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Onafhankelijke Post en
Telecommunicatie Autoriteit
(OPTA)

Zurichtoren - Muzenstraat 41
2511 WB Den Haag
Netherlands

For the attention of:
Mr. Chris A. Fonteijn
Chairman

Fax: +31 70 315 92 04

Dear Mr Fonteijn,

Subject: Commission decision concerning Case NL/2011/1278: market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location in the Netherlands

Comments pursuant to Article 7(3) of Directive 2002/21/EC¹

I. PROCEDURE

On 28 November 2011, the Commission registered a short notification from the Dutch national regulatory authority, the Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA). The notified measure concerns OPTA's assessment of the wholesale market for (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location in the Netherlands.

The national consultation² ran from 23 June 2011 until 18 August 2011.

On 2 December 2011 a request for information³ was sent to OPTA and a response was

¹ 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, OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC (Better Regulation Directive), OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12 (Framework Directive).

² In accordance with Article 6 of the Framework Directive.

³ In accordance with Article 5(2) of the Framework Directive.

received on 7 December 2011.

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

II. DESCRIPTION OF THE DRAFT MEASURES

II.1. Background

The latest review of the wholesale markets for (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location⁴ in the Netherlands was notified to and assessed by the Commission under case number NL/2010/1041⁵. In this decision OPTA re-confirmed the inclusion of fibre to the office delivered at the optical distribution frame (ODF-FttO)⁶ in the relevant product market following a court⁷ ruling overturning OPTA's 2008 decision. OPTA argued mainly on the basis of chain substitution between copper and fibre on the underlying retail market and the lack of significant price differences between lower and higher capacity products.

In its comments letter, the Commission noted that it was not fully convinced that competitive pressures apply to the same extent in business parks where there appears to be a business customers' demand for symmetrical capacity connections that can only be provided by fibre networks laid in those areas (FttO networks). However, in the absence of sufficiently important price differences and of plans by FttO operators to further expand their networks to other business parks (all business parks largely having been served), and the evidence provided by OPTA indicating that KPN would have SMP also on a differently defined product market, the Commission only invited OPTA to strengthen its decision in terms of market definition.

II.2. Market definition

On 3 May 2011 the Dutch Court (CBb) again overturned OPTA's latest physical network access market decision on the basis of insufficient evidence that ODF-FttO access belongs to the same market as main distribution frame (MDF), sub distribution frame (SDF), and ODF-FttH access. Therefore, OPTA further investigated (i) the development of the fibre infrastructure and the impact that this could have on the underlying costs of the ODF-FttO tariff and (ii) the technical capacity to deliver higher capacity and quality via MDF access⁸. On the basis of that analysis OPTA reaches the conclusion that ODF-

⁴ Corresponding to market 4 of the 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, (the Recommendation) OJ L 344, 28.12.2007, p. 65.

⁵ SG-Greffe (2010) D/3098.

⁶ The following technical terms will be used and abbreviated as follows: Fibre to the Office (FttO), Main Distribution Frame (MDF), Sub Distribution Frame (SDF), Optical Distribution Frame (ODF) Fibre to the Home (FttH).

⁷ College van Beroep voor het bedrijfsleven (CBb).

⁸ OPTA considers, in particular, that in order to deliver a higher capacity and quality via MDF access use must be made of several MDF connections per location (for example two or four).

FttO access no longer belongs to the same relevant market⁹. OPTA will notify the analysis of the ODF FttO market separately. Other local loops like coax local loops, dark fibre, mobile networks, WiFi, WLL and satellite connections are excluded from the relevant market.

The availability of (point to point) FttH networks continues to increase in the Netherlands. OPTA explains that in the coming regulatory period the number of installed FttH connections is expected to grow to between 1.2 million and 1.8 million households in 2014, covering 16% to 25% of the total number of households. In the meantime, KPN is upgrading its copper network.¹⁰

OPTA also concludes that the relevant geographical market for unbundled access is national.

II.3. Finding of significant market power

OPTA concludes that KPN has SMP in the relevant market on the basis of *inter alia* the following criteria: market shares¹¹, economies of scale and scope, control over an infrastructure with a national coverage which is not easily replicable, the lack of countervailing buying power and the benefits of vertical integration.

II.4. Regulatory Remedies

In the current draft measure, OPTA proposes the imposition of the following obligations on the SMP operators:

a) Access

KPN is required to grant alternative operators unbundled access to its copper network at MDF level, both full and shared access, as well as at SDF level, and on its fibre network at ODF-FttH level, including access to associated facilities¹².

OPTA indicates, however, that KPN may consider a request for SDF access unreasonable at those sites where it uses vectoring. OPTA underlines that a SDF access request may qualify as unreasonable as long as a suitable and complete alternative is provided by KPN. This alternative is subject to negotiation between KPN and other access seekers¹³.

