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25.02.2014

Informal Consultation on the Draft relevant Markets Recommendation

Dear Sir or Madam

BUGLAS welcomes the fact that the European Commission (EC) has decided to make a draft of its Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation and of the related Explanatory Note accessible to the public and takes the opportunity to provide a number of observations and comments, from a procedural, formal and substantive perspective. BUGLAS will focus its observations and comments on the broadband markets and on the discussion on defining sub-national markets. The observations and comments will relate to both, the Draft Recommendation and the Explanatory Note.

1. Formal Aspects

BUGLAS is of the view that the consultation on relevant markets which was initiated by the EC in October 2012 on the basis of abstract questions is not sufficient in the light of the fact that fundamental changes to the definition of broadband markets are envisaged which could not be foreseen prior to the end of the 2012 consultation and in the light of the conclusions drawn from its results by the EC. BUGLAS is of the view that not running a formal consultation process would amount to a procedural shortcoming due to the fundamental changes which are envisaged in the draft recommendation. Without prejudice to the aforementioned concerns, BUGLAS intends to provide its observations and views to decision makers directly over the upcoming period of adoption.

2. Substantive Aspects

2.1 Broadband Product Markets at the Wholesale Level

2.1.1 A new Market for Wholesale Local Access

It is our understanding that according to the draft Recommendation, not only physical infrastructures, such as in particular unbundled local loops and unbundled sub-loops shall be included in a the market for wholesale local access, but also equivalent virtual products which

- are delivered close to the Pol (although not necessarily at all existing Pol's);
- can be configured by the recipient;
- are able to carry multi-cast applications.

It is our understanding that the inclusion of such virtual products into the scope of the product market is motivated by the fact that new technologies (such as vectoring on copper loops) makes unbundling impossible and that such access lines might hence be disregarded in the further process of the market analysis in the absence of including an equivalent virtual product into the market definition. We appreciate if such virtual products are included into the market definition strictly for the purpose to overcome the concern that local loops, which the incumbent has made inaccessible for competitors by the use of technologies such as vectoring, might otherwise not be reflected in the market analysis (e.g. in calculating market shares of the incumbent operator). However, we are concerned that the use of including such a virtual product into the market definition may create more confusion than benefit, as we shall highlight immediately below.

Including a virtual unbundled local access product into the market definition requires (and implies) that it is considered as a substitute for physically unbundled local loops. BUGLAS is very concerned that the notion of substitutability can be misunderstood further down the line in the regulatory process, most notably at the level of defining access remedies.

In particular, BUGLAS is concerned that at the notion of substitutability introduced at the level of market definition may be misunderstood at the level of defining (and providing) access remedies as a possibility to leave it up to the free discretion of the incumbent operator whether to provide physically unbundled local (sub-)loops or an 'equivalent' virtual product. BUGLAS is of the view that in the Recommendation, utmost precaution is taken to prevent any such misunderstanding. To this end, BUGLAS urges the Commission to include a clarification to the effect that the provision of a VULA product as an access remedy is only the last resort. A VULA should be an upstream remedy where (and limited to scenarios in which) the provision of a physically unbundled product as requested by the incumbent's competitor is not feasible due to constraints which result from the use of vectoring. The Commission itself has reiterated the rationale of such regulatory intervention. Regulation should primarily occur at the wholesale level which is closest to the retail level, before further upstream markets are considered. Although this rationale appears to apply primarily to the relation between the current markets 4 (physical unbundling takes priority) and 5 (virtual access), it must also apply at the level of designing remedies within a newly defined wholesale local access market that includes both physically unbundled and equivalent virtual products: where physically unbundled access is requested, it must be granted by priority where technically possible; competing access seekers may only be referred to a VULA product where physical unbundling is not feasible as the result of the use of vectoring technology. As a remedy, a VULA product must remain the exception.

Moreover BUGLAS is concerned that VULA is not clearly defined. Current experience in the wake of the so-called vectoring-decision adopted by the Germany Regulatory Authority (BNetzA, as per its German initials) shows that where the incumbent operator is obliged to provide a VULA product at the wholesale level, it tries to escape its obligations in the absence of clear specifications of the required layer 2 bitstream: Currently, Deutsche Telekom limits itself to providing layer 3 bitstream access at the MdF, although a layer 2 bitstream access would be required. Therefore, BUGLAS encourages the European Commission to take appropriate measures which enable National Regulatory Authorities to clearly define a VULA product at the wholesale level. In the view of BUGLAS, such a VULA

product must be available at every cable splitter station (sub loop) where the incumbent uses vectoring technologies. Access seekers must be in the position to freely configure that wholesale product. Further a VULA product must be ready to enable multicast applications. The German vectoring-decision of BNetzA still has shortcomings, since there were no clear criteria which would define a VULA product.

