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RESPONSE BY DEUTSCHE TELEKOM

BEREC PUBLIC CONSULTATION ON THE DRAFT REVIEW OF THE BEREC COMMON POSITION ON GEOGRAPHICAL ASPECTS OF MARKET ANALYSIS

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Executive Summary

Deutsche Telekom welcomes the review of BEREC's common position on geographical aspects of market analysis.

We strongly support BEREC and NRAs taking much stronger account of the geographic dimension of relevant markets in order to effectively take into account the dynamics of competition and today's stage of telecommunication markets. In the wider context of the Digital Economy, markets for telecommunication, IT, media and devices are converging and become inextricably linked. The success of IP-based over-the-top services, applications and alternative competing platforms are challenging established views on market structure and market power in electronic communications markets.

Differences in the competitive conditions between different areas within the national territory are an essential feature of many of today's broadband markets. Delineating markets at the sub-national level marks an important step for tailoring regulatory remedies and reducing regulation to the minimum necessary. Geographical segmentation thus constitutes one important element for paving the way towards a level playing field between different market players and promotes a more investment-friendly framework which is conducive to improving the NGA broadband coverage in Europe.

NRAs have handled specific aspects of geographical segmentation differently in different EU Member States in the past. Further clarification in the common position is thus appreciated.

We welcome a number of the findings made by BEREC in the consultation document. Deutsche Telekom's main remarks relate to the following aspects of this review:

- The absence of geographic pricing with the nationwide incumbent operator does not *per se* indicate that the market is to be delineated nationally. If there is one nationwide incumbent with a national pricing but there are local or regional alternative operators in some parts of the territory, there clearly are geographic differences in prices from the customer's point of view who either has no, some or many choices in the respective areas.
- The Ofcom approach of a geographic segmentation of market 5 is a sustainable and transferable role model for other EU countries. The general principles are in line with BEREC's findings and should be used more consequently by all EU NRAs.
- Broadband markets have developed in a very competitive manner, often based on several NGA networks being in place, such as cable and alternative fiber networks. NGA transition of one specific platform is not necessarily a barrier to implementing a geographic segmentation based on today's infrastructure. As the UK case of market 5 shows, the impact of NGA deployment has to be assessed based on the concrete facts, not on speculations, such as on potential future shutdowns of Main Distribution Frames (MDFs). The fact that adjustments to the geographic unit might become necessary at one point in the future does not impede the necessary delineation of sub-national markets.

Geographical aspects of market analysis

BEREC has launched a public consultation in December 2013 with the objective to provide new guidance and an updated Common Position on geographical aspects of market analysis. Deutsche Telekom welcomes this initiative which is both timely and important.

Objectives of geographical segmentation of relevant markets

Deutsche Telekom strongly supports BEREC and NRAs taking much stronger account of the geographic dimension of relevant markets, in particular at sub-national level, in order to effectively take into account the dynamics of competition and today's stage of telecommunication markets. Delineating markets at the sub-national level is in many cases a precondition for tailoring regulatory remedies to the actual competition problem in the market and reducing regulation to the minimum necessary. Geographical segmentation thus promotes a more investment-friendly framework which in turn is conducive to improving the NGA broadband coverage in Europe.

It is the case, as correctly analyzed by the draft Common Position, that the increase in broadband penetration has, in many countries, is associated with a rise in the number of alternative network operators and their market shares in areas that are economically viable. This often results in market conditions varying significantly within the territory of a country, e.g. illustrated by the fact that the former incumbent has market shares well below 30% in large cities and dense populated areas. Nevertheless most NRAs were reluctant to proceed to a geographic analysis due to a number of challenges. This bears the risk of over-regulation of incumbent operators and thus reduced innovation and efficiency.

It is worth noting that geographical segmentation is also supported by the German Monopolies Commission (Monopolkommission). Within its recent special report on competition in the telecommunications market the Monopolies Commission explicitly invites BNetzA to consider a geographically differentiated regulation in the course of the forthcoming analysis of the German wholesale bitstream market and stresses that geographical segmentation opens up the potential to reduce regulatory intervention in a faster manner than it would be possible within a national market. In the Monopolies Commission's opinion, the risks for competition and infrastructure rollout sometimes associated with geographic segmentation as well as practical difficulties of such an approach are being exaggerated.[1]

Necessity and basic principles

We fully agree with BEREC's finding that the importance of geographical aspects has increased over the past years. More and more competing network infrastructures have developed, such as cable and local fiber networks, in addition to the existing operators relying on Local Loop Unbundling (LLU). Alternative network operators increased their coverage, performance range and market shares. This trend is expected to continue in the coming years. This in many markets leads to a 'patchwork' of areas with different numbers of infrastructures and operators posing significant competitive constraints at retail and wholesale level. The competitive conditions in these markets are strongly affected by these regional differences and render the definition of a nationwide market unjustified. In this case, it is appropriate to define markets on sub-national level and, within competitive areas, to abolish regulation. Infrastructure-based competition can thus be sufficient on its own to lead to effective competition on the retail market.

