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Notification of draft measures according to Article 7 (3) of the Framework Directive (2002/21/EC) regarding Market 4 of Recommendation 2014/710/EU – Reference Offer CFV 2.0,
BK2c 18/004 CFV-Ethernet 2.0, Reference Offer

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

Dear Sir/Madam,

We hereby submit on behalf of our member companies our comments on the draft of the second partial decision in the procedure for reviewing the standard offer of Telekom Deutschland GmbH ("Telekom") "Native Ethernet leased lines with bandwidths from 2 Mbit/s up to and including 150 Mbit/s" ("Carrier Leased Lines 2.0", "CFV 2.0"), notified by the BNetzA on 24 October 2022 pursuant to Art. 32 (3) of the European Electronic Communications Code (EECC).

We, therefore, urge the European Commission

to initiate a Phase II review procedure and to identify the most appropriate and effective measure with regard to the objectives of Art. 3 EECC.

We reserve the right to make a further statement and to provide further information on the matter for the Phase II procedure.

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In our view, an intervention by the European Commission is urgently required as there are considerable doubts for the compatibility of the notified measure with the EU law (section 1). In addition, the measure constitutes an obstacle to the internal market (section 2).

1. Compatibility with EU law

According to Art. 3 par 2, (b) of the EECC, National Regulatory Authorities (NRAs) must promote effective competition in the provision of electronic communications networks and services. A key instrument for this is the obligation of the company with significant market power to grant access to its network to competitors requesting access. If such an undertaking has access obligations under the relevant Art. 72 and 73 EECC (as in this case), the NRAs must ensure that this is the case as:

> "*where an undertaking has obligations of non-discrimination, national regulatory authorities may require that undertaking to publish a reference offer, which shall be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested. That offer shall contain a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions, including prices. The national regulatory authority may, inter alia, impose changes to reference offers to give effect to obligations imposed under this Directive*." (Art. 69, par 2, EECC)

and

> "*in order to contribute to the consistent application of transparency obligations, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines on the minimum criteria for a reference offer and shall review them where necessary in order to adapt them to technological and market developments. In providing such minimum criteria, BEREC shall pursue the objectives in Article 3, and shall have regard to the needs of the beneficiaries of access obligations and of end-users that are active in more than one Member State, as well as to any BEREC guidelines identifying transnational demand in accordance with Article 66 and to any related decision of the Commission*." (Art. 69, par 4, EECC)

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To sum up, the EECC clearly foresees the obligation that national regulatory authorities shall ensure that a reference offer is published, taking utmost account of the BEREC Guidelines on the minimum criteria for reference offers, and shall ensure that, where appropriate, the key performance indicators and the corresponding levels of service for the access provided are identified by closely monitoring them and following up on their compliance. In addition, national regulatory authorities may, where necessary, determine in advance the appropriate financial penalties in accordance with Union and national law.

In accordance with the requirement set by Art. 69, par 4 EECC, the Body of European Regulators for Electronic Communications (BEREC) has published minimum criteria for standard tenders. In the *BEREC Guidelines on the minimum criteria for a reference offer relating to obligations of transparency*[1], the following points are listed as minimum criteria under section "*3.3 Service supply and quality conditions*":

- "*service level agreements (SLAs) for ordering, delivery, service (availability) and maintenance (repair), including specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, for provision of support services (such as fault handling and repair);*

- *the quality standards that each party must meet when performing its contractual obligations including the specification of key performance indicators (KPIs) with respect to SLAs, where relevant;*

- *service level guarantees (SLGs) for ordering, delivery, service (availability) and maintenance (repair), including the amount of compensation payable by one party to another for failure to perform contractual commitments as well as the conditions for eligibility for compensation;*

- *procedures in the event of amendments being pro-posed to the service offerings, which may include a requirement for notification to the NRA for such amendments,*

[1] (BoR (19) 238) of 5 December 2019.

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for example, launch of new services, changes to existing services or change to prices."

Under section "*3.4 General Conditions of the Agreement*" it is further stated:

- "*a dispute resolution procedure to be used between the parties*;
- […]
- *a definition and limitation of liability and indemnity*;"

The regulation of the standard offer CFV 2.0 planned by the BNetzA does not meet these requirements in some central points particularly important for practice. In our view, the points of the guarantee, definition and measurement of central performance parameters and the determination of the legal consequences in the event of non-compliance with these parameters by the Telekom are particularly problematic. The parameters affected are Ethernet Frame Transfer Delay (EFTD), Ethernet Frame Loss Ratio and Ethernet Frame Delay Variation (Jitter). These parameters are particularly relevant in the business customer market, in which, with respect to the experience of our member companies, end customers frequently demand fast signal transmission in high quality as an essential performance feature, especially in the context of formal invitations to tender. If they cannot promise their end customers such parameters, they are at a significant competitive disadvantage vis-à-vis Telekom.

