

## CLIENT ALERT

### EC Endorses German Regulatory Measure Which Will Open Markets to Broadband Network Providers

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The Commission has given its support to the proposal by the German telecoms regulator Bundesnetzagentur (“BNetzA”) for opening up the wholesale broadband access market to competition. Wholesale broadband or “bitstream” access allows companies to access the infrastructure of other established operators in order to provide broadband services, such as high-speed internet and telephony directly to business and consumer end users.

The BNetzA proposal and the Commission's endorsement of it means that Deutsche Telekom will have to open its high-speed Internet networks to rivals, allowing them to offer their services (e.g., Internet television, Voice over Internet Protocol telephone calls) directly to customers. Furthermore, the BNetzA will have to approve in advance the price for which Deutsche Telekom will sell the access.

The BNetzA has offered these remedial measures in response to a December 2005 determination that Deutsche Telekom was holding a dominant position in the German wholesale broadband access market and in the market for wholesale ATM bitstream access.

The Commission has expressed its approval of BNetzA's proposal under Article 7 of the Framework Directive on Electronic Communications. Article 7 is the principal instrument that the EU has to regulate electronic communications. Under its procedures, national regulatory authorities propose changes to remedy issues in their electronic communications markets, and notify the Commission as to their proposed remedies. The Commission assesses these remedies and may veto remedies it believes are inadequate for purposes of creating market definitions or addressing single market power issues.

The proposal approved by the Commission on Monday 21 st August will require Deutsche Telekom to open its infrastructure to competitors who want to provide IP bitstream access, including stand alone. This includes interconnection and collocation access to all xDSL variants, including ADSL2, ADSL2+, SDSL and VDSL. Competitors will be able to choose their points of interconnectivity. HFC cable broadband is excluded from this obligation, as Deutsche Telekom does not use it.

Under BNetzA's proposal, Deutsche Telekom will be under a non-discrimination obligation, accounting separation, an obligation to issue a reference offer, an obligation to submit information on internal input and revenues, and a price control obligation. Tariffs levied by Deutsche Telekom for IP bitstream access will be subject to approval by BNetzA. The method of ex ante price control to be used is yet to be determined. Under German law, this form of price control can be implemented in the form of cost orientation or benchmarking.

In its comments, the Commission endorses BNetzA's application of these obligations to include all substitutes of bitstream access products, including VDSL products which BNetzA had previously excluded. The Commission emphasizes its findings that VDSL and other forms of bitstream access are substitutes on both a retail and wholesale level and requires that VDSL-based infrastructure must be included in the proposed remedy.

Regarding price regulation, the Commission expresses a concern that using benchmarking will not accurately account for specific national circumstances that may impact the costs associated with bitstream access, such as network topology and interconnection points. In addition, the Commission comments that benchmarking may fail to ensure the appropriate margins with German retail prices and or with German regulated local loop unbundling rates. With these questions in mind, the Commission asks BNetzA to impose either a retail minus or cost-oriented price control.

The Commission has urged BNetzA to implement its proposal as soon as possible. Deutsche Telekom has objected to the inclusion its new three billion euro VDSL- infrastructure in these obligations. Due to this investment, Deutsche Telekom has asked for the three-year "regulatory holiday" of freedom from competition to recoup the cost of its new network. However, as stated clearly in its opinion, the Commission views VDSL as a substitutable product in the bitstream market and has threatened Germany with legal actions for infringement of EU law in the event it exempts Deutsche Telekom from competition for a period of three years.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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