The definition of one national market with differentiated remedies does not constitute an equivalent alternative to geographic market definition. Maintaining regulation in competitive areas, even with less intrusive remedies, distorts competition in the market. The differentiation of remedies within a single market may only be an option, if sound and objective reasons exist which render the geographic segmentation into

[1] Monopolkommission, Sondergutachten 66, Dezember 2013.

different local markets inappropriate. The priority should be to define sub-national markets where justified, i.e. where competitive conditions are not sufficiently homogenous.

Many broadband markets in Europe have developed in a very competitive manner. A large number of broadband providers are offering services, often based on proprietary infrastructures. In many regions with alternative operators Deutsche Telekom is competing with infrastructures such as cable and fiber and has no more significant market power in that area. According to BNetzA, there have been 28.4 million broadband lines in Germany in 2013. Competitors reach a market share of approx. 56%, with an upward tendency. In particular cable operators achieved large growth. Since 2009 cable operators have doubled their number of broadband lines, now approaching 4.8 million.[2] Similarly in Greece alternative operators, relying entirely on LLU, have reached a market share of **[.]**.

As stated by BEREC, the findings on relevant infrastructures are dependent on the prior definition of the relevant product market. It should be noted that this definition should not result in overly narrow product markets as this would otherwise risk understating the competitive constraints stemming from alternative networks and operators. When alternative infrastructures and operators are competing in the market this should be treated as clear evidence for the need of conducting a detailed geographical analysis.

Alongside the two above mentioned criteria indicating the need for geographical analysis, i) coverage of competing regional or local infrastructures and ii) the number and size of alternative operators based on these infrastructures, BEREC is giving guidance as to whether pricing and price differences are indicative for sub-national markets. We agree with BEREC that the analysis of prices needs to be assessed and interpreted carefully. A nationwide uniform pricing does not in itself indicate that sub-national markets would be inappropriate.

When investigating regional aspects and analysing pricing on respective markets, NRAs should consider the closely linked aspect of regional market share developments over time. For a geographic analysis it is more important to analyse whether there are different market shares in different regions and thus to reflect the customers' perspective. Deviating market shares between compared regions are a clear indication for distinctive markets. So uniform or regional pricing is not a conclusive indication of the nature of competition and no precondition for a delineation of markets.

BEREC's clarification on this point is very important, as some national regulators have given too much weight on the presence of national pricing in the past and abstain from implementing a geographic segmentation just because of the absence of regional pricing. Moreover, BEREC states that regional differences in pricing is already present from the customer's point of view, when there is a national pricing of an incumbent operator, but different regional presence of alternative operators. In the past, NRAs sometimes have narrowed that view on the regional difference in the incumbent's pricing.

In addition the impact of publicly funded networks that BEREC indicates as a factor of differentiation of competitive conditions in a country is rightly mentioned and should be carefully included by NRAs when carrying out a market analysis and SMP assessment because publicly funded networks usually have the obligation to provide wholesale services and costs are subsidised compared to networks deployed based on own investments.

Markets affected by a geographical segmentation of markets

Deutsche Telekom agrees, that the retail market analysis should be the starting point of every analysis. The retail markets should be examined in detail, in particular as to whether the market exhibits strong and sustainable inter-platform competition. If present, it creates either direct or indirect competitive constraints on the upstream wholesale markets and must not be neglected. Most national regulators already follow this approach. We strongly agree on taking account of such competition especially in market 5.

2 Bundesnetzagentur, Tätigkeitsbericht 2012/2013, Dezember 2013.

From Deutsche Telekom's point of view, geographic aspects play an important role for the upcoming market analysis on market 5 (wholesale broadband access) in highly competitive markets like Germany. Especially in the wholesale broadband access market, the implementation of geographic segmentation has already been proven to be adequate and necessary. The approach taken by Ofcom in the UK gives a good example of an application of a geographic assessment within the market analysis procedure.