In other words: **Access regulation runs empty if the quality of service is not comprehensively contractually secured**.

It is therefore beyond our abilities to comprehend the unjustifiable rejection of BNetzA of all submissions made by our members on this core point of standard offer regulation.

Thus, we would like to highlight the following points in detail:

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1.1 Service Level

1.1.1 Annex 1, Section 4 - Fault clearance in the event of non-compliance with quality parameters (Recital 745 ff. Draft Decision)

BNetzA emphasises that the contractual provisions on fault clearance do not contain any "*restriction of the fault regime to certain types of faults*" (Recital 755, Draft Decision). However, this leaves unregulated whether non-compliance with the quality parameters EFTD etc. as such already constitutes interference (according to the position of our member companies) or only if the customer can no longer use the leased line for its intended purpose, irrespective of compliance with the values (according to the position of Telekom). In its supplementary first partial decision of 23 November 2021, BNetzA took the side of Telekom in pointing out that interference is only present if a deviation from the assured quality parameters impairs the use of the CFV; the clarification requested by the respondents was therefore rejected (Recital 49, Draft Decision).

We pointed out several times during the proceedings that this position leads to devaluation of the quality parameters. Thus, in the concrete case of non-compliance with quality parameters, a quick restoration of the contractual target state is necessary. As currently, there is no criteria of non-compliance, whether the customer has first to go through Telekom and explain that the line can no longer be used or not, does not matter for the contractual obligation to be fulfilled. After all, it is precisely the purpose of determining measurable performance parameters to prevent a dispute about the existence of a defect in an emergency and thus to enable a quick solution. Cutting on this and adding additional steps, which only slow down the process without creating any added value whatsoever impairs the quality of service of the alternative operators. In this central point, the standard offer remains deficient.

A deficient standard offer is not compatible with the requirements of EU law. According to Art. 69 par. 4 and 2 EECC, the national regulatory authorities must guarantee essential performance indicators as well as the corresponding performance levels to be made available via the access provided. However, this obligation is not met as long as a non-compliance with the quality parameters is not clearly defined as a fault to be remedied by Telekom. In addition, this is also not in line with the BEREC guidelines, which in the cited section 3.3 explicitly specify the definition of quality standards and "*service level guarantees*", which include "*maintenance*".

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Similarly, the prerequisites for damages claims must be specified - this is exactly what BNetzA has failed to do by now.

1.1.2 Annex 2, Section 1.3.3 - Applicability, definition, monitoring and reporting of quality scores (Recital 1070 ff. Draft Decision)

A central deficit of the reference offer is that it does not contain any regulations on the exact definition, measurement and enforcement of performance quality.

It is incomprehensible that the provisions requested by the respondents for the precise determination and measurement of the quality parameters have not been included (requests reproduced in Recital 1072 ff. Draft Decision). These regulations do not burden Telekom, they serve the purpose of creating transparency and foreseeability necessary to make the contractual obligations clearly manageable. The absence of such regulations, which are part of the contractual standards, is not compatible with the German legal requirements of equity and fairness foreseen in § 69 (3) sentence 1 TKG.

The objection of the BNetzA that there is no legal basis for such "*quality monitoring*" and that this is also not necessary for the monitoring of the contractual thresholds as since each carrier can check the quality on its own (Recital 1074, Draft Decision), is not convincing. The necessary legal basis for regulation on the precise determination of the performance parameters follows from the access obligation itself - here it is a matter of describing as clearly as possible the main service to be provided by Telekom. This includes the description of the measurement method. After all, the situation would not be mended if the competitor seeking access can measure the quality himself, but Telekom does not recognise his measurement method.

Furthermore, we would like to express the view that the continuous rejection of the submissions made by our member companies to the BnetzA does not comply with the requirements of EU law. The BEREC guidelines explicitly stipulate the use of "*key performance indicators*" in the form of quality standards. However, it is precisely this specification that is missing if the quality parameters mentioned above are not defined to the extent that their application and measurement is possible in the practice and provides for legal certainty.

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1.1.3 Annex 4, Section 2.2.2.3 - Sanctions for non-compliance with quality parameters (Recital 1423 ff. Draft Decision)

With regard to non-compliance with quality parameters, our remarks remain the same and apply to this topic as well. Sanctions in the event of non-compliance with the quality parameters have been rejected by BNetzA on the grounds that flat-rate compensation for delayed fault clearance apply in this respect (Recital 1428, Draft Decision). However, this presupposes a reliable determination as to when a fault exists and thus when Telekom is obliged to remove the fault. From the Telekom's point of view and based on it, from the point of view of BNetzA, non-compliance with the quality parameters is not to be automatically qualified as a fault (see section 1.1.1). In addition, the following points should also be addressed: The delay of the fault clearance on its own provides for the lack of contractual foreseeability adding to the mere non-compliance with the quality parameters. The sanctioning of the delayed fault clearance alone does not affect the non-compliance with the quality parameters as such and the other way around.

