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Public consultation on the draft BEREC Report on competition amongst multiple operators of NGA networks in the same geographical region, BoR (22) 188

Dear Madam, Dear Sir,

1&1 appreciates the opportunity to comment on BEREC's Draft Report on competition amongst multiple operators of NGA networks in the same geographical region. The Draft Report is significant because infrastructure competition among multiple NGA operators is a crucial factor in the geographic market delineation for the purpose of SMP assessment. Moreover, the geographic market definition can ultimately lead to deregulation, either through the definition of geographically separate markets (NRA decides to deregulate because sufficient infrastructure competition is prevalent in that separate geographic market) or through geographically differentiated remedies (NRA decides that no regulation is necessary for a particular geographic region).

Given these tremendous implications, the Draft Report raises concerns about the reliance on out-of-date market data which we seek to address in this response. Furthermore, the Report is missing information on BEREC's subsequent course of action in connection with the main findings of this Report. We have aligned our comments to the numerical order of the chapters in the Draft Report, which should facilitate the processing of our responses.

Chapter 4 – Conclusions

Vague objective and insufficient evaluation

Regrettably, the conclusion is merely descriptive and just an aggregated summary of questionnaire responses of the surveyed NRAs. At this stage, the purpose of BEREC's data collection is hard to interpret. BEREC should include a section on whether and how it will utilise the main Draft Report findings. Should BEREC intend to use these findings to prepare BEREC Guidelines to harmonise and further a geographically differentiated market analysis and remedies, the collected data may not be sufficient in achieving these objectives.

Furthermore, the Draft Report requires more elaboration. For instance, the relevant criteria for grouping geographical units into homogeneous submarkets and/or areas with different remedies illustrated in table 11[1] reveals a non-harmonised approach amongst NRAs. In its conclusions, however, BEREC neither comments on why various Member States regard certain criteria more conclusive than others, nor does it propose any action to harmonise these criteria.

Limited comparative value

1&1 submits that the comparison of market analyses from various Member States is only of limited value. Firstly, electronic communications markets are characterised by innovation and fast-paced changes. Secondly, the five-year time intervals for conducting market analyses[2] are out of sync – rather than concurrent – amongst Member States: Germany has finished its last market 3a analysis in October 2019, Greece in December 2016, France in December in 2020, Portugal in March 2017 and so forth. Hence a comparison of the respective geographic segmentations of the markets and remedies (if any) is only partially conclusive. Coupled with different historic developments and national peculiarities, BEREC might run the risk of "comparing apples with oranges".

Sub-national market segmentation may lead to premature deregulation

The scope of the Report should also be widened with an examination to what extent NRAs safeguard sustainable competition insofar as their sub-national market segmentation was accompanied by deregulation measures. Likewise, BEREC should assess whether and how the respective NRAs have adopted a transitional phase whenever there was a shift from national to sub-national market delineation. In particular, how were the existing commercial interests of access seekers subsequently protected when the NRA concluded that deregulation of access rights was adequate in a specific sub-national market? Were access seekers protected by virtue of a transitional phase in which they could continue obtaining pre-existing regulated access? What were the main factors that justified a sub-nationally deregulated market? For instance, the commercial availability of several concurrent NGA/VHCN access offers, and/or potentially imminent market entry as a sufficient deterrent against exploitative wholesale price increases? Or perhaps a commitment of the incumbent to offer fair and non-discriminatory access in return for deregulation measures?

An example of premature deregulation is also evident in Germany. In its most recent market analysis 3b, BNetzA has delineated a sub-national wholesale market for Layer3-BSA in cities with populations greater than 60.000 people.[3] In applying the Three-Criteria-Test, BNetzA has, *inter alia*, considered whether the relevant (subnational) market structure tended towards effective competition.[4] Aside the development of market shares and wholesale prices, BNetzA has also considered the likelihood of voluntary Layer3-BSA access offers on part of the incumbent, i.e. Deutsche Telekom.[5] BNetza concluded that Deutsche Telekom was already under pressure to offer voluntary L3-BSA since competing wholesale offers based on Vodafone's cable infrastructure were available to the largest access seekers, most notably

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[1] See p. 12 of the Draft Report: For example (i) the number of competitors, (ii) market share of incumbent below a certain threshold, (iii) differences in the existence or terms of wholesale commercial offers etc.

