Brussels, 13.6.2012
C(2012) 3770

COMMISSION RECOMMENDATION

of 13 June 2012

in accordance with Article 7a 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") in Case NL/2012/1284: call termination on individual public telephone networks provided at a fixed location in the Netherlands and in Case NL/2012/1285: voice call termination on individual mobile networks in the Netherlands

only the Dutch version is authentic

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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")[1] and in particular Article 7a (5) thereof,

Having called on interested parties to submit their observations pursuant to the provision cited above[2] and having regard to their observations,

Having regard to the opinion of the Body of European Regulators for Electronic Communication (BEREC)[3],

Whereas:

1. PROCEDURE

(1) From 7 November 2011 until 19 December 2011, the Dutch Regulatory Authority, *Onafhankelijke Post en Telecommunicatie Autoriteit* (OPTA), carried out national

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 (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 Notice published at: https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp

3 Opinion of BEREC of 23 March 2012, BoR(12)23, published at: http://erg.eu.int/doc/2012/bor12_23.pdf.

consultations[4] concerning a partial revision of (i) the fourth review of the wholesale market for call termination on individual public telephone networks provided at a fixed location and (ii) the third review of the wholesale market for voice call termination on individual mobile networks[5] in the Netherlands.

(2) On 12 January 2012, the Commission registered two notifications concerning the partial revision of the above-mentioned markets.

(3) On 20 January 2012, a request for information (RFI)[6] was sent to OPTA, and a response was received on 24 January 2012. A supplementary RFI was sent on 25 January 2012 and a response was received on the same day.

(4) On 13 February 2012 and 14 February 2012, the Commission, pursuant to Article 7a(1) of the Framework Directive, informed OPTA and BEREC, respectively, of the reasons why it believed that the draft measure would create a barrier to the internal market and its serious doubts as to its compatibility with EU law (the "Serious doubts letter").

(5) On 27 February 2012 and on 28 February 2012, the Commission received two third party observations[7].

(6) On 23 March 2012, BEREC delivered its opinion to the Commission[8].

(7) On 18 April 2012, a meeting between OPTA, BEREC and Commission took place in order to identify the most appropriate and effective measure addressing the Commission's serious doubts in line with Article 7a (4) of the Framework Directive.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Previous notifications

2.1.1. Call termination on individual public telephone networks provided at a fixed location

(8) The fourth round review of the market was notified to and assessed by the Commission under case NL/2010/1079[9]. OPTA proposed to designate all (39) active operators as having significant market power (SMP) and to impose the remedies of access, transparency, and price control. It also proposed to impose price caps for fixed termination services and direct interconnection services calculated on the basis of the pure BULRIC methodology.

(9) In OPTA's subsequent final decision of 7 July 2010 fixed call termination rates were imposed as follows:

4 In accordance with Article 6 of the Framework Directive.

5 Corresponding to market 3 and market 7 in Commission Recommendation 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 OJ L 344, 28.12.2007, p. 65-69.

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

7 In accordance with Article 7a(2) of the Framework Directive.

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

9 SG-Greffe(2010)D/7848.

FTRs price caps (in EUR/min)					
Level	2nd half 2010	1st half 2011	2nd half 2011	01/01/2012 - 01/09/2012	01/09/2012 onwards
Local	0.0050	0.0052	0.0053	0.0045	0.0036
Regional	0.0071	0.0071	0.0072	0.0054	0.0036

(10) OPTA's decision of 7 July 2010 was partially annulled by the Trade and Industry Appeal Tribunal (the "Tribunal") on 31 August 2011. The Tribunal annulled the market analysis relative to the exclusion of 085 numbers and the inclusion of 084/087 numbers into the market definition and asked OPTA to take a new decision on 085 numbers.

(11) In addition, the Tribunal ordered OPTA to take a new decision regarding both the price caps for fixed termination rates and for direct interconnection rates on the basis of the BULRIC plus methodology. As an interim measure, the Tribunal held that the price cap of EUR 0.0072/min for regional traffic and EUR 0.0053/min for local traffic would apply until OPTA adopts a new decision on the price caps for fixed termination rates.

2.1.2. Voice call termination on individual mobile networks

(12) The third round review of the market was notified to and assessed by the Commission under case NL/2010/1080[10]. OPTA proposed to designate all (10) active operators as having SMP and imposed the remedies of access, transparency, and price control. It proposed to set a symmetric price cap for mobile call termination rates based on the pure BULRIC costing methodology, as well as capped prices for direct interconnection.

(13) OPTA's subsequent final decision of 7 July 2010 imposed mobile call termination rates as follows:

MTR price caps (in EUR/min)				
	07/07/2010-01/01/2011	01/01/2011-01/09/2011	01/09/2011-01/09/2012	01/09/2012 onwards
All operators	0.056	0.042	0.027	0.012

(14) OPTA's decision of 7 July 2010 was partially annulled by the Tribunal in the above-mentioned decision. The Tribunal ordered OPTA to set the price cap for mobile termination rates at EUR 0.056/min as of 7 July 2010, EUR 0.042/min as of 1 January 2011, 0.027/min as of 1 September 2011, and EUR 0.024/min as of 1 September 2012

[10] SG-Greffe(2010)D/3765.

on the basis of the BULRIC plus methodology and OPTA's own calculations. It also ordered OPTA to take a new decision regarding direct interconnection rates on the basis of the same costing methodology.

