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Autoriteit Consument & Markt
(ACM)

Zurichtoren – Muzenstraat 41
2511 WB Den Haag
Netherlands

For the attention of:
Mr Chris Fonteijn
Chairman

Mr Henk Don
Vice chairman

Fax: +31 70 722 23 55

Dear Sirs,

**Subject: Commission Decision concerning Case NL/2013/1439:
Implementation of the FttH ODF access tariff regulation in the
Netherlands**

Comments pursuant to Article 7(3) of Directive 2002/21/EC

I. PROCEDURE

On 22 March 2013, the Commission registered a notification from the Dutch national regulatory authority, Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA)¹, concerning the wholesale market for (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location² in the Netherlands.

The national consultation³ ran from 7 December 2012 to 25 January 2013.

On 3 April 2013, a request for information⁴ was sent to the newly formed Authority for

¹ Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Corresponding to market 4 in Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

³ In accordance with Article 6 of the Framework Directive.

⁴ In accordance with Article 5(2) of the Framework Directive.

Consumers and Markets (ACM)⁵ and a response was received on 8 April 2013.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The wholesale market for (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location in the Netherlands was previously notified to and assessed by the Commission under case NL/2011/1278⁶. OPTA found the relevant market to consist of two sub-markets. On the one hand, a market for local loop unbundling comprising Main Distribution Frame (MDF) and Sub-Distribution Frame (SDF) access over copper, as well as Fibre to the Home (FttH) Optical Distribution Frame (ODF) access on which KPN/Reggefiber⁷ (Reggefiber) was found to have significant market power (SMP) and made subject to a full set of obligations.

On the other hand, OPTA identified a market for Fibre to the Office (FttO) ODF access - the analysis of which was notified to and assessed by the Commission under case NL/2012/1407⁸ - on which KPN was also found to have SMP and made subject to a full set of obligations.

MDF and SDF access over copper loops is regulated by OPTA by means of a safety cap, i.e. a tariff ceiling based on the estimated embedded direct costs (EDC)-based prices for 2011 and increased with the consumer price index for each year of the regulatory period. OPTA departs from its usual EDC cost orientation regulation to better counter uncertain future network volume developments and ensure regulatory certainty.

FttH and FttO ODF access are both regulated on the basis of a discounted cash flow (DCF) model⁹ which OPTA considers best suited in the light of the considerable uncertainties surrounding the ultimate long-term access cost for these new services.

The Commission invited OPTA to review its analyses upon entry into force of any recommendation on costing methodologies.

II.2. Current draft measure

The current draft measure implements the DCF-based FttH ODF access tariff regulation as imposed by OPTA in case NL/2011/1278¹⁰.

⁵ OPTA merged on April 1, 2013 with the Netherlands Competition Authority and the Netherlands Consumer Authority into the newly formed entity named Authority for Consumers and Markets.

⁶ C(2011)10075.

⁷ KPN and Reggefiber B.V. together established a joint venture, Reggefiber Group B.V, with the objective of constructing fibre loop networks.

⁸ C(2012)9967

⁹ The DCF model considers all wholesale revenues resulting from the provision of access to Reggefiber's FttH network, i.e. to third parties as well as to KPN. The costs correspond to those incurred by Reggefiber according to projects for its fibre roll-out where civil engineering is considered to be newly built and therefore none of the existing civil infrastructure assets are reused.

¹⁰ OPTA imposed FttH ODF-access price regulation which was first notified to and assessed by the Commission under case number NL/2008/826. The implementation decision was notified to and assessed by the Commission under case number NL/2009/868.

OPTA/ACM verifies at the start of each new regulatory period if the ceiling of the monthly tariff for unbundled FttH access is still effective to prevent excessive pricing by comparing Reggefiber's internal rate of return (IRR)¹¹ with the all-risk weighted average cost of capital (WACC). If such IRR is lower than the all-risk WACC, then the tariff ceiling is not adjusted by OPTA/ACM.

On the basis of Reggefiber's updated and audited DCF cost model 2012, OPTA finds that the IRR amounts to [...] %. Since the all-risk WACC amounts to 9.39%¹² OPTA concludes that there is no reason for a downward adjustment of the price caps for the unbundled FttH access.

In the present draft measure, OPTA therefore sets the maximum tariffs, retroactively for 2012 and until the next market analysis, by allowing an annual CPI increase¹³ for (i) unbundled FttH ODF access line for the currently 14 different CAPEX-areas¹⁴, (ii) collocation per Area Point of Presence (PoP)¹⁵ and (iii) the city-ring connection of the Area PoP with the City PoP¹⁶, (iv) a connection contribution per Area PoP¹⁷, (v) patching and de-patching¹⁸ tariff ceilings, (vi) the one-off telco-telco migration¹⁹.

Reggefiber also offers new services²⁰ for which OPTA endorses the tariffs proposed by the former, *inter alia* a nationwide unbundled FttH ODF access line tariff²¹, new connection and collocation services and tariffs for Area PoPs of a different size than the standard Area PoP, additional features for patching, and an ODF information product.

