

**BEREC Opinion on
Phase II investigation
pursuant to Article 7a of Directive 2002/21/EC as amended by
Directive 2009/140/EC:**

Case DE/2013/1500

**Access to the public telephone network at a fixed location for
residential and non-residential customers in Germany (withdrawal
of obligations)**

15 November 2013

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1. EXECUTIVE SUMMARY

On 4 September 2013, the European Commission registered a notification from the German national regulatory authority, *Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (BNetzA)* concerning the withdrawal of existing remedies for access services provided in the context of agreements with a single customer with an annual sales volume of more than Euro 500,000 (Case DE/2013/1500), that were excluded from the market for access to the public telephone network at a fixed location for residential and non-residential customers in Germany (market 1 in Commission Recommendation on Relevant Markets).

The third review of the market for access to the public telephone network at a fixed location for residential and non-residential customers in Germany was notified to and assessed by the Commission under case DE/2013/1468, with regard to the market definition and the SMP designation. The relevant geographic product market was defined as national and included analogue, ISDN as well as IP-based complete connections. Furthermore, access services provided in the context of agreements with a single customer with an annual sales volume of more than Euro 500,000 were excluded from the market definition. The Commission has not commented on the market definition, but requested BNetzA to closely monitor whether the wholesale remedies were sufficient to ensure effective competition at the retail level.

On 4 October 2013, the Commission sent a serious doubts letter opening a phase II investigation, under case DE/2013/1500, pursuant to Article 7a of Directive 2002/21/EC, as amended by Directive 2009/140/EC. Commission's doubts concern the withdrawal of obligations in the absence of a market analysis. More precisely, the Commission underlines a lack of proper market definition and a lack of assessment of the competitive conditions prevailing in the market segment between Euro 500,000 and Euro 1 million, where BNetzA proposes to withdraw currently existing remedies.

The Commission believes that a withdrawal of existing regulatory obligations, in the absence of an assessment of the market conditions and in the absence of a determination that the market is effectively competitive, is contrary to the provisions of the Framework Directive, and in particular to its Article 16(2).

On the basis of the analysis set out in this Opinion, BEREC considers that the Commission's serious doubts are not justified.

2. INTRODUCTION

On 4 September 2013, the Commission registered a notification from BNetzA concerning the withdrawal of existing remedies for access services provided in the context of agreements with a single customer with an annual sales volume of more than Euro 500,000, that were excluded from the market for access to the public telephone network at a fixed location for

residential and non-residential customers in Germany (market 1 in Commission Recommendation on Relevant Markets).

On 10 September 2013, a request for information (RFI) was sent to BNetzA, and a response was received on 13 September 2013. On 16 September 2013, a supplementary request for information was sent to BNetzA, and a response was received on 18 September 2013.

The Commission initiated a phase II investigation, pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC, with a serious doubts letter issued on 4 October 2013. In accordance with the BEREC rules of procedure, the Expert Working Group (EWG) was established immediately after that date with a mandate to prepare an independent BEREC opinion on the justification of the Commission's serious doubts on the case.

On 15 October 2013, the EWG sent a first list of questions to BNetzA. Answers were received from BNetzA on 18 October 2013.

The EWG met on 16 October 2013 in Rome. During this meeting the EWG held a conference call with BNetzA to gather further information and clarification in response to the questions sent the day before and to additional questions. The objective of the EWG was to reach a clear conclusion on whether or not the Commission's serious doubts are justified.

On 22 October 2013, the EWG held a conference call with the Commission upon the EWG's request. On this occasion, the Commission explained in detail to the EWG the reasons behind its serious doubts. This gave the group a deeper understanding of the case.

A draft opinion was finalized on 7 November and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 15 November 2013. This opinion is now issued by BEREC in accordance with Article 7a (3) of the Framework Directive.

