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BEREC
Body of European Regulators for Electronic
Communications (BEREC) and the Office

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**BEREC's Review of the Common Positions on wholesale unbundled access, wholesale
broadband access and wholesale leased lines
Statement of EWE TEL GmbH**

26. März 2012

Dear Sirs,

Enclosed please find the statement of EWE TEL concerning the above mentioned consultation.

Because of a lack of resources we send the same document that we already forwarded to the European Commission in the context of its consultation on non-discrimination by the end of last year. We would appreciate, if you take our arguments into consideration, however.

Best regards,

ppa.
Matthias Büning

pp
Andrea Weißenfels

Anlage

Statement of EWE TEL GmbH on the consultation procedure of the EU Commission to prepare discrimination free access of alternative operators to infrastructure and services of market dominating telecommunications providers

EWE TEL would like to express its thanks for the possibility to submit a statement on the consultation procedure of the EU Commission. EWE TEL is a large regional TC company in Germany with currently more than 600,000 customers, of whom over 95,000 are business customers. The company provides private and business customers with landline direct connections in Lower Saxony, Bremen, parts of NRW and in Brandenburg. EWE TEL promotes the development of broadband in these regions, by bringing its own glass fibre network closer to the customer. However, EWE TEL still greatly relies on access to unbundled subscriber lines of Telekom Germany, which are connected to both the Main Distribution Frames - MDF and also in the case of the broadband development, to the street cabinets - SC - from the EWE TEL network.

1. Considerable significance of the duty of non-discrimination

The hearing document quite rightly describes that non-price discriminatory behaviour is just as serious and can in part be even more difficult than price discriminatory competition.

However, there remain unchanged dangers and burdens from price discriminatory behaviour by market dominating providers, which cannot be prevented or cannot be effectively prevented by applying the ex-post regulation. A fundamental example that can be mentioned here is the removal of the margin squeeze when accessing the local network, which had to be adjudicated not by the German NRA, but by the EU Commission (Matter COMP/C-1/37.451, 37.578, 37.579 — Deutsche Telekom AG, Adjudication of 21 May 2003). After proceedings lasting many years through all the courts (compare adjudication of the ECJ of 14 October 2010, Rs. C-280/08 P) the then price discriminated competitors of the market dominant operator have to date still not received any financial compensation for the restrictions suffered then. Therefore, the EU Commission should continue actively to support and demand a removal of price discrimination. Margin squeezes also remain unchanged in other areas of the German telecommunications market – for example, the proceedings due to data costs for subscriber data were known as well as unequal treatment when purchasing services for subscriber access (e.g. excessive payments for unjustified fault reports) and when purchasing interconnection services (e.g. one-sided formation of purchasing conditions by Telekom Germany for purchasing services from their interconnection partner). The national regulatory authority overwhelmingly sees no responsibility in these cases to remove this discriminatory behaviour.

Insofar as the national NRA sees responsibility for the removal of price discriminatory behaviour (e.g. in Market 1 – access of private and business customers to landline connections) in Germany, an ex-post regulation has been established that cannot ensure any effective correction of price discriminatory behaviour due to the mechanism of the applicable regulations. An example for this is the offer of so-called T-VPN contracts by Telekom Germany to larger customers (compare only BK2b 07/008 establishing unjustified bundling). If, due to complaints from competitors (who often only find out about price discriminatory behaviour by accident, because they do not have governmental information authority), the national NRA opens review proceedings that, with preliminary

enquiries and main proceedings, take many months. As a result the abusive behaviour of the regulated company remains practically without financial consequences, despite corresponding identification of the abuse by the German network agency. This results from the fact that success in customer acquisition has already occurred, but that the adjudications of the NRA merely have an "ex nunc" effect from the point in time of the legal validity of the decisions and only relate to individual cases (contracts). An anti-competitive sales practice can be maintained both throughout the duration of the proceedings and also for all cases not affected by the specific proceedings. Even in the event of an adjudication by the NRA identifying price abuse the company acting abusively would receive HIGHER payments from its customers; the competing company affected by the abusive behaviour would receive no financial compensation. However, the distortion of competition remains without sanctions both in the past and future, because the affected end customers usually cannot give legal notice of termination of the contract, nor would they give notice of termination of the contract due to the effort involved in changing. Here it must be considered that large customers in particular (large corporations, public authorities, associations and organisations) can only change provider through a tendering procedure and a laborious change process. Once a selection decision has been made, it is usually hardly revisable for a certain period of time.