OPTA sets the discounts that Reggefiber is allowed to grant depending on the total number of lines in a connection area as well as the discount percentage²² for the national tariff structure. In its response to the request for information, ACM confirmed that Reggefiber cannot allow itself (i.e. KPN) higher discounts than any other (third) party.

¹¹ The IRR is the discount rate that makes the net present value of the future cash flows (i.e. revenues minus costs) of Reggefiber's business case equal to zero.

¹² i.e. the WACC applicable to the copper network after taxes (5.89%) plus a fibre increment (not calculated by OPTA since the present IRR is in any case significantly lower than the all-risk WACC without this increment and would therefore not impact the final outcome of the return test), plus an increment for asymmetric regulatory risk (3.5%).

¹³ i.e. the annual tariff ceilings are set through the annual CPI change of the previous year.

¹⁴ Ranging from 15.2 to 25.46€/month in 2012 and from 15.52 to 25.99€/month in 2013.

¹⁵ 524.37€/in 2012 and 535.38€/in 2013.

¹⁶ 629.24€/in 2012 and 642.45€/in 2013.

¹⁷ i.e. a contribution to the investment costs made by Reggefiber serving to directly recoup the initial investments in the fibre network (3146.21€/in 2012 and 3212.28€/in 2013).

¹⁸ i.e. operations at the ODF/telephone exchange. The DCF model assumes that a line is patched every 7 years. Patching: 104.88€ and 107.08€ in 2012 and 2013 respectively including an investment contribution and a cost compensation in 2012; de-patching: 36.71€/in 2012 and 37.48€/in 2013.

¹⁹ i.e. transfer of an existing (already connected) local loop as the result of e.g. commercial switching of an end-user between different telecom providers, the technical migration of a specific line from wholesale broadband access to ODF access with the same telecom provider. These costs only consist of operational costs (47,20€/in 2012 and 48,19€/in 2013).

²⁰ A new service is a service which offers another added value by means of a different functionality, price, tariff structure, quality, or delivery conditions.

²¹ i.e. the weighted average of all maximum monthly line tariffs per CAPEX area (18,84€/for 2013).

²² i.e. 7.88% in 2013.

This is one of the consequences of the non-discrimination obligations that are imposed on Reggefiber. Reggefiber has the responsibility to comply with these obligations on a continuous basis. This means that Reggefiber has to ensure that every offer it makes complies with the margin squeeze test as imposed by means of case NL/2011/1278.

III. COMMENTS

The Commission has examined the notification and the additional information provided by OPTA/ACM and has the following comment:²³

Price control

The Commission reiterates in the present FttH ODF access price control implementation case the principles of its comment in OPTA's FttO ODF access case NL/2012/1407.

Given the importance of regulating key wholesale access products in the transition period to NGA networks in an effective and consistent manner across the EU, the Commission recalls that it is currently finalizing a Recommendation that sets out the regulatory principles to enhance the broadband investment environment. This Recommendation will provide guidance on the implementation of the non-discrimination obligation and of costing methodologies for key wholesale access prices. The Commission therefore requests ACM to review its costing methodology in line with the forthcoming Recommendation once adopted.

The Commission also emphasizes that in principle an *ex ante* price control obligation for fibre infrastructure would not be necessary if there were sufficient competition safeguards in place. In this regard, ACM should consider the proportionality of imposing an Equivalence of Input (EoI) obligation, which generally requires the SMP operator to provide services and information to their access seekers on the same terms and conditions, the same time scales using the same systems and processes with the same degree of reliability and performance, as it does to KPN. As EoI can only be fully implemented over a longer time period, this requirement could consist in immediate terms in a firm obligation on and commitment by the SMP operator to undertake certain key initiatives over a set time period. Such a non-discrimination obligation should also include the requirement to ensure technical replicability, foresee milestones setting out the time table for the implementation of relevant key performance indicators as well as service level agreements necessary for the provision of the key regulated wholesale access services, and provide an effective enforcement and monitoring mechanism. ACM should also foresee an economic replicability test that ensures that as a result of the pricing flexibility for NGA access prices, the margin between the relevant retail price and the relevant NGA-based regulated wholesale access inputs covers the incremental downstream costs and a reasonable percentage of common costs.

Against this background, the Commission asks ACM to engage as soon as possible in dialogue with stakeholders to assess the feasibility of implementing EoI in the Netherlands. It could lift the cost orientation requirement for the SMP operator's fibre lines as soon as the necessary safeguards are effective in the Netherlands and ACM would establish that the SMP operator's pricing behaviour is properly constrained by either cost-oriented copper prices or by significant

²³ In accordance with Article 7(3) of the Framework Directive.

competitive constraints, indicated in particular by the presence of well-developed alternative infrastructures.

Pursuant to Article 7(7) of the Framework Directive, ACM shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC²⁴ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission²⁵ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.²⁶ You should give reasons for any such request.

Yours sincerely,
For the Commission,
Robert Madelin
Director-General

²⁴ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

²⁵ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

²⁶ The Commission may inform the public of the result of its assessment before the end of this three-day period.