3. BACKGROUND

Previous notifications

The previous review of the market for access to the public network at a fixed location for residential and non-residential customers in Germany was notified to and assessed by the Commission in 2009 with regard to the market definition and the SMP designation.¹ BNetzA defined the relevant geographic product market as national and included analogue, ISDN as well as IP-based complete connections. Access services provided in the context of agreements with a single customer with an annual sales volume of more than Euro 1 million were excluded from the market definition.

¹ DE/2009/0897, C(2009) 3059.

In a separate measure notified to and assessed by the Commission,² BNetzA imposed on Deutsche Telekom and its undertakings an obligation to provide Carrier Selection and Carrier Pre-selection as well as ex-post price control of the retail access services.

The third review of this market, concerning only the market definition and the SMP assessment, was notified to and assessed by the Commission on 12 June 2013³. BNetzA defined the relevant market in similar terms as in 2009, however, BNetzA reduced the threshold of annual sales to Euro 500,000, thereby excluding from the definition of the relevant market all access services provided on the basis of contracts with a single customer above that threshold. The Commission did not comment on the market definition, but criticized BNetzA for the delay in notifying the draft measure containing the remedies (not expected before early 2014).

Current notification and the Commission's serious doubts

Current notification

On 4 September 2013, the Commission registered a notification⁴ concerning the market for access to the public telephone network at a fixed location for residential and non-residential customers in Germany (withdrawal of obligations).

In the notified draft measure BNetzA proposes to withdraw all remedies previously imposed on Deutsche Telekom which relate to the segment of the market access services provided on the basis of contracts with a single customer between Euro 500,000 and Euro 1 million. BNetzA states that since it has adopted its final measure on 8 August 2013 concerning the new market definition, the access services concluded with individual customers exceeding Euro 500,000 in annual turnover do not any longer belong to the relevant market. In this regard, BNetzA claims that it is legally obliged to adjust the regulatory measure if it no longer corresponds to the market reality.

Commission's serious doubts

The Commission considers that the notified draft measure falls under the Commission's power of ensuring the consistent application of remedies as set out in Article 7a of the Framework Directive.

The Commission has identified the following issues, which raise concerns:

- i) Withdrawal of obligations in the absence of a market analysis:
 - Lack of proper definition of the relevant market;
 - Lack of SMP assessment.
- ii) Incompatibility with EU law.

² DE/2009/1006, C(2009) 10488.

³ DE/2013/1468, C(2013) 4561.

⁴ DE/2013/1500.

4. ASSESSMENT OF THE SERIOUS DOUBTS

On 4 October 2013, the Commission sent out a serious doubts letter opening a phase II investigation pursuant to Article 7a of Directive 2002/21/EC, as amended by Directive 2009/140/EC. Commission's doubts concern the withdrawal of obligations in the absence of a market analysis, in particular, the Commission underlines a lack of proper market definition and a lack of assessment of the competitive conditions prevailing in the market segment between Euro 500,000 and Euro 1 million, where BNetzA proposes to withdraw currently existing remedies.

4.1. Withdrawal of obligations in the absence of a market analysis

Introductory remarks

Before evaluating the Commission's concerns on the absence of a proper market definition and a lack of SMP assessment regarding the market segment of access services that are provided in the context of overall contracts with a single customer and with an annual turnover between Euro 500,000 and Euro 1 million, BEREC finds it necessary to make a remark, which is relevant for this case.

BEREC notes that NRAs need to present the approach underlying a market analysis in a clear and comprehensible manner. It is therefore important that the arguments presented are logically structured, under dedicated chapters/subchapters, corresponding to the issues discussed.

BEREC recognises at the outset that BNetzA did not follow such an approach for the examined market. In fact, the section dedicated to "Customer-specific overall contracts" (section 9.1.8. of the draft measure notified under case DE/2013/1468), which belongs to the chapter presenting the market definition (Chapter 9), contains mixed considerations regarding both the market definition (such as the substitutability analysis) and the assessment of the competitive conditions (countervailing buyer power and competition law sufficiency), while the chapter dedicated to the examination of SMP (Chapter 12) only deals with the segment of the market that BNetzA intends to keep regulated.