We, therefore, would like to emphasize that the refusal to impose a sanction for non-compliance with the quality parameters is also not compatible with the requirements of EU law. As stated in the Section 3.3 of the BEREC Guidelines und bullet point "*service level guarantees*", there is an explicit provision dedicated to the determination of damages to be paid by the party that does not fulfil its service obligations. However, the BNetzA has neglected to adopt precisely this provision in the Draft Decision.

Finally, the regulatory deficit is not even partially remedied by the adoption of the monitoring requirements in the supplementary agreement. Although the supplementary agreement defines the general terms of measuring the quality parameters (Recital 1446 ff. Draft Decision), the three-month intervals set for Telekom to provide the necessary data alone show that the foreseen monitoring does not aim at immediate fault clearance in individual cases. In addition, the necessary regulatory link backing the obligation commitment defining the relationship between the individual end-customer and the access seeker is missing. In the current situation, as defined by the draft decision, any details around measuring the quality parameters of the performance remain unclear, as for example, which measurement results comply with the 90% threshold and which measurement results comply with the 100% threshold? So far, BNetzA

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has dismissed the submissions made in this regard by our member companies without any plausible justification.

1.1.4 Open points

Everything said above leads to the conclusion that there is a set of additional questions, which yet remain to be addressed by the regulatory order:

- How are the 90% and 100% values determined? Do they apply per hour, day, month or even year? In section 1.3.3 of Annex 2, Telekom refers to the "*available measured values*"[2]. This does not answer the question of the time reference period.
- Does the reference to "*available measured values*" mean measured values of Telekom or of the customer? Based on Recital 131, 1. Partial Decision, the ruling chamber states that customers can check "*the specific EFTD of a line*" by means of their own end-to-end measurements. Are such measurements binding for Telekom?
- How are the measurements determined? Which measurement methods are suitable for verifying compliance with the set threshold?
- How can a monitoring suitable for troubleshooting and fault clearance be implemented at 15-minute intervals?
- What is to be done if the measured values of Telekom and the customer deviate from each other?
- What are the legal consequences of Telecom's failure to comply with the set threshold?
- What are the terms and conditions defining a fault? In the 1. Partial Decision, the ruling chamber states that a "*mere deviation from contractually guaranteed limit values without perceptible disturbance*"[3] is not a disturbance in the contractual sense (Recital 49, Draft Decision). When a disturbance "*noticeable*" would be in the view of the chamber?
- What is the legal consequence if such - yet to be determined - "*noticeable*" disturbance exists?

[2] In the original text was used the expression "*verfügbare Messwerte*".
[3] In the German original text: „*reine Abweichung von vertraglich zugesicherten Grenzwerten ohne wahrnehmbare Störung*" (Recital 49, 1. Partial Decision)

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These questions remain unanswered. **The standard offer is thus <u>inoperable with regard to the contract specifications defining service quality</u> and thus, faulty under contract law.**

1.2 Concrete performance parameters: Annex 2, section 1.3.3 - EFTD values, no protection and continuance of the existing service relations, no guarantee of performance parameters (Recital 1005 ff., 1067 ff. Draft Decision)

In general, the determination of EFTD values in the differentiation between remaining core network / cross-core network as well as the designation of 90% and 100% values corresponds to the demands of the alternative operators. The now ordered indication of EFTD values of "remaining BNG"[4] is also based on the requests made by the alternative providers in order to be able to create reliable end-customer products; even though these newly introduced measures are welcome and highly anticipated, they remain incomplete without the VDSL variant, which remains not available. Furthermore, the SDSL values do not meet the criteria of equal opportunities and fairness as they do not reflect the demands of the alternative operators and fall far short of what is technically possible as a service.

In addition, the foreseeability and planning of services of the alternative providers is further impaired by the fact that the BNetzA, in contrast to what we requested with regard to the L2-BSA regulation, has not put in place any troubleshooting and fault clearance provisions with regard to the Telecom for the allocation of the connection areas. In addition, there is no guarantee of quality parameters, which is a common prerequisite for reliable product planning.

This is also incompatible with the requirements of EU law. Section 3.3 of the BEREC guidelines explicitly calls for "*service level guarantees*". However, these are not given by Telekom as liability limitations apply even in the case of gross negligence.

1.3 Service quantity of services: Annex 3, Section 3.1 - Order quantities (Recital 1228ff., 1231, Draft Decision).

[4] Original: "*BNG verbleibend*".