Where VULA products are not available at the level of sub-loops or where the incumbent operator remains free to provide layer 3 bitstream (instead of a properly defined layer 2 bitstream product), or where the bitstream product cannot be freely configured or cannot enable multicast applications, existing investments of BUGLAS operators into FTTC roll-out (as a necessary intermediate step towards FTTH) are frustrated, future planned investments into FTTC roll-out by alternative operators are inhibited. For those operators which have been following the EU Commission's mantra of the ladder of investment thus far, such as the BUGLAS carriers, the economic incentive to access the cable splitter and to get closer to the end customer in order to provide future proof infrastructure solutions would be removed by regulation in the absence of clear-cut requirements. Infrastructure competition would be frozen in at the current level.

2.1.2 A Market for Central Access for Mass Market Products and a (new) Market for High Quality Bandwidth Products

BUGLAS understands that the draft Recommendation has split the current market 5 into a residential and a business segment. In the draft Recommendation, the central access market for mass products (residential segment) is listed as a sub-market (lit. b) under the newly defined wholesale local access market. BUGLAS seeks further clarification that the Wholesale Central Access Market (WCA-market) corresponds with the 'classic' best effort bitstream market at the MdF level and is not blended into an overall bitstream access market (also including local access products). To this end, further clarification would be appropriate to the effect that products and remedies on the WCA-mass-market (market 3 lit. b) are not to be (mis-)understood as remedies for competition problems identified at the local access market (market 3 lit. a). We have extensively out-

lined the reasons for this above under section 2.1.1. A clearer distinction of the markets would be desirable.

BUGLAS remains concerned however, that the split of the classic bitstream market into a residential segment and a business segment (as complemented by leased line products) mainly serves the purpose of providing arguments in favor of achieving de-regulation at the sub-national level (mainly by removing the ubiquity of service requirement which exists in the market segment for business customers from the market for residential customers).

BUGLAS' carriers heavily rely on the ladder of investment, thus including bitstream products to end customers when planning investments in new FTTX deployment areas. Any artificial distinction of business and residential segments of bitstream markets which would expose the residential segment more to a potential regional de-regulation of the incumbent affects the alternative carriers' capacity to plan and to commit to further FTTX investments.

In conclusion, BUGLAS does not share the view that there is a need (or a justification) to split and reorganize the current markets 5 and 6.

2.2 Geographic market segmentation

2.2.1 Formal Aspects

BUGLAS is of the view that the scope of the Recommendation on Relevant Product Markets should strictly be limited to products and services susceptible to ex ante regulation. Article 15 of the Framework Directive appears to be very explicit in limiting the powers of the Commission to recommending product and service markets. By contrast, Article 15 leaves it explicitly up to the Member States to define the relevant geographic scope of the market, although in accordance with SMP guidelines. BUGLAS would therefore expect any reference to a regionalized approach towards market definition be deleted from both, the (draft) Recommendation and the (draft) Explanatory Note.

Further, BUGLAS understands that the European Commission has summarized its experience from the so-called Article 7 procedures in which NRAs presented geographic segmentations of broadband markets. However, that experience is limited to a very small number of cases in a small number of EU Member States. BUGLAS is of the view that these cases do not set a general trend. In relation to the small number of cases, the discussion on a regionalized approach in regulation takes a disproportionately large space. This sets the wrong priorities for most NRAs at the wrong point in time, in particular (although without limitation) insofar as the current market 4 (the future wholesale local access market) is concerned, as we shall outline immediately below.

2.2.2 Substantive Aspects and Concerns

In the view of BUGLAS, a geographic segmentation of wholesale markets which would result in the de-regulation of the German incumbent, Deutsche Telekom, would be significantly premature. This holds true in a scenario where the relevant markets, as such, would be defined (and eventually de-regulated) at the regional level and in a scenario where 'only' the remedies would be differentiated along regional boundaries, such as for example in the case of lifting the obligation of cost based pricing of wholesale products at the regional level.