BEREC considers that the lack of a clear presentation by BNetzA might have led the Commission to conclude that BNetzA had neither properly defined the market involved nor carried out an assessment of the competitive conditions prevailing in the market segment that it intends to deregulate.

Having said that, BEREC further assesses whether the evidence provided by BNetzA, even if not presented at length and clearly, contains, in substance, sufficient elements to identify the relevant market and the competitive conditions prevailing in it, implying the subsequent withdrawal of remedies by BNetzA on the market segment considered to be competitive (notified under case DE/2013/1500).

4.1.1. Lack of proper definition of the relevant market

Concerns of the Commission

According to the serious doubts letter, the Commission is of the view that, with regard to the segment of the market for which BNetzA proposes to withdraw regulatory obligations (i.e. access services provided in the context of agreements with a single customer with an annual sales volume between Euro 500,000 and Euro 1 million), BNetzA has not defined a relevant market, as it was supposed to.

Furthermore, the Commission considers that the mere statement that the competitive conditions are “different”, cannot be regarded as a proper market definition for the specific segment, which remains regulated.

The Commission considers that BNetzA provided sufficient evidence justifying the exclusion of the access services in the price segment between Euro 500,000 and Euro 1 million of the market. However, the Commission notes that, from BNetzA’s draft measure, it is impossible to conclude whether the access services in the segment between Euro 500,000 and Euro 1 million constitute a separate relevant market or are part of the relevant market with the services beyond the Euro 1 million threshold or whether there are several different relevant markets.

The Commission concludes that the determination of the market boundaries with regard to the access services above Euro 500,000 is indispensable for the purpose of assessing the competitive conditions prevailing in that segment of the market, where BNetzA has found an SMP position in the previous market review. Furthermore, the Commission stresses that, in the absence of the determination of the market boundaries, any potential SMP assessment is meaningless.

Finally, the Commission, during the conference call with the EWG, stated that it expected a follow-up notification regarding the definition and SMP assessment of the part of the access market that was regulated according to BNetzA’s 2009 market review and was excluded from the relevant market, as re-defined in 2013.

Views of BNetzA

BNetzA states that it adjusted the threshold of the regulated market (from Euro 1 million to Euro 500,000) in order to reflect better the market conditions. BNetzA emphasizes that the general structure of the market has remained unchanged since the last market review: the market is still split into a regulated market segment - including the entirety of the access products and the access products that are part of individually negotiated contracts up to a given threshold - and an unregulated market segment pertaining to access products that are part of individually negotiated contracts with revenue beyond that threshold. BNetzA considers that all contracts between the old and the new threshold should not be regulated anymore.

BNetzA based its assessment of the adjustment of the threshold on:

- The limited number of suppliers offering customized contracts;

- The small number of contracts generating an annual turnover of between Euro 500,000 and Euro 1 million, which is comparable to the number of contracts above Euro 1 million;
- The significant buyer power of the purchasers.

In conclusion, BNetzA is of the view that the absence of homogenous competitive conditions in the segment below and beyond the threshold of Euro 500,000 supports the finding of two separate markets, while implying proper market delineation.

BEREC Assessment

BEREC observes that in the draft measure, notified under case DE/2013/1468, BNetzA provided reasoning aimed at changing the boundaries of the existing market. More specifically, BEREC considers that BNetzA explained the adjustment of the threshold between the regulated and the unregulated part of the access services market from Euro 1 million to Euro 500,000. Indeed, the Commission itself does not dispute the exclusion of the segment between Euro 500,000 and Euro 1 million from the (re)defined market.

However, in BEREC's understanding, the adjustment of the threshold not only reduced the boundary of the regulated market, but also implicitly extended the boundary of the unregulated one, hence defining an unregulated segment including all access services with value above Euro 500,000.

Indeed, BNetzA provided information, in its notification and upon the Commission's request for information, showing that the evolution of the number of suppliers and the number of contracts in the segment between Euro 500,000 and Euro 1 million is similar with the one in the segment above Euro 1 million being significantly different from the one in the segment below Euro 500,000.

