection lines by the three companies and the absence of any regulatory predictability on the conditions for their availability.

Due to the lack of FttH standard offer from Telekom to be reviewed by BNetzA, access seekers were forced to find a contractual agreement. Otherwise, Telekom would have been able to exploit an unacceptable market advantage on its new FttH-networks as a single supplier of the FttH products. In the absence of accompanying regulation, these contractual agreements have by no means been concluded amicably and on an equal basis, but at the cost of considerable asymmetry.

A prerequisite for acceptable agreements is always a competition-supporting regulation, which, in the first place, makes agreements with the SMP-company possible. The asymmetry in the case of the commitment contracts in question also means that, despite intensive negotiations, other market players were unable to reach an agreement with the Telekom, resulting in a rather small group of companies agreeing to the conditions offered by Telekom.

Having said that, we would like to point out once again that the commitment model does not take sufficient account of the concerns of smaller, regional network operators and, in particular, of *b2b* providers who use a comparatively small number of lines. The current notification, therefore, completely neglects the interest of the majority of (above all smaller regional) competitors towards predictability and legal certainty about future purchasing conditions. Even though these four companies part of the so called „*market consensus*“ indisputably purchase the large proportion of mass-market lines, they do not constitute the bulk of demand in terms of numbers.

To conclude, we would like to state the obvious: whatever justification BNetzA provides for its approach, the result indisputably is price deregulation of the most important product on the market. By choosing this path, BNetzA fails to recognize that the copper VULA is not just a mass-market wholesale product, but is now, like the unbundled local loop, a basic wholesale product for a wide variety of end-customer services. This different role must now be considered, especially in the context of rate regulation and the legacy that this sets for the transition into FttH-based services.

Access to infrastructure information / planning tools for fiber deployment

Although BNetzA claims that a broader access to Telekom's physical infrastructure is indispensable for a scalable fiber deployment, the notified regulatory order provides that access would be possible only when the charges and contractual conditions have been determined, expected at the beginning of 2024. Considering that many regulatory decisions are already available and could be used for the new access obligation, a much faster availability must be made possible as soon as possible.

BNetzA correctly states that the use of existing ducts in conjunction of the fiber roll-out also depends significantly on the fact that the building companies can obtain knowledge of available duct capacities in an uncomplicated manner. **It is, therefore, absolutely incomprehensible that after years of market-wide consultation the notified regulatory order does not foresee direct access to Telekom's documentation and planning system MEGAPLAN** – which was initially planned in the draft put for national consultation and which was welcomed by the entire industry as an important milestone in the further competitive development of the market. The removal of the access to the MEGAPLAN introduced as part of the current notification to the European Commission was justified with unveiling Telekom's business secrets and security-relevant information. This line of reasoning is very surprising as these considerations were certainly already weighed up intensively by the authority during the national consultation and were also discussed with the parties involved. Unfortunately, instead of providing access to the MEGAPLAN, the regulatory order now merely stipulates that the free capacities available in Telekom's network are to be presented in the "Infrastructure Atlas/Gigabit Register" for direct retrieval by telecommunications companies requesting access.

The concept of an Economic Replicability Test (ERT)

With regard to the regulation of charges for FttH-based access, BNetzA refrains from imposing an ex-ante price regulation and instead plans to conduct an examination based on the Economic Replicability Test (ERT). However, the proposed approach does not adopt the EoI principle and, ultimately, goes against the BNetzA statement that the regulatory order is going to introduce an EoI based regulation in relation to the FttH based services. Example for that is the fact that the eternally and externally used interfaces for the same services remain different, ultimately resulting in considerable disadvantages for the alternative providers. The proposed

ERT concept is another proof for an inherently biased treatment in favour of the incumbent on behalf of BNetzA.

The ERT shall only be applied to the product with 100 Mbit/s, not for the other products with bandwidths of 50, 250, 500 and 1,000 Mbit/s. In our view, an ERT performed to one bandwidth alone does not provide sufficient protection against disadvantages in price competition on the retail market. BNetzA justifies the limited scope of the test by stating that the reference point for the ERT should be the flagship product of the dominant company in accordance with the EU Recommendation on Consistent Non-Discrimination Obligations and Costing Methodologies.

It further assumes that the 100 Mbit/s speed class will be the flagship product over the next few years, as this is the widely favoured product based on new customer subscriptions for FttH connection. We believe that this view is based on a serious misinterpretation of the EU Recommendation. The Recommendation does not limit the scope of the evaluation to the most relevant retail product to define the flagship product. Rather, the most relevant retail products are to be explicitly examined for their replicability. By no means only the 100 Mbit/s bandwidth has a particular competitive relevance in the fixed network market. This can be demonstrated by the fact that the 100 Mbit/s variant accounts for approx. 40% of the share of new customers acquired.

At the same time, the most recent market surveys examining the development of the fixed network market in Germany show that the share of connections with a bandwidth of more than 250 Mbit/s to 1000 Mbit/s has more than tripled in the period 2019 to 2021. This dynamic growth shows the strong increase in demand for high bandwidths on the market. Therefore, BNetzA's position that Telekom's corresponding products are not sufficiently relevant is clearly wrong. Telekom's pricing measures for the bandwidth classes not defined as flagship products and not reviewed by ERT can undoubtedly have a direct influence on the market potential of all FttH retail products. Using the example of the currently defined flagship product with 100 Mbit/s, Telekom could, for example, apply the following pricing strategy on the retail market: On the one hand, it could offer a very low-priced entry-level product with 50 Mbit/s for customers with rather low bandwidth needs and at the same time offer the product with 250 Mbit/s at the same price as the one for the 100 Mbit/s product.

As, according to BNetzA's definition, neither the 50 Mbit/s nor the 250 Mbit/s product would be considered a flagship product, it would be possible for the Telekom to offer retail tariffs in this respect below the replicability threshold, squeezing out its competitors.

In this scenario, competitors would not be able to successfully sell their own products, regardless of the replicability of Telekom's retail product with 100 Mbit/s, as it would make more sense for the end customer to choose Telekom's cheaper entry-level product with 50 Mbit/s or the more performant product with 250 Mbit/s. Even the federal Cartel Office criticizes this approach and condemns it as inappropriate, as it clearly gives green light to the Telekom to engage in predatory price competition in the bandwidth segments *around the flagship product*.

We, therefore, urge for considerable adjustments in the proposed regulatory order and the introduction of remedies preventing the uncertainty that an ERT in its proposed form would introduce.

We would like to emphasize that the provided points reflect a wide consensus on the market and are considered to be essential for the proper functioning of the German telecommunications sector. We, therefore, hope that these are going to be taken into utmost account during the evaluation of the current notification procedure and inform the decision-making process of the Commission.