⁹ OPTA underlines that even if the observed price differences in the underlying retail market are still limited this cannot be assumed at wholesale level. On the contrary, the uncertainty about the degree and speed of the roll out of fibre by KPN to company locations and the upgrade of the copper networks render it unlikely that the difference between the costs of ODF-FttO access and unbundled copper access is small. If FttO networks are rolled-out less swiftly, the costs per unbundled FttO connection will increase. Consequently, the price difference between unbundled copper and ODF-FttO access will also increase. OPTA concludes that ODF-FttO access exercises insufficient competitive pressure on copper unbundling and that indirect demand substitution is insufficiently strong to make a SSNIP of unbundled copper unprofitable.

¹⁰ The upgrade of the copper network with VDSL, vectoring and phantoming will increase speeds to 20-150 Mbit/s in the short to medium term. In 2012 KPN will offer a guaranteed minimum speed of > 40Mbit/s to approximately 71% of households (16% with fibre, 55% with copper) and in 2013 it will offer the same speed to approximately 79% of households (21% with fibre, 55% with copper).

¹¹ KPN together with Reggefiber has a market share of nearly 100% on the wholesale market for unbundled access. Other alternative operators offering fibre access have a market share of 0.5%

¹² There is no obligation to provide access to ducts given that in the Netherlands fibre cabling is put directly into the ground without a duct infrastructure.

¹³ OPTA considers any negotiated alternative access product to be a viable outcome, and suggests that

As regards the migration towards NGA-based access products, KPN can only withdraw unbundled access under the following conditions: (i) a reasonable phasing-out period¹⁴, (ii) the availability of regulated reasonable alternatives, (iii) equal handling as regards the phasing out of related services KPN itself uses, (iv) clear phasing-out procedures and (v) guarantee of service in case of migration.

b) Non-discrimination and transparency

KPN is required to sell the services and associated facilities at the same terms and conditions as to its own retail business¹⁵. The non-discrimination obligation encompasses also the obligation for KPN to co-operate with wholesale customers to enable them to provide their end-users with the same quality as KPN itself does.

In addition, the non-discrimination obligation prohibits prices that would lead to a margin squeeze. A margin squeeze test is imposed between the wholesale unbundling market and the downstream wholesale markets¹⁶.

As regards transparency, KPN is obliged to publish a Reference Unbundling Offer.

c) Price regulation, cost accounting and accounting separation

OPTA points out that a significant degree of uncertainty renders an accurate estimate of the future cost levels and volumes of copper lines unfeasible¹⁷. This situation is aggravated in the Netherlands by a strong cable sector and by the incumbent's investment in both copper and fibre which makes it difficult to formulate an accurate estimation of the volumes of each network. OPTA therefore believes that it is necessary to consider an alternative price regulation which maintains the advantages of pure cost-orientation in the transition period from copper to fibre. Therefore OPTA intends to apply a safety cap¹⁸ for SDF and MDF access¹⁹ and corresponding facilities in order to ensure

imposing virtual alternative to SDF access would mean an unnecessary restriction of the alternatives that can be negotiated. In the response to the RFI, OPTA underlines that KPN has an incentive to quickly provide clarity on the availability, pricing and quality of the alternative access product so that the access obligation at SDF level can be withdrawn.

¹⁴ For the de-commissioning of the MDF location the phasing-out period is three years (24 months of announcement period and 12 months of migration period). Even if the operators didn't reach a final agreement on the conditions of phasing-out MDF access, OPTA considers this period to be reasonable, given the obligation on KPN to provide a reasonable regulated alternative service.

¹⁵ The non-discrimination obligation will be applied to (i) the availability of services and network maintenance periods, (ii) recovery times in case of interruption, (iii) the ordering and delivery process, (iv) the process of announcing new or altered services (prior to and during the notice period of new or modified services the relevant wholesale service may not be offered and/or supplied in retail offers), (v) the provision of information process.

¹⁶ The related markets are the wholesale broadband access, rental lines, and wholesale fixed telephony markets (assuming that KPN is an efficient operator). There is no margin squeeze test at retail level.

¹⁷ This uncertainty is mainly related to the (i) the remaining life of the copper network; (ii) the level of the future investment in the copper network; (iii) the decreased predictability of the maintenance costs; (iv) the volumes of the active networks (DSL-Fibre-Cable).

¹⁸ OPTA is aware that the deviation from cost orientation is an inherent feature of the safety cap, but it also underlines that the tariff ceiling is a reasonable approximation of the cost price which contributes toward both the prevention of excessively high tariffs and margin erosion. The safety cap is imposed on each single tariff and not on a basket or average of tariffs.