In particular, BNetzA, in its notification and upon BEREC's request, has provided further information supporting the view that there is a single market for the access services generating an annual turnover of above Euro 500,000. Specifically, BNetzA stated that the nature of the contracts changes with the revenue generated by them, in the sense that: smaller contracts (beneath the threshold of Euro 500,000) can be substituted more readily by a bundle of standardised offers, while larger contracts above that threshold are individually designed to meet the demand of the customers. In addition, large contracts have common characteristics, such as the fact that they require a high service level, with negotiations between suppliers and customers, with a detailed analysis of the demand and potential solutions. Furthermore, larger contracts are typically procured by means of a bidding process or after a comparison of offers from two or more suppliers. Finally, the high revenues generated by the access services in this segment allow the potential competitors to invest and offer services in areas where they were not previously present.

BEREC believes that, through the description of such characteristics, BNetzA intended that the segment of access services provided in the context of agreements with a single customer with an annual sales volume between Euro 500,000 and Euro 1 million forms a single market, together with the access services generating above Euro 1 million in turnover also being part of this same market.

However, BEREC recognizes that it would have been more appropriate for BNetzA to provide a separate section in its notification dealing solely with the market definition for access services between Euro 500,000 and Euro 1 million, while stating that they belong to the same market segment as the access services above Euro 1 million in annual sales. If, on one hand, it is true that BNetzA made available detailed information for this segment and took several arguments into account for the (re)definition of the market boundaries, on the other hand, BNetzA has neither presented the given information at length, nor stated clearly all its considerations and/or its approach. A more elaborated analysis in this part of their document would have improved the understanding of the facts of the case and would have probably avoided some of the Commission's concerns. In other words, while in the view of BEREC, BNetzA had all the relevant and needed information and arguments for a proper market definition, it fell short in presenting them comprehensibly and accurately. In this regard, BEREC also notes that in the relevant section of market definition BNetzA also analyses aspects (such as the third criterion and the countervailing buyer power) that should have been placed in a separate section on competitive assessment.

In BEREC's view, BNetzA's reasoning, even if not thoroughly presented, contained sufficient elements to lead the Commission to, at least, ask for additional information in order to better understand BNetzA's point of view on market definition and its intentions concerning the (re)defined market under case DE/2013/1468.

Taking all the above under consideration, BEREC does not share the Commission's serious doubt on the absence of market definition for the specific market segment of access services in the price range between Euro 500,000 and Euro 1 million.

4.1.2. Lack of SMP assessment

Concerns of the Commission

In the view of withdrawal of obligations in the absence of market analysis, the Commission expresses concerns on the lack of significant market power (SMP) assessment by the German NRA. Accordingly, the Commission states that BNetzA did not carry out an assessment of the competitive conditions in the market segment for access services generating an annual turnover of between Euro 500,000 and Euro 1 million, which is the market segment on which the measures are proposed for withdrawal. The Commission explicitly expected such a notification, but did not inform BNetzA about their expectations.

The Commission notes that the specific section highlighted by BNetzA as containing the assessment of the competitive conditions prevailing in the market segment between Euro 500,000 and Euro 1 million, in its reply to the request for information, deals with the market definition. Thus, the analysis on this segment has been made with the sole purpose of defining the boundaries of the market for access services at public telephone network at a fixed location.

While the Commission acknowledges the market definition and SMP assessment of the defined market segment as notified under case DE/2013/1468, it stresses that the analysis is to be applied solely for the market of access services to the public telephone network at a fixed location, except for those access services, which are provided in the framework of an overall contract with one customer and annual sales of more than Euro 500,000.

However, it accepts BNetzA's exclusion of the segment between Euro 500,000 and Euro 1 million from the (re)defined market.

