



**INITIATIVE
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European Commission
Art. 7 Task Force
Mrs. Paraskevi Michou, Mr. Reinald Krüger
Rue Joseph II, 70

B-1000 Brussels

**Subject DE/20050262 (Wholesale Broadband Access)
IEN Statement on the opening of a Phase II investigation accord-
ing to Art 7 para 4 of the Framework Directive 2002/21/EC**

Berlin, den

22.11.2005

Dear Madam and Sir,

the Initiative of European Network Operators (IEN) would like to take the opportunity to comment on the Commission's Serious Doubts Letter which was submitted to the Bundesnetzagentur (BNetzA) in regards to the notification of the market definition and analysis of market 12 (Wholesale Broadband Access).

IEN represents some of the largest pan-European network operators (British Telecommunications, Cable & Wireless, Colt Telecom, MCI, Tiscali, Versatel) in Germany which have about 4000 employees and are firmly tied to the German market by long-term investments. Therefore, all IEN members have a strong interest in fair investment conditions in Germany and in a level playing field across all Member States. For the reason of being pan-European providers of broadband products and services, the members of IEN are reliant on the implementation of a bitstream access product in Germany which complies with international standards.

I.

The Commission opened a phase II investigation according to Art. 7 para 4 of the Framework Directive, expressing serious doubts on the compatibility of BNetzA's approach to exclude wholesale broadband access to VDSL technologies from the definition and analysis of market 12 with Art. 8 para 2 and Art. 15 para 3 of the Framework Directive. The initiation of this investi-

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gation was based on the opinion that the regulation of VDSL technologies could influence trade between the Member States. In the Commission's view, BNetzA failed to prove evidence for the omission of Broadband Access to VDSL technologies.

II.

The members of IEN share the view that BNetzA should have included upcoming VDSL technologies as elements within its definition and analysis of market 12.

With focus on the requirements of the Community regulatory framework, market definitions and analyses are supposed to be based on a forward-looking and technologically neutral approach. BNetzA stated that products based on VDSL technologies are presently not existent in Germany. However, the recent announcement of Deutsche Telekom AG to invest up to 3 billion Euro for an upgrade of its access networks with VDSL technology justifies the inclusion of VDSL in a forward looking market definition.

Nonetheless, IEN would like to point out that an inclusion of these technologies into BNetzA's analysis would not bring any change to the result of the present market analysis in regards to Deutsche Telekom's SMP. In order to avoid any undue delays in the notification process, the members of IEN would like to stress the crucial importance of implementing Bitstream Access in the German market in due course.

Therefore, it is suggested to work towards an immediate review of the market analysis.

III.

1. Forward-Looking approach. Though no VDSL-offer exists on the German market, VDSL is to be considered as a well-known long-time discussed technology. IEN acknowledges that market analyses should be carried out on a forward-looking basis. With reference to the announcement of Deutsche Telekom, IEN would like to point out the recent discussion in Germany concerning a moratorium to protect "new wave technology" from regulation which is strongly criticized by the members of IEN. The discussion also supports the Commission's request to include VDSL technologies in the market analysis document. In the IEN's opinion, market analyses should be carried out on the level of NRAs and the Commission rather than to be influenced by national political interests. Therefore, the regulatory exclusion of VDSL could only be subject to an accomplished market analysis and the respective remedy decision. This approach is also backed by the Community regulatory framework. The Directive on competition in the markets for electronic communications networks and services (2002/77/EC)

obliges Member States to ensure that undertakings provide electronic communications networks and services without prejudice to the provisions of the Framework Directive and thus, the accomplishment of a market analysis proceeding and the decision on remedies.

2. Technology neutral approach. The members of IEN doubt as to whether the exclusion of VDSL technologies complies with the regulatory framework. Considering the requirement of a technologically neutral approach, any technology deployed to deliver wholesale broadband access should be included in the market analysis, irrespective of the fact that such inclusion would lead to no other result than what is already proposed in the update version.

In reference to the view taken by Deutsche Telekom AG stating that VDSL is to be considered as an emerging market, IEN would like to stress that VDSL is a matter of broadband technology rather than a separate broadband market. Furthermore, such an approach can be disproved considering the Commission's definition of the wholesale broadband access (WBA) market. The Commission has defined the market in its recommendation on relevant product and service markets (2003/311/EC) as a market that covers "bit-stream" access that permits the transmission of broadband data in both directions and other wholesale access provided over other infrastructures, if and when they offer facilities equivalent to "bit-stream" access. This indicates that the wholesale broadband access market is not limited to currently available technologies, but rather needs to be open for further technological developments, such as VDSL.

3. Functional substitutability. The new VDSL infrastructure of Deutsche Telekom AG is meant to offer triple play to its end-users, e.g. fast internet access, high quality communication services and individual entertainment downloads (Funkschau 22/2005, November 2005). With focus on end-user applications, there is no evidence that VDSL would serve a different market than already provided with the current technologies, e.g. ADSL2+. In regards to wholesale, the members of IEN consider VDSL as a full demand side substitute for (non-existent) ADSL and SDLS bitstream. With focus on bandwidth, parameters of quality and interfaces, VDSL infrastructures serve the same need for a broadband access element on retail level as part of the bitstream access product as any other DSL technology does. In addition, IEN expects that VDSL bitstream will be, in terms of costs and quality, comparable to ADSL/SDSL bitstream products.

4. Need for implementation of bitstream access. IEN would however like to stress the vital importance for the market participants to implement bitstream access. Disregarding several enquiries of the alternative network operators, Deutsche Telekom AG is still preventing bitstream access in Germany. In regards to the offer of "Premium Bitstream Access" of Deutsche Telekom AG, IEN refers to its former statements. For the above



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mentioned reasons, VDSL technologies need to be included in definition and analysis of market 12. Nonetheless, it is essential for the alternative network operators that the ongoing notification procedure does not cause any material delay in regards to the remedy decision. Thus, IEN encourages the Commission and BNetzA to work together to ensure that BNetzA investigates the Commission's remarks immediately and rectify the market definition and analysis. IEN would therefore kindly suggest that BNetzA follows a short track by withdrawing the notification in regards to VDSL and re-notifies without national consultation. This would allow the Art. 7 procedure to be closed relatively quickly and without undue delay whilst avoiding to set a precedent that is likely to be in breach of competition law principles.

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Furthermore, the members of IEN consider that the inclusion of VDSL technologies would not bring any change to the result of the present market analysis. Therefore, IEN would like to recommend that BNetzA in parallel continues with its activities in regards to the decision on remedies.

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

Kind regards,

A handwritten signature in black ink, appearing to read 'M. Nanda', written in a cursive style.

Malini Nanda
Head of Legal and Politics