In particular, the market structures which – according to precedent from other EU jurisdictions – would be required for such a regional approach do not exist in Germany at present and will not exist in the foreseeable future. We see no evidence which would allow identifying regions

- in which the conditions of competition would differ fundamentally from other regions;
- which would be sufficiently large for the purpose of regulatory oversight; and
- which would have stable boundaries.

As it is true that the network operators organized within BUGLAS initially started to deploy their FTTB/H networks in densely populated areas, the deployment of these NGA networks is in principle able to

fuel the discussion on a regional approach in regulation. However, the current state of FTTB/H deployment is far from reaching an order of magnitude which would co-determine the conditions of competition in a sufficiently large area to an extent that a regionalized approach in regulation could be justified.

In this respect, a number of aspects must be considered:

First, our network operators deploy their FTTB/H networks consecutively deployment area by deployment area which are located within densely populated regions (the size of which might be sufficiently large to be considered as a sub-national market). By contrast, FTTB/H networks are at this stage not ubiquitously deployed in areas which might be considered as sufficiently large for regional regulatory approaches. Rather, our network operators follow the concept of the 'ladder of investment', thus using – step by step – bitstream remedies, procuring wholesale products (such as unbundled local loops) from Deutsche Telekom and deploying FTTC as intermediate steps, gain customers' confidence and gradually deploy their FTTB/H networks deployment area by deployment area which are located within a region or larger city. This development will still take years to achieve the completion of FTTB/H roll-out in areas sufficiently large to be considered as units for (de-)regulation. Moreover, our members increasingly deploy NGA networks in less densely populated areas which are located in the (more rural) vicinities of their primary deployment areas. At this point, it becomes clear that for the foreseeable future, these areas are neither sufficiently large nor sufficiently stable to justify a regional approach in regulation.

Secondly, if despite the above, the regions within which the operators organized within BUGLAS proceed with the deployment of FTTB/H networks deployment area by deployment area, were overlaid with an approach towards de-regulating the incumbent operator, the consequences for further broadband deployment, for infrastructure competition and for the achievement of the digital agenda targets would be fatal:

Regional differentiation would most likely result in the definition of 2 or 3 clusters, mainly differentiating densely populated areas from rural areas, thus making deregulation most likely in densely populated

areas where a sufficient number of competing infrastructures would seem to emerge.

Consequently, the incumbent operator could either refuse access to wholesale products, such as unbundled local loops, altogether, or it could make such products significantly more expensive. Investments into the deployment of FTTC as a necessary intermediate step would be prevented or frustrated, the further deployment of FTTB/H by alternative operators would be rendered impossible from an economic perspective.

To the extent that the incumbent could refuse access to wholesale products altogether (in densely populated areas), the model of the 'ladder of investment' would break down, infrastructure competition would be frozen in at a 'status quo', e.g. at the level of a number relatively small FTTB/H deployment areas readily developed inside an region designated for de-regulation. To the extent that wholesale products would still be available, although at higher prices, FTTC and FTTB/H deployments would be less likely to be economically feasible, at least however, negative knock-on effects on the development of infrastructure competition in less densely populated areas would be likely to occur. In particular, rolling out broadband infrastructures in rural areas would become more expensive or economically unfeasible, as costs would have to be re-allocated to a smaller number of MdF, thus raising the unit cost for unbundled sub-loops (or equivalent products) at the level of the cable splitter. Any remaining incentives for the deployment of broadband would be removed in 'white' areas.

Both developments would stall the emerging trend towards infrastructure competition.

Against the background of the situation which we face in Germany, we believe that any policy which would actively encourage or even require regulatory authorities to consider the possibility of de-regulating the incumbent at a regional level would be inappropriate, premature and detrimental to develop a sustainable infrastructure competition in the long run.

3. Conclusion

The draft Recommendation in its current form may lead to confusion and misunderstandings at the level of remedies to the extent that physically unbundled wholesale access products are considered as being substitutable with virtual products at the level of market definition. Such misunderstandings are to be avoided.

Any push towards de-regulation at a sub-national level is premature and is likely to freeze in the first serious signs of emerging infrastructure competition at the current level.

We are open to support the European Commission in providing our further observations and views.

Yours sincerely

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