As regards the substance of the argumentation, the Commission does not dispute the fact that there is heterogeneity of competition conditions in the market for access services sold as part of customer-specific contracts generating a turnover of up to Euro 500,000 and above Euro 500,000. However, the Commission points out that the existence of countervailing buyer power cannot be considered in itself as an indication of a competitive market and stresses that the competitive conditions can be analysed only together with other relevant indicators (market shares, price trends etc.).

As far as BNetzA's motivation concerning the sufficiency of ex-post intervention in order to ensure effective competition in the defined market for access to public telephone network at a fixed location is concerned, the Commission notes that the German NRA has not proved how such a conclusion can be reached.

In conclusion, the Commission considers that the proposed withdrawal of remedies is unjustified in the absence of a thorough assessment of the competitive conditions on the market for access to the public telephone network at a fixed location for residential and non-residential customers. Moreover, the Commission recognizes that there are potentially relevant aspects for the case at stake, which have not been completely presented in the notified measure.

Views of BNetzA

Against the expressed serious doubts of the Commission, BNetzA questions the legal basis for the Commission's approach. The German NRA considers that, given the market definition and SMP assessment issues involved, the Commission should have raised its doubts in the context of the previous Article 7 Procedure of the Framework Directive (FD) and not under Article 7a Procedure, which concerns only remedies. BNetzA notes that the procedure under Article 7a cannot be used to reopen a procedure on a market analysis already completed pursuant to Article 7 of the FD.

Moreover, BNetzA highlights that even though the serious doubts concern formally the withdrawal of obligations on the market segment between Euro 500,000 and Euro 1 million, the issue questioned by the Commission is, in fact, the lack of analysis on the market segment under discussion, which has been part of the previously notified document. With reference to the Commission's aforementioned concerns, BNetzA notes that it has already provided sufficient evidence and the necessary reasoning for concluding that the market segment between Euro 500,000 and Euro 1 million should not be regulated.

Furthermore, BNetzA justifies the lack of proper delineation and the length of the competitive conditions assessment on the relevant market segment by the fact that it simply shifted the previously established monetary threshold from Euro 1 million (case DE/2009/0897) to Euro 500,000. As a conclusion, BNetzA believes that the assessment of competitive conditions on the whole market of access services has already been presented to the Commission under the notification document DE/2013/1468.

BEREC assessment

With regard to the Commission's concerns on the fact that the competitive conditions' analysis is not to be found in the notified market analysis under case DE/2013/1468, BEREC is of the view that in section 9.1.8. of the document, there is a clear reference to some indicators used for the assessment of the "competitive conditions" (number of contracts, countervailing buyer power, sufficiency of competition law etc.), that, even if not extensively and clearly analyzed, demonstrate the attempt of BNetzA to carry out an assessment of the level of competition in the market of access services provided in the context of overall contracts with a single customer and with an annual turnover between Euro 500,000 and Euro 1 million.

In particular, it can be concluded that BNetzA intended to analyze the competitive conditions through the three criteria test and not through a specific SMP assessment. In this regard, BEREC reminds that Recital 17 of the Recommendation on relevant markets susceptible to ex-ante regulation (EC Recommendation) states that an NRA can choose whether to carry out or not an SMP assessment for the market (segments) contained in the EC Recommendation and for which the three criteria are not cumulatively met. Furthermore, as the regulatory practice shows, the Commission has previously accepted withdrawal of remedies on the basis of solely the three criteria test.

The third criterion of the three criteria test mentioned above considers the sufficiency of competition law in dealing with the market failures on a specific market, taking a forward looking approach. As mentioned in its notification in June, BNetzA states that it "(...) *comes especially for customized overall contracts with high revenue once again to the conclusion that the general laws of competition are sufficient instrument for preventing anti-competitive behavior*". BEREC believes that the provided market definition implies that the German NRA, when mentioning contracts with high revenues, refers to all the undertakings supplying access services in the context of overall contracts with annual turnovers of above Euro 500,000. Accordingly, BEREC assumes that the third criterion has been analyzed for the market segment of access services provided under contracts generating above Euro 500,000 of annual sales.