2.2. The notified draft measure

2.2.1. Market definition

2.2.1.1. Call termination on individual public telephone networks provided at a fixed location

(15) OPTA includes 085, 084/087 numbers (without a subsequent service), 088, 112, 14xy and 116xyz in the market definition of its notified measure.

2.2.1.2. Voice call termination on individual mobile networks

(16) The market definition relative to mobile termination remains valid as it was not changed by the Tribunal.

2.2.2. Finding of significant market power

2.2.2.1. Call termination on individual public telephone networks provided at a fixed location

(17) OPTA considers that each operator terminating fixed calls, including, without limitation, 085 numbers and 084/087 numbers without subsequent service, has SMP on its respective networks.

2.2.3. Regulatory Remedies

2.2.3.1. Call termination on individual public telephone networks provided at a fixed location

(18) OPTA proposes to set the price caps for fixed termination rates on the basis of the BULRIC plus costing methodology. The measure notified by OPTA sets the price cap at EUR 0.0037/min.

(19) This price cap has been set on the basis of new information on the VoIP software costs. OPTA explained that the total costs in the BULRIC plus model consist of costs related to transport networks (EUR 0.0013/min), VoIP hardware (EUR 0.0010/min) and VoIP software costs (revised from EUR 0.0034/min to EUR 0.0014/min). OPTA also explained that having recalculated the VoIP software costs, the cap for fixed termination rates on the basis of a pure BULRIC model would amount to EUR 0.0016/min (compared to the rate of EUR 0.0036/min in the decision of 7 July 2010, calculated on the basis of pure BULRIC but also of the previous calculation of VoIP software costs).

(20) The measure notified by OPTA proposed to implement this price cap as of 1 May 2012. From the entry into force of the new decision until 1 May 2012, OPTA proposed to apply the price cap of EUR 0.0072/min for regional fixed calls and EUR 0.0053/min for local fixed calls.

2.2.3.2. Voice call termination on individual mobile networks

(21) OPTA conforms to the Tribunal's decision based on the BULRIC plus costing methodology. On this basis, it proposes that a price cap of EUR 0.027/min will apply until 1 September 2012, and a price cap of EUR 0.024/min will apply thereafter.

2.2.3.3. Direct interconnection rates

(22) OPTA proposes to set the same direct interconnection rates for both, fixed and mobile call termination markets. OPTA intends to apply these rates retroactively as of 1 September 2010 (entry into force of the partially annulled decision regarding the

direct interconnection rates). The reasons provided by OPTA for the retroactive application of this measure are threefold.

(23) First, OPTA considers that the Tribunal upheld the price regulation of direct interconnection as appropriate. Hence, it concludes that if the Tribunal would have been able to set the BULRIC plus rate (which at that point had not been calculated by OPTA), it would have done so as of 1 September 2010. Second, OPTA points out that the proposed rate calculated on the basis of the BULRIC plus methodology is only slightly higher than the annulled rate calculated on the basis of the pure BULRIC methodology. Third, OPTA believes that in case it did not impose a price cap for direct interconnection with a retroactive effect, at least one provider would increase the rates for direct interconnection of mobile networks to the unregulated level (ten times the BULRIC price cap). However, the operators directly connected with this provider would not be able to correspondingly and retroactively increase rates for their retail telephony services and for their transport services to other participants.

3. SERIOUS DOUBTS EXPRESSED BY THE COMMISSION WHEN INITITIANG THE SECOND PHASE OF THE ARTICLE 7a PROCEDURE

(24) The Commission expressed serious doubts as to the compatibility of the draft measure with EU law and provided reasons why it believed that the draft measure would create a barrier to the internal market.

(25) The Commission agreed that based on the competition problem identified by OPTA in the notification of the market review in 2010, consisting of the risk of excessive pricing and margin squeeze, a price control remedy is appropriate.

(26) The Commission noted that OPTA proposes to implement price caps for fixed and mobile termination rates as well as for direct interconnection rates based on the BULRIC plus methodology in accordance with the Tribunal's ruling[11], from 1 May 2012 for fixed rates and from 1 September 2012 for mobile rates, until the end of the review period.

3.1. Compatibility with EU law

(27) The Commission referred to Article 8(4) of the Access Directive[12] which requires national regulatory authorities ("NRAs") to impose remedies which are based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive. Moreover, the Commission referred to Article 16(4) of the Framework Directive which requires NRAs to impose on SMP undertakings appropriate regulatory obligations.

(28) In addition, the Commission underlined that pursuant to Article 8(3) of the Framework Directive, NRAs shall contribute to the development of the internal market by cooperating with each other, with the Commission and BEREC in a transparent manner to ensure not only the development of a consistent regulatory practice but also consistent application of the Framework Directive and the Specific Directives (together, the "Regulatory Framework").

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11 The Commission understands that there is no remedy against the Tribunal's decision under national law.

12 Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection, of electronic communications networks and associated facilities, OJ L 108, 24.4.2002, p. 