[2] Art. 67 (5)(a) EECC.

[3] See BNetzA BK1-20/004, market analysis decision from 13.11.2020, page 201.

[4] Art. 67 (1)(b) EECC.

[5] See BNetzA BK1-20/004), market analysis decision from 13.11.2020, page 212.

Telefónica. In addition, competitors whose access was based on regulated L2-BSA would also be able to offer competing wholesale L3-BSA, thus exerting greater pressure on Deutsche Telekom to provide voluntary L3-BSA. BNetzA concluded that because of these competitive constraints, Deutsche Telekom was compelled to provide voluntary access even in the absence of regulatory remedies. Since the relevant subnational market thus tended towards effective competition, the Three-Criteria-Test was not fulfilled, and the relevant (subnational) market was deregulated.

However, BNetzA's assumption that regulated L2-BSA served as a price anchor for Deutsche Telekom's commercial L3-BSA is flawed because LS-BSA is not subject to *ex ante* cost-oriented price regulation. Instead, wholesale prices for L2-BSA are merely subject to *ex post* control based on *ex post* standards.[6] As such, L2-BSA does not lend itself as a proper price anchor to exert sufficient supply-side competition in the realm of L3-BSA. In other words, BNetzA has overestimated the competitive constraint emanating from competitors whose access is based on L2-BSA, since they are not sufficiently protected against abusive pricing in regard to Deutsche Telekom's L2-BSA wholesale prices. As such, BNetzA's decision to deregulate the relevant subnational market for L3-BSA was premature.

1&1 observes a general trend that BNetzA is *prima facie* succumbing to a fallacy that the lessening of regulatory remedies is a suitable means to achieve sustainable and self-supporting competition. In particular, BNetzA has hastily adopted a "regulation light" approach in its latest remedy decision[7], arguing that competitors are sufficiently protected from exploitative wholesale prices and margins squeezes by means of an ERT coupled with EoI obligations. However, BNetzA has reduced wholesale price regulation even though Deutsche Telekom – in our assessment the only national incumbent in all Member States – is actually gaining market shares on the retail level. Hence there is a risk that the premature reduction or withdrawal of wholesale remedies might reignite the market failures previously identified. Thus, there is a potential correlation between the absence of strong wholesale SMP regulation and Deutsche Telekom's recently observed increase of retail market shares (rather than a result of competition on the merits). Hence a careful examination by BEREC is justified concerning the NRAs' due diligence in ruling out premature measures of deregulation.

Annex 3: Data per country Germany[8]

Survey answers are outdated

In the light of fast-evolving and innovative telecommunications markets, we submit that BNetzA's survey answers do not fully reflect current and imminent market dynamics.

As BEREC correctly points out,[9] BNetzA finished the last analysis of market 3a/2014[10] only in October 2019 and has not yet undertaken an analysis of market 1/2020. Furthermore, BNetzA has adopted its corresponding remedy decision – meant to address the competition problems identified back in 2019 – only in July 2022, i.e. almost three years after its market review 3a/2014.[11] It is noteworthy that this piecemeal approach and the resulting substantial time gap

[6] See BNetzA BK3-19/020, remedy decision from 21.07.2022.
[7] See BNetzA BK3-19/020, remedy decision from 21.07.2022.
[8] See p. 63-64 of the Draft Report.
[9] See p. 63 of the Draft Report.
[10] See BNetzA BK1-19/001, market 3a (2014) analysis from 11.10.2019.
[11] See BNetzA BK3-19/020, remedy decision from 21.07.2022.