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It does not satisfy the legal requirements put in place by the national legislator, in particular the requirements of equity and timeliness, if a no more than 50 service orders can be placed per working day. BNetzA explains the refusal to lift this limit by stating that reportedly only one company so far has placed more than 50 orders per day. However, this does not justify the rejection. The decisive point is that the alternative operators must be granted a position to serve the end-user demand to the same extent as Telekom itself. Telekom does not put any upper limit on its own end-customer with regard to the number of service orders. Therefore, the foreseen order quantities are discriminatory for the alternative operators.
This clause would also not be in line with the practical market requirements. Large customer orders can only be handled efficiently if there is no upper limit for a daily order quantity. Above all, the legal requirement of equal opportunities therefore abolition of the set upper limit.

In addition, we see the rule in question as opposed to the legal requirements set by the European legislation. With regard to the basis regulation of the refence offer, Art. 69 par 2 EECC explicitly refers to the non-discrimination. This should be taken into account as the BNetzA imposed a non-discrimination obligation on Telekom in the relevant regulatory order (ref. BK2a-16/002R). This is not compatible with Imposing an access limit on the alternative providers to a service, which Telekom apparently does not impose on its internal sales, is not compatible with the general principal of non-discrimination. The mere reference by the BNetzA in the draft decision to the prohibition of discrimination does not eliminate the unequal treatment.

1.4 Annex 4, Section 1.3 - Prices for connecting lines (Recital 1262 ff. Draft Decision)

It does not satisfy the legally set requirements for equity that the connection line charge, contrary to the predecessor product CFV 1.0, does not provide for a kilometre-dependent distance component. The abolition of this component means that in many cases it is not economically feasible for the alternative providers to use their own network when using CFV 2.0. This is a considerable discrimination of their own infrastructure compared to mere resellers.

This also becomes clear in comparison with the CFV 1.0 charges, which have a connection-dependent component. In the CFV 1.0 price structure, the price difference between the shortest and the longest connection is 622%. If we look at it in the same way for CFV 2.0, the price

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difference is only 1.4%. This deprives competitors with their own infrastructure of the basis for price differentiation compared to competitors without their own infrastructure.

This discrimination is exacerbated by the fact that in its CFV 2.0 charge approvals, the BNetzA itself, under the checkpoint "*price-cost gap*", describes access seekers for CFV 2.0 which use their own infrastructure as inefficient compared to access seekers pure resellers; we refer to our presentation on this in the last consolidation procedure on the CFV 2.0 charge approval. This regulatory practice starkly contradicts the regulatory goal of actively promoting infrastructure competition. This regulation hinders infrastructure competition, devalues the infrastructure investments of the alternative providers and ultimately leads to the market displacement of infrastructure competitors.

The exclusion of the business model of infrastructure providers from the margin squeeze test violates the requirement set by EU law in Art. 74 (1) subpar 2 sentence 1 EECC and Recital 192, 193 EECC to set incentives for infrastructure-based competition in price control (see in detail our position paper in the last consolidation procedure on the CFV 2.0 fee authorisation 2022 ref. BK2a 22/005).

2. Obstacle to the internal market

Irrespective of its illegality under EU law, the regulation of the reference offer, if adopted in this way, constitutes a barrier to the internal market. Such a barrier is created, i.a, by measures which constitute an obstacle for an undertaking established in another Member State to provide an electronic communications service in another Member State, or by measures which affect market structure or market access and lead to adverse effects for undertakings in other Member States (Recital 87 EECC).

Therefore, the current regulatory practice with respect to reference offers leads to considerable impediments to competition on the wholesale market in Germany. German alternative providers as well as alternative providers from other Member States are considerably impaired in their competitive opportunities by the regulation of the CFV 2.0 reference offer, which is deficient in key points. This applies in particular to the lack of robust regulations for the definition, measurement and enforcement of the most important performance parameters. In sustaining

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this practice, the BNetzA is ignoring the relevant BEREC guidelines, which are to be taken into account in the regulation of reference offers according to Art. 69 (4) subpar 2 EECC. As there is a clear corelation between the lack of compliance with the rules and guidelines set on a EU level and the degree of competition distortion in a national context, we urge the European Commission to take actions against the BNetzA reflecting on the inability of the NRA to enforce non-discriminatory, equitable and fair market conditions for all alternative providers active on the wholesale market in Germany.

3. Summary

In conclusion, we would like to emphasize that in the view of VATM and our member companies the planned regulation of reference offers contradicts to the EU law and constitutes an obstacle to the internal market.
Therefore, we call on the Commission to intervene and correct the proposed measures.

Should you have any questions, please do not hesitate to contact us.

Kind regards,
Lilyana Borisova

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