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Commission of the European Communities
eCommunications Consultation Task Force
Ms P. Michou, DG Information Society
Mr R. Krüger, DG Competition
Rue de la Loi 200

B-1049 Brussels
Belgium

Wholesale leased lines in Germany (Markets 13, 14 of the recommendation 2003/311/EC)

Case reference: DE/2007/677 and DE/2007/678

Comments of the Initiative of European Network Operators (IEN)

Dear Mrs Michou, Mr Krüger,

on 27 August 2007, the Commission has received a re-notified draft market analysis regarding markets 13 and 14 of the recommendation 2003/311/EC from the German national regulatory authority (BNetzA). This market analysis covers the definition and analysis of the markets for wholesale terminating segments of leased lines and wholesale trunk segments of leased lines under case numbers DE/2006/0480 and DE/2006/0481 pursuant to Article 7 of Directive 2002/21/EC. The draft was re-notified after the Commission had raised serious doubts and opened a Phase II investigation under Art. 7 (4) of the Framework Directive.

The Initiative of European Network Operators (hereinafter: IEN) welcomes the opportunity to comment on re-notified draft. In this context, IEN refers to its submissions under case numbers DE/2006/0480 and DE/2006/0481.

I. Executive Summary

IEN clearly welcomes BNetzA's findings with regard to market 13. With focus on market 14, IEN believes that the Commission should open a Phase II investigation.

Berlin, den

13.09.2007

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IEN would like to recommend that BNetzA should concentrate on the issue of the inhomogeneity of competition on this market. In view of IEN, the findings of BNetzA lead to the conclusion that market 14 should be split into two sub-markets: one for those core network sites with less than three competitors present and another one for core network sites with three or more competitors present. With regard to the second sub-market, IEN acknowledges the possible absence of dominance. However, for the first sub-market IEN believes that Deutsche Telekom AG (DTAG) still maintains SMP. Such a decision reflects a far more market driven approach since it is at current state more secure to assume that competition is very fragile unless at least three competitors with self-owned infrastructure in place at or in close proximity to all 76 core sites are existent.

IEN especially criticises that BNetzA intends to treat core network sites as competitive disregarding the existence of the facts that core network sites exist where there is no competitor present or in the event, that a competitor seems to be present, this competitor might not have connected the building or a nearby building but rather established a presence somewhere in the city. Furthermore, the situation appears that a competitor is present at the respective core network site, but the connection is not built over own fibre but rather a leased circuit. It should be taken into account that BNetzA's findings neglect that a competitor could be present somewhere close to DTAG's respective core network site and has not connected DTAG's network site.

II. Remarks on the market definition and analysis

1. Market Definition

BNetzA has separated the markets 13 and 14 and thus, defined separate markets for access and trunk segments. In addition, 76 demarcation points were listed.

IEN clearly welcomes that BNetzA has abandoned its former position of bandwidth split below and above 2 Mbit/s. Furthermore IEN appreciates that the product market of products includes wholesale leased lines with both traditional and new interfaces, such as Ethernet and wholesale leased circuits (systems solutions). The definition of 76 demarcation points between the markets is considered as appropriate because of its compliance with market definitions in other European countries.

As regards the inclusion of Ethernet, IEN would like to stress that - driven by strong demand from business customers - Ethernet has established itself as a replacement for traditional leased line data services. Ethernet enables the utilisation of the same protocol in local area networks (LAN) and wide-area-networks (WAN) which leads to cost reductions technical advantages for businesses and consumers. IEN would like to mention, that

Wholesale Ethernet Services are still not available from DTAG, though members of IEN have requested access already 2 years ago. DTAG's subsidiary T-Systems has launched various retail Ethernet services.

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BNetzA considers the determination of market shares on markets 13 and 14 as difficult since no data was available to split DTAG's overall wholesale revenues on leased lines between market 13 and 14. By the usage of three different scenarios of distribution of overall end-to-end revenues BNetzA comes to the conclusion that this does not indicate SMP of DTAG. In the following, with regard to alternative supply options on market 14, BNetzA concluded that sufficient competition exists. Focusing on the geographic distribution of competitors, BNetzA however admits that no full competitive coverage is available nation wide. Nevertheless, the risk that DTAG would refuse supply to core network sites without the presence of a competitor is considered as low. BNetzA justifies this by stating that access seekers were free to use wholesale access segments into these sites where DTAG refused to supply trunk segments.

IEN however would like to object this position. Core network sites where no competitors are present could not easily be connected through access segments. The replacement of a trunk segment through an access segment is not economic. It should be taken into account that an access segment is a link between a customer site and the corresponding trunk site. Any link into a core network site that does not have its other end within the catchment area of this core network site is not an access segment but a trunk segment. Additionally IEN would like to stress that trunk circuits typically are aggregated, whereas access circuits are not.

2. Market analysis

Regarding market 13 BNetzA concludes that DTAG and its wholly owned subsidiaries maintained SMP. With focus on market 14 the conclusion was drawn that no operator in the market held SMP regarding market shares, market entry barriers and alternative infrastructure.

IEN shares BNetzA's findings on market 13. IEN however doubts the result on market 14. Though IEN acknowledges that some routes on this market are likely to be competitive, IEN objects the conclusion that the entire Market 14 was competitive. In view of IEN the German market 14 contains two sub-markets: one for core network sites with less than three competitors present, one for core network sites with three or more competitors present.

BNetzA's approach neglects the inhomogeneity of competition on this market. IEN again would like to stress that that BNetzA's findings do not indicate full and sufficient competition but show that only around 50 % of all core network sites can likely be considered as competitive if taking into account that sufficient competition should base on at least 3 competitors in the same building or nearby within a radius of 100 meters.

Furthermore IEN takes the view that the market analysis lacks any statement to which extent the competitors were same at both ends. It is not clear whether a competitor is able to provide a trunk circuit from one city to another, even if competitors are present in both cities.

With regard to BNetzA's remarks that competitors have connected some of their sites to DTAG's network using leased circuits instead of fibre, IEN would like to straighten out that an alternative operator who uses leased lines to build his backbone network, is not able to provide virtually unlimited bandwidth. In the event that leased lines are used to connect core network sites, the ability of the competitor to deliver trunk services is limited to the bandwidth available through the leased line in place. In case that his own input is a leased circuit, the competitor is unable to compete against DTAG's leased line service because he is reliant on the respective product being sold by DTAG. IEN fears the risk that if remedies on market 14 were removed, DTAG is able to refuse to supply these leased circuits.

IEN would finally like to point out that the following terms "Site" and "PoP City" should not be mixed. The presence of a competitor in a certain *city* today does imply that he has presence space in or very close to the termination segment *building*. In this context it must be stressed that to connect to DTAG's access segments the presence in or close proximity to DTAG's *building* is necessary. To date, bandwidth collocation is unavailable. If BNetzA states that a collocation obligation will be imposed on market 13 and thus, competitors are able to establish presence in or near the buildings that form the demarcation points of market 14, this must be considered as the first step towards competition on market 14. However, this could not lead to the conclusion that competition is existent on market 14 for at present, the effects of regulation on market 13 have not occurred.

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

Kind regards,



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