Moreover, BEREC observes BNetzA's point that the potential market failures, which could appear on the market for access services provided as part of overall contracts with an annual turnover of above Euro 500,000, are factually limited to a very narrow segment of the market. To support such a statement, BNetzA provides the number of contracts active as of 2011 in the range between Euro 100,000 and Euro 500,000 (850 contracts) and in the range above Euro 500,000 (250 contracts), therefore, showing the relative small size of the segment above Euro 500,000. Consequently, BNetzA could have argued that potential competitive issues on this market segment could be addressed by competition law, where the interventions would be more focused. Hence, competition law interventions could be considered sufficient, given the dimension of the affected segment and the proved lack of frequent interventions in the past.

However, BEREC notes that BNetzA, after providing data on contracts, draws its conclusion on sufficiency of competition law without accurately justifying how it could be reached. BEREC also notes that BNetzA did not even mention the first and the second criteria and assumed that the non-fulfillment of the third criterion was sufficient to prove the existence of

competitive conditions. In this regard, BEREC observes that even if according to the Commission Recommendation on relevant markets, the three criteria “*should be applied cumulatively, so that failure to meet any one of them would indicate that a market should not be identified as susceptible to ex-ante regulation*”, the Commission suggested, during the conference call with the EWG, that it might not have had problems with withdrawal of remedies on the basis of the two first criteria being met.

Furthermore, BEREC notes BNetzA’s statement that on the market segment of access services generating more than Euro 500,000 a year there is a countervailing buyer power stemming from the three main sources:

- i) the nature of the contracts: these customized contracts concern the provision of access services together with additional services, such as maintenance and repair services, expansion of already installed infrastructure, guaranteed response times for customer support, certain service level agreements etc.;
- ii) the purchasing method of these contracts: by bidding or direct negotiations or even tender offers;
- iii) the amount of revenue that they generate for the undertaking supplying the access services, which, having an allegedly significant impact on the incomes of the undertaking, provides the customer with negotiation power. Such countervailing buyer power, in BNetzA’s view, implies that a potentially anti-competitive behavior could be limited.

In BEREC’s view, the analysis of countervailing buyer power, even if not accompanied by the analysis of other indicators, is a proof of BNetzA’s attempt to analyze competitive conditions. Moreover, it could be read as limiting further the impact of a potentially anti-competitive behavior, leaving room for the intervention of competition law if and where necessary.

BEREC also considers that BNetzA made additional consideration to support its conclusion on the third criterion. For example, BNetzA also states that “*the larger the share of these services (additional services, other than the access services provided in the frame of the same overall customized contract) in a customized overall contract*” is, the lower is the impact of the products providing access to publicly available telephone services on the total price. Therefore, even if such contracts are covered by regulatory measures, “*the exploitation of a powerful market position could hardly be prevented.*” This is to say that even if regulation were in place for the market segment concerning access services provided under customized contracts generating an annual turnover of more than Euro 500,000, the assumed dominant position could easily be leveraged at the level of the other services provided under the same contractual provisions. BEREC believes that, also from this statement, it could be understood that the intention of BNetzA was to deregulate the market.

Having assessed in-depth the explanations of BNetzA, BEREC reached a conclusion that from the measure notified in June 2013 it could have been understood that according to BNetzA, the structure of the market for access services consisted of a regulated market segment including the entirety of access products and the access products that are part of individually negotiated contracts up to Euro 500,000 and an unregulated market segment with access products that are part of individually negotiated contracts with revenue above the mentioned threshold. Therefore, the Commission could have expected a withdrawal of remedies in the near future.

Nonetheless, BEREC observes that it would have been more appropriate for BNetzA to provide a separate section in its notification dealing solely with the assessment of competitive conditions including a more complete and in depth explanation of the three criteria test. In BEREC's view, the faults of the competitive assessment part are more evident compared to those of the market definition. Nonetheless, as in the case of market definition, BEREC believes that a more elaborated analysis of the competitive conditions would have improved the understanding of the facts of the case and would have probably avoided some of the Commission's concerns.