According to the experiences of EWE TEL the largest problems of non-price discrimination currently lie in the poor quality of the provision and fault clearance of subscriber lines demanded by advance payment customers. EWE TEL has very recently observed a phase of considerably worse quality, which from the end customer's point of view has negative effects on EWE TEL. This is because the end customer relationship is managed by EWE TEL and the actual causes of the quality problems are irrelevant and have to be irrelevant. In any case, the impression can be established on the market that in the case of an end customer relationship between Telekom Germany and their own end customers, better quality is available than in the case of an end customer relationship between a competitor company and its end customers.

2. Quality monitoring

According to findings by EWE TEL, systematic quality monitoring by the NRA or an independent centre currently does not take place in Germany for advanced payment services.

With reference to cases of poor service the NRA overwhelmingly takes the standpoint that implementation and compensation should take place using civil law, i.e. bilaterally between the company providing poor service and the advance payment customer. EWE TEL has also carried out several proceedings with all the problems of preparing the case of the poor services cases and the evidence of the extent of the damage incurred among others, without this fundamentally improving the problem. The lump sum damages ordered within the context of a review of the standard range have not fundamentally improved the problem to date, because from EWE TEL's point of view these lump sums are firstly, set too low and secondly, still require enforcement under civil law. A sustainable organisational improvement of the quality standard cannot be implemented in this manner.

We see a gap in implementing quality monitoring and quality assurance here with the resources of regulation law. Although these resources are legally available to the NRA in principle (authority of the BNetzA in accordance with Sections 126 ff. of the TKG and fine-levying provisions and so-called additional revenue elimination), these have to be ordered and implemented. From our point of view the existing regulatory order in Germany to access subscriber connections TAL (BK3g-09/085) orders a duty of non-discrimination in a less concrete form. The tenor of the regulatory order merely says that access contracts are to relate to objective agreements, have to be comprehensible, grant

equal access and have to meet the precepts of equality of opportunity and equity. The justification for the regulatory order will not become more concrete, whatever constraints arise from this for the regulated company at least. The regulatory order – supported by the duty of non-discrimination - also could already have been able to set the tenor of a requirement with reference to quality monitoring and quality assurance. The complaints procedure initiated by some customers (e.g. on the occasion of the introduction of the Telekom Germany WITA interface) was carried out with a procedure duration of many months and brought no or few results, so that from EWE TEL's point of view a general regulation would be preferable.

EWE TEL is prepared to submit documents and evidence to the EU Commission about the quality faults enforced. We would like to ask for a corresponding indication of whether this submission is relevant to the case and if it can be treated confidentially towards other competing companies.

3. Functional separation

EWE TEL regularly applies to the BNetzA and has carried out administrative proceedings with the aim that the BNetzA orders a duty of Telekom Germany to keep separate accounts in accordance with Section 24 TKG and a duty of transparency in accordance with Section 20. In particular, keeping separate accounts is a considerably milder remedy in comparison with a functional separation. However, the BNetzA regularly rejects such remedies, because in its opinion these go too far and would disproportionately burden the regulated company. EWE TEL regularly points out that the TKG "usually" demands separate accounts "from vertically integrated companies in particular" for a good reason. According to Section 24 Para. 1 Sentence 3 TKG this is intended among others to prevent breaches of the discrimination prohibition. This possibility is not used.

In view of the refusal to impose these remedies, the imposition of a functional separation would probably fail in practice. From EWE TEL's point of view the duty of a functional separation as the last means against constant quality discrimination is factually correct and is to be supported. In this manner there could be effective prevention of "double standards" being applied to quality parameters – one with the better qualities for the distribution of the regulated company and the other in the distribution of the advance payment customer.