- Ofcom is currently conducting the next market analysis for the wholesale bitstream access market in UK. Ofcom proposes to continue defining sub-national markets and to abolish regulation in areas in which the competition conditions are deemed sufficient. By doing so, Ofcom makes consequent use of the corresponding scope of the EU legislative framework and tailors regulation to the actual competitive developments in the market. The overall objective is to focus on the prevailing local competitive conditions and to effectively assess whether these differ between different regions. As the consequence, regulation will be reduced in regions where no undertaking is being designated as having SMP.
- According to the draft consultation document, the market is split into two groups.[3] The group of competitive areas consists of exchange areas in which BT and at least two more competing operators are present, whereby the latter are based on BT's wholesale products or on own infrastructure. In this group Ofcom would abstain from imposing remedies. The deregulated area would cover in total approx. 90% of the market.
- More recent academic work reveals important positive effects from the geographic segmentation in UK: more competition and more investment in deregulated areas.[4] This is further underlined by market developments. In 2013, FTTx-based broadband lines have been available to more than 55% of the market; 65% planned until April 2014. Average broadband speed has grown by 22% up to 14.7 Mbps.[5]

In addition to the wholesale broadband access markets, Deutsche Telekom welcomes BEREC's efforts in bringing other markets of the Recommendation to attention, which are suitable for geographic segmentation, such as Market 1 (retail fixed voice telephony access, which should no longer appear in the next recommendation) and market 6 (terminating segments of wholesale leased lines).

Proposed analysis to assess differences in the competitive situation

We broadly agree with the approach to analysing differences in the competitive situation. We would like to comment on two aspects, i) the retail market as starting point and ii) the choice of the geographical unit.

Retail market as the starting point: Above, we already referred to the importance of competition conditions at retail level. We basically agree with the typical situations described by BEREC which need to be taken into account in the geographical analysis, that is i) retail competition driven by wholesale access and/or ii) driven by inter-platform competition. In particular the existence of operators with own infrastructures such as cable, fiber or stationary use LTE as well, needs to be acknowledged. If the corresponding products are substitutes at retail level these operators pose direct and indirect competitive constraints which are important for the decision on sub-national markets. If inter-platform competition poses sufficient competitive constraints at the retail level, there is no need for maintaining or introducing regulatory interventions on the wholesale level.

Choice of geographical unit: We basically agree with BEREC in that the choice of the relevant geographical unit may to some extend depend on the particular situation. In case competition is based on Local Loop Unbundling, areas served by an exchange or main distribution frame are likely to be the appropriate unit. In case of inter-platform competition, alternative network's structure is likely to be appropriate. However, often

3 Another group covers the HULL area.

4 Falck, O. und Fabritz, N.: „Investment in Broadband Infrastructure Under Local Deregulation: Evidence from the U.K. Broadband Market", CESifo Working Paper No. 4277, 06/2013.

5 Ofcom: "UK fixed-line broadband performance", 05/2013; Point Topic: "Mapping broadband in the UK – Q2 2013", 08/2013.

there is a mixed situation, i.e. competition on retail level stems from both wholesale access and inter-platform competition. Experiences from advanced broadband markets such as Germany and the United Kingdom show that exchange or main distribution frame areas are an appropriate and sustainable geographical unit.

What is the most appropriate unit is best analysed by the national regulator on a case-by-case basis under consideration of the specific market situation within the Member State. It is important to stress that – as BEREC also acknowledges - the indication contained in EC's guidelines on market analysis (market comprises the area of the SMP operator; legal or other regulatory instruments) may not be flexible enough to adequately deal with today's and future market development.

It is sometimes argued with respect to practicability that the costs for gathering relevant data for geographic differentiation would justify a wider market definition. However, we do not see that obtaining the necessary network-related information constitutes an insurmountable hurdle. The market analysis (not only in the course of geographical segmentation) had from the outset to be based on a procedure that by its nature generates a certain degree of complexity and involves extensive data gathering. An administrative burden of gathering data thus cannot justify jumping directly to the national level as the one and only alternative. In most cases, technical data are linked to geographic information (such as the connected MDF and its address or coordinates) for maintenance and billing puropses. Therefore, operators have to keep available such data.

Criteria for assessing the homogeneity of competitive conditions

BEREC suggests a couple of criteria to be used to assess differences in the competitive conditions between different areas, such as barriers to entry into the market, number of suppliers, market shares, price differences and other aspects, e.g. marketing strategy, commercial offers, nature of demand etc.

We agree that these criteria are useful for the task of assessing regional differences in competition. In particular barriers to entry, number of suppliers and market shares should be used in the assessment as they are straightforward. Pricing issues on the other hand are less obvious when it comes to the question whether a market should be delineated as nation-wide or subnational.

As stated above, we welcome BEREC's clarification on the question that if there is one nationwide incumbent with a national pricing and local or regional alternative operators, there clearly are geographic differences in prices from the customer's point of view having either none, some or many choices in the respective areas, leading to a heterogenous pricing from a national perspective.