Despite the said failures, BEREC believes that the elements analyzed by BNetzA constitute in a way an assessment of the level of competition in the above mentioned market segment.

Taking all the above into consideration, BEREC does not share the Commission serious doubt on the lack of SMP assessment for the specific segment between Euro 500,000 and Euro 1 million.

4.2. Incompatibility with EU law

Concerns of the Commission

The Commission states that the notified draft measure is not compatible with EU law, as the withdrawal of existing regulatory obligations in the absence of an assessment of the market conditions and in the absence of a determination that the market is effectively competitive is contrary to the provisions of the Framework Directive, and in particular to its Article 16(2). In the light of the above, the Commission points out that it may need to consider undertaking further legal steps, as provided under the Treaties, to ensure full compliance with the Framework Directive.

During the conference call with the EWG, the Commission specified that the market segment for access services with values between Euro 500,000 and Euro 1 million was not considered as notified under case DE/2013/1468, which, in turn, concerned only the notification of the retail market for services up to Euro 500,000. The Commission confirmed its expectation of a follow-up notification by BNetzA concerning the market definition and SMP assessment of the remaining segment of the market.

Views of BNetzA

BNetzA, both in the response to the requests for information by the Commission and to the request by the EWG, pointed out that the entire market analysis, also regarding agreements between Euro 500,000 and Euro 1 million, was submitted to the Commission in the notification procedure of June 2013 (case DE/2013/1468). BNetzA specified that the result of the market analysis, according to which agreements with individual customers with an annual turnover of more than Euro 500,000 are no longer part of the market identified as in need of ex-ante regulation, can be found in chapter 9.1.8. of the draft notification. BNetzA pointed out that, in the context of that procedure, the Commission has not expressed any criticism regarding the above mentioned segment (not objecting to the lack of a proper market analysis and its results or the sufficiency of general competition law together with the presence of countervailing buyer power being enough to assure competition in the market segment above Euro 500,000), but has rather asked BNetzA "*to continue monitoring this*

process and to review the market as soon regulation at wholesale level would be sufficient to guarantee effective competition on the retail telephony access market.”

Moreover, BNetzA observes that although the serious doubts of the Commission formally relate to the decision "on the imposed remedies", the substance of the case reference is mainly about the lack of market definition and of proper SMP assessment. BNetzA argues that if the Commission had considered it necessary that further investigations were required, this would have been done in the proceeding under Article 7 and not under Article 7a of the Framework Directive.

Indeed, BNetzA observes that the Article 7a of the Framework Directive regulates, based on the European Law, the consultation process in connection with the selection or imposition of ex-ante obligations and, in any case, the provision cannot be used to allow the Commission to reopen a consultation procedure on a market analysis, which has been completed pursuant to Article 7 of the Framework Directive.

BEREC Assessment

In the serious doubts letter, the Commission concludes that the notified measure is not compatible with EU law due to the absence of market analysis concerning the segment in relation to which BNetzA proposes to withdraw the previously established remedies.

In the light of the considerations expressed in the previous sections, BEREC believes that a market analysis of the market segment for services with values between Euro 500,000 and Euro 1 million is in a way performed. Indeed, BEREC considers that the draft measure notified under case DE/2013/1468 included information and evaluation concerning both the market definition (change of boundaries) and the assessment of competitive conditions. In BEREC's view, such information and evaluations, even if not thoroughly assessed, could have been traced back to a market analysis that includes both the market definition and a competitive conditions assessment. Therefore, BNetzA presented sufficient elements to encourage the Commission to comment on that or, at least, to ask for additional information.

In particular, in section 9.1.8. of the document notified under case DE/2013/1468, BNetzA provided an analysis of "Customer-specific overall contracts" aimed at determining whether the limit of Euro 1 million decided in the previous market analysis is still appropriate and whether market boundaries have to be changed. As already stated in section 4.1.1., BNetzA provided a reasoning aimed at changing the boundaries of the existing market and, hence, at defining a segment including services with value above Euro 500,000. This, in turn, implicitly modifies the previous segment of services with values above Euro 1 million.