¹⁹ If new services are introduced during the regulatory period the use of a safety cap is not possible because of the lack of a starting tariff. In this case OPTA considers that the existing WPC/EDC method of cost orientation will be applied.

regulatory certainty during the transition period from an old to a new technology. OPTA intends to set the tariff ceiling using the estimated cost prices for 2011 and adding the consumer price index for each year of the regulatory period.²⁰ OPTA specifies that this measure is expected to be extended beyond the period 2012-2014 as it considers the safety cap as a measure for a longer term.

For ODF FTTH access OPTA proposes to continue to apply cost orientation based on a discounted cash flow (DCF) model already imposed in the previous market analysis²¹.

III. COMMENTS

On the basis of the present notification and the additional information provided by OPTA, the Commission has the following comments²²:

Lack of notification of the full wholesale market for (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location in the Netherlands

The Commission notes that, contrary to OPTA's previously notified draft measures, the relevant product market now excludes ODF FttO access. For the latter OPTA intends to adopt a separate decision containing a full market review and regulatory obligations. The draft ODF-FttO decision has not yet been notified under the Article 7 consultation mechanism.

The Commission points out that in order to come to a consistent evaluation of the wholesale market for physical network infrastructure access in full knowledge of the facts, the market for FttO access should have been notified at the same time. While the Commission does not object to the market definition proposed by OPTA given the specific national circumstances, the exclusion of FttO from the market definition could have been substantiated in a number of respects. OPTA could have provided more information with regard to technical differences between FttH and FttO ODF-access, the technical capacity to deliver higher capacity and quality via MDF, the potential differences in FttH and FttO business plans, and quantitative data on market developments and in particular FttO roll-out plans by the different operators active on the ODF-FttO access market.

The Commission urges OPTA to elaborate on the above points in its final version of the currently notified draft measure as well as in its forthcoming draft regulatory measures for the ODF-FttO access market, prior to EU notification.

Absence of a regulated alternative (virtual) product to SDF physical access

OPTA maintains the obligation to provide access at SDF level. However, the Commission notes that KPN has already planned for 2012 the upgrade of the copper network with new technologies such as vectoring, which are at the

²⁰ The CPI for the 2011 is predicted to be 2.2 % therefore the basic MDF access tariff will increase from EUR 6.54 per month in 2011 to EUR 6.68 per month in 2012.

²¹ In the response to the RFI OPTA states that assuming that Reggefiber is not over-performing and makes no excessive returns considering the inflation level of 2.2% the maximum tariff per line for ODF FttH access in the different areas will increase from EUR 14.86-17.94 per month in 2011 to EUR 15.19-18.33 per month in 2012.

²² In accordance with Article 7(3) of the Framework Directive.

moment and in near future technically incompatible with SDF access. It is, therefore, likely that the number of cases where KNP considers a request for access at SDF level unreasonable will increase over the review period. Although in these cases the parties could negotiate an alternative (virtual) access product or submit a dispute to OPTA, this procedure seems to lead to a significant degree of uncertainty regarding availability, characteristics, and prices of alternative access products. Moreover, such a complex procedure could have an impact on the timely implementation of new technologies enabling higher speed services delivered over the copper network.

The Commission invites OPTA to consider imposing on KPN a virtual alternative for local access in those locations where SDF access is no longer technically feasible. Virtual alternative for local access should to the greatest possible extent have the same functionality as local loop unbundling.

Price control

OPTA proposes to impose a price control for the existing SDF and MDF access services and corresponding facilities, which corresponds to a safety cap instead of maintaining a pure cost-orientation. OPTA justifies the proposal with the need to guarantee regulatory certainty in the coming regulatory period given that future copper cost levels cannot be accurately predicted.

The Commission has repeatedly held that in order to ensure regulatory certainty for access seekers and, thus, promote efficient investment by all operators, access prices need to be cost-oriented. Even when a tariff ceiling is to certain extent a reasonable approximation of the cost price and contributes to the prevention of excessively high tariffs and margin erosion, it cannot guarantee a proper cost-orientation of access prices for a period which according to OPTA could last as long as ten years, i.e. far beyond the upcoming regulatory period.

The Commission invites OPTA to reassess in the forthcoming regulatory period if the currently proposed price control measure is still justified. Moreover, 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 carried out a public consultation on costing methodologies for such products. In the light of this, the Commission invites OPTA to review its analysis upon entry into force of any relevant recommendations.

Pursuant to Article 7(7) of the Framework Directive, OPTA shall take the utmost account of comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measures and, where it does so, shall communicate them 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/EC²³ the Commission will publish this document on its website. The Commission does not consider the information contained

²³ 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.

herein to be confidential. You are invited to inform the Commission²⁴ 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 publication²⁵. You should give reasons for any such request.

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

²⁴ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

²⁵ The Commission may inform the public of the result of its assessment before the end of this three-day period.