between market analysis and the imposition of remedies has repeatedly been criticised by the European Commission.[12] Remedies should be tailored, proportionate and justified in the *present* market environment and based on the *most recent* data. In this regard, BEREC should also conduct an analysis of whether other NRAs apply a similar piecemeal approach to market analysis and remedies and how large the time discrepancies are between completed market analysis and the imposition of remedies.[13] 1&1 submits that the German regulatory outcome is fundamentally flawed in this respect: In Germany, remedies meant to address market failures observed in 2019 will only be implemented in 2024, when the next market 1/2020 analysis is due to commence.

Accordingly, BNetzA's answers in the questionnaire are partially overhauled and do not provide an up to date and accurate reflection of the competitive dynamics in Germany.

Regionally varied prices

The problem of outdated survey answers is particularly evident in regard to regionally varied retail prices. In particular, BNetzA's answers to BEREC's questionnaire regarding different retail prices and product characteristics (Table 50) are not based on most recent market data. Instead, they're based on the market analysis carried out almost three and half years ago. In said market analysis, BNetzA has investigated whether retail prices differ between geographic areas and has observed that differences in regional retail prices are only marginal. At the time, only 9 telecom operators (out of 130) applied different retail prices in different areas. This, however, does not provide a complete picture of current market trends.

1&1 submits that it is not unlikely that German telecom operators might in future adopt regionally differentiated retail prices for FTTH broadband access. Going forward, regional differences in wholesale pricing (in conjunction with Deutsche Telekom's uniform retail prices, leading to a margin squeeze) will likely compel access seeking competitors to adopt regionally varied retail prices.

i. The need to examine regional differences in wholesale prices

The Report has only considered the presence and extent of regional differences in retail prices, without a reference to wholesale prices. BEREC should also extend the scope of this Report to differences in *wholesale* prices between geographic areas to better appreciate the risks of regional retail price variations in Germany. Such examination must be based on most recent market data, particularly new market developments since 2019.

FTTH deployment is fast evolving in Germany and was hitherto pioneered by alternative deploying operators who would deploy in white and grey spots designated for broadband State aid and where the incumbent Deutsche Telecom was unable or unwilling to roll out its FTTC footprint as a competitive alternative. Ever since 2020 – i.e. one year after BNetzA's final market 3a analysis, – Deutsche Telekom has drastically increased its FTTH-roll out as a response to this competitive pressure, solidifying its SMP in FTTH access.

Consequently, Deutsche Telekom is able to set the wholesale- and retail prices to an appreciable extent independently of competitors, customers and ultimately consumers. At the time of the final market 3a analysis (October 2019), Deutsche Telekom had no significant FTTH

[12] Cases DE/2022/2385, C(2022) 5231 final; DE/2020/2258, C(2020) 5000; DE/2018/2133, C(2018) 9044; DE/2017/1989, C(2017) 4561; DE/2016/1943, C(2016) 8765.

[13] This is important because the imposition of remedies addressing the identified market failures has important commercial impacts on the affected market, such as on the business models of access seekers/competitors.

coverage and thus no corresponding wholesale access product. Wholesale access to Deutsche Telekom's FTTH infrastructure was not commercially available to access seekers until 2022.

Deutsche Telekom has always adopted uniform wholesale- and retail prices for FTTC/VDSL coverage nationwide. By contrast, it has introduced regionally varied wholesale pricing for FTTH access, while maintaining uniform retail prices for FTTH broadband nationwide. In turn, this divergence between uniform retail prices and regionally varied wholesale prices leads to (hitherto undetected) margin squeezes to the detriment of access seeking competitors. Its regionally varied wholesale pricing for FTTH access works as follows:

Deutsche Telekom's network consists of over 2000 **local network areas** nationwide. Each local network area is a geographical area in which all fixed lines have the same area code. When setting wholesale prices, Deutsche Telekom distinguishes between

(1) small network areas (less than 10K connected households), and

(2) large network areas (more than 10K connected households).