By the same token, in section 9.1.8., there is a clear reference to some indicators used for the assessment of the "competitive conditions" (number of contracts, countervailing buyer power, sufficiency of competition law etc.) that, as already said in section 4.1.2., even if not exhaustive, demonstrates the attempt of BNetzA to carry out an assessment of the level of competition in the above mentioned market segment.

BEREC notes that the Commission, despite having sufficient elements in order to understand BNetzA's attempt to change the boundaries of the market and to assess the competitive conditions in the segment including services with value above Euro 500,000, did not express any criticism regarding this segment at the time of the evaluation of the case DE/2013/1468.

In particular, even if the Commission criticized BNetzA for the significant delay in notifying the draft measure (not expected before early 2014), it did not request, at the time, additional information, nor did it ask specifically BNetzA to integrate its market analysis with the remedies, as it considered the information provided not to be sufficient. The Commission rather asked BNetzA to closely monitor whether the wholesale remedies are sufficient to ensure effective competition at the retail level. This invitation could have been referred both to the segment that was and remains regulated and to the one that BNetzA intended to deregulate. In the latter case, such invitation may have led BNetzA to think that the Commission understood its intention to deregulate the segment excluded from the market definition and, consequently, invited the regulator to monitor on the effectiveness of wholesale regulation to guarantee competition on the deregulated market segment.

BEREC underlines that, even if BNetzA's analysis could have been improved, the Commission's actions (no criticism under case DE/2013/1468) created a reasonable expectation of BNetzA about the legitimacy of the notified draft measure. In consideration of that, the German regulator adopted the final decision concerning market definition and SMP assessment and subsequently proposed the withdrawal of remedies in the regulated segment including services with value between Euro 500,000 and Euro 1 million in September 2013.

Taking all the above under consideration, BEREC does not share the Commission's view according to which the notified measure is not compatible with EU law due to the absence of market analysis concerning the segment in relation to which BNetzA proposes to withdraw the previously established remedies.

Besides the arguments concerning the substance of the case, BEREC stresses that in case the Commission would have decided to communicate earlier its concerns to BNetzA regarding the market definition and SMP analysis, the on-going procedure could have been probably avoided.

5. CONCLUSIONS

On the basis of the analysis set out in the above section 4, BEREC considers that the Commission's serious doubts regarding the draft decision of the German Regulatory Authority on withdrawal of obligations in the absence of a market analysis - as expressed in the EC's letter to BNetzA on 4 September 2013 – are not justified.

BEREC is of the opinion that the Commission's serious doubts on the absence of a proper market definition and of SMP assessment for the specific segment of between Euro 500,000 and Euro 1 million are not justified. In particular, BEREC maintains that BNetzA provided enough information for the delineation of two relevant markets separated by the Euro 500,000 threshold and for the assessment of the competitive conditions in the market that it proposes to deregulate.

Consequently, BEREC does not share the Commission's view according to which the notified measure is not compatible with EU law, in particular with Article 16(2) of the FD, due to the

absence of market analysis concerning the segment in relation to which BNetzA proposes to withdraw the previously established remedies.

BEREC notes that the Commission, despite having sufficient elements in order to understand BNetzA's attempt to change the boundaries of the market and to assess the competitive conditions in the segment including services with value above Euro 500,000, did not express any criticism regarding this segment at the time of the evaluation of the case DE/2013/1468.

BEREC is aware that BNetzA's analysis could have been improved in the sense that it had all the relevant information and arguments for a proper market definition, but it fell short in presenting them accurately. Indeed a more elaborate analysis of the document, both for the market definition and for the assessment of competitive conditions, would have enhanced the understanding of the facts of the case and would have probably avoided some of the Commission's concerns. Having said that BEREC underlines that the Commission's action created a reasonable expectation of BNetzA about the legitimacy of the notified draft measure.