We agree upon BEREC's finding, that "a segmentation based on a single criterion (e.g. the number of operators) will usually not be appropriate". OfCom's approach on market 5 is based on a well-suited set of criteria, which can be transferred to other national markets:

- Number of operators
- Market share of the incumbent
- Structure of the geographic units (such as the number of access lines per MDF)

In Greece OTE has provided in the past such data and has shown concrete evidence on the difference in competitive conditions in diferrent geographic areas. Data shows that **[.]**. In these areas **[.]**. But even though evidence is tangible, EETT has not taken into consideration such data and has defined OTE as having SMP nationwide while remedies have not been geographically differentiated, inhibiting OTE's ability to compete in these areas.

Implications on NGA networks

In the consultation document, the transition from the copper-based network to NGA is discussed. It is implied that such a transition involves an active decomposition of the traditional network with MDF-site closures. First of all it has to be clarified that such a swift transition and the removal of the traditional network elements is very unlikely to happen, especially in markets with ULL-driven competition and high numbers of ULL-lines. In some countries such as Hungary transition periods have been fixed which lasts several years. The transition will take a long time and for the coming years an active removal of traditional networks will not be considered. We are not aware of any country, where the closing of MDF-sites on any significant scale is a topic of today.

NGA plays an important role in the upcoming (and past) market analysises, as the rollout of NGA networks might shift the market structure in various ways. BEREC successfully brings together possible NGA scenarios and geographic segmentation. We agree on the general point, that NGA and the upcoming developments do not produce such an uncertainty that the consequence would be to refrain from geographic segmentation.

The best proof can be found in the current review of Market 5 in the UK. OfCom does not see any necessity in changing the basic principle of defining MDF-wise areas, even the network structure might change in the future. Moreover, NGA even is not seen as a separate market apart form the traditional networks. OfCom just integrates NGA into the present market and basically finds, that any changes will be assessed, when they are about to happen. Additionally, Ofcom's approach is flexible enough to deal with "moving" areas, i.e. areas that have become effctively competitive as well as formerly competitive areas that are now grouped within the regulated sub-national market. This clearly shows a difference from the market analysis in Germany, where BNetzA has decieded against geographic segmentation in view of a potential reduction of MDF-sites. Even for a forward looking approach on the market analysis, BEREC should underline that any changes involving NGA should be clearly foreseeable and certain when taken into account. As there is no long-standing experience in NGA transition, it is difficult to foresee if any MDF-reduction will take place in the next years and how fast the "traditional" ULL will vanish. In countries with strong ULL-based competition, this might take a very long time to migrate millions of ULL-lines. In the meantime, this must not hamper an appropriate geografic delineation. NGA-driven changes in the market are moreover more relevant in scenarios where competition relies mostly on LLU competition. In case of alternative competing infrastructures, an NGA migration of one platform will not be a hurdle for defining sub-national markets in any case.

We agree with BEREC that absence of a commercial wholesale offers (fiber unbundling) does not necessarily signal a non-competitive environment at the retail level. This issue should be analysed by NRAs on a case-by-case basis.

Risk and benefits from a geographical analysis

BEREC is discussing a couple of risks possibly associated with the definition and deregulation of sub-national markets.

We agree with BEREC, that business customers' may have a nation-wide demand but that this does not per-se require a nation-wide market. Business customers can rely on multiple commercial offers within competitive areas and regulated products elsewhere.

In many EU-countries, NRAs have defined separate markets for business customer products and mass market products mainly for retail customers. Therefore, the nation-wide demand for business products has to be assessed within the respective national market. If there is one market for both mass market and business customers, the relevance of business products might be minor compared to the great quantity of mass market demand, rendering the effect of nation-wide demand on such products irrelevant.

It is appreciated that BEREC classifies geographical segmentation as a means to limit ex-ante regulation to the minimum extend needed, i.e. to impose regulation only where and when it is really needed. It is important to underline the fact observed by BEREC that geographical segmentation can be beneficial because the former SMP operator is now more flexible for innovations, investment, better prices and quality.

Geographical segmentation thus constitute an important lever to promote a more investment-friendly framework and ultimately to improve NGA broadband coverage in Europe.

We welcome BERECs discussion on type 1 and type 2 errors. In the German market 5, we already see a type 2 error: In General, regulation was slightly reduced from a cost-based ex-ante regulation, to a (Germany specific) mixture of cost-based pricing regulation and ex-post charge control. In MDF-areas with dense competition, BNetzA did not revoke regulation completely, as it would have been done if OfCom's approach had been adopted. This may be at the expense of innovative behavior, designing products and setting prices. Beside undue limitation of Deutsche Telekom in these areas by unjustified regulation, the whole market suffers from less competitive impulses than would be possible in a deregulated environment.