Deutsche Telekom applies a regional surcharge of € 6 per month in small network areas for each connection.[14]

ii. Margin squeeze

Viewed in isolation, Deutsche Telekom's uniform national retail prices do not cover wholesale costs in small network areas, amounting to a margin squeeze. The reason why BNetzA has not detected this margin squeeze is due to its methodically flawed *ex ante* ERT analysis, leading to a non-imposition of wholesale price regulation for FTTH access. BNetzA carries out the ERT as a national test, so that the regional surcharge is only partially taken into account in the ERT. For a proportionate consideration, the surcharge is weighted with the proportion of households connected to small network areas in the total number of households. A back calculation of monthly wholesale prices (as a weighted average of €12.03 for large network areas and €18.03 for small network areas) leads to the result that households in small network areas account for 26% of all households.[15]

When viewed nationally, BNetA's ERT is positive with **+0.67€**:[16]

Monatliche Kosten FTTH 100 EN		Monatlicher Endkundenpreis Breitbandbündelprodukt Magenta L	
Bereitstellung/Kündigung	1,01 €		
Infrastrukturentgelt	3,86 €	Bereitstellung	0,81 €
Überlassung FTTH 100 gewichtet	13,59 €	Überlassung	33,49 €
Upfront	3,48 €		
Übergabeanschluss	0,07 €	**Zusätzliche Erlösminderungen**	
Kollokation am BNG	0,04 €	**für**	
Transport bis PoP	2,84 €	TV/Mobilfunk	- 0,67 €
Zusatzkosten	6,26 €	Retention	- 0,64 €
Gemeinkosten	**1,15 €**		
Summe Kosten	**32,32 €**	**Summe Erlöse**	**32,99 €**
Delta	**0,67 €**		

[14] See BNetzA BK3-19/020, remedy decision from 21.07.2022, page 230.
[15] See BNetzA BK3-19/020, remedy decision from 21.07.2022, page 230.
[16] See BNetzA BK3-19/020, remedy decision from 21.07.2022, page 225.

Viewed regionally, the ERT would be negative regarding small network area connections. Here, wholesale prices at €18.03 are €4.44 higher than the weighted monthly wholesale price of €13.59, which BNetzA is using instead. A regional perspective of the ERT would result in a negative delta of **-3.77€**.

iii. Danger of regionally varied retail prices

Regardless of which calculation is used to determine the profit spread for competitors, Deutsche Telekom's pricing policy puts tremendous pressure on its competitors' margins (even with a positive of **+0.67€**, as suggested by BNetzA's ERT). 1&1 submits that Deutsche Telekom's pricing strategy will likely force competitors to adopt regionally varied retail prices in the near future.

Due to Deutsche Telekom's uniform retail pricing for FTTH broadband, competitors are currently adopting uniform retail pricing policies nationwide. Particularly as part of their pre-marketing efforts, competitors are pressured to undercut Deutsche Telekom in their retail prices. To reiterate, Deutsche Telekom applies a regional surcharge of € 6 per month in small network areas for each connection. With a nationally uniform retail price, telecom operators cross-subsidise end users connected to small network areas with end users connected to large local network areas.

If retail prices in large network areas come under increasing pressure due to intense competition amongst NGA networks, access seeking competitors may not be able to sustainably cross-subsidise small network areas in the long term. Hence they will likely be pressured to adopt regionally differentiated retail prices to cover their respective wholesale costs in small network areas. Put differently, access seeking competitors will likely be forced to pass on their regionally varied wholesale surcharges onto end users connected to small network areas. Hence there is a genuine risk that Telekom's access seeking competitors might be compelled to adopt regionally varied retail prices for FTTH broadband, to the detriment of end users connected to small network areas.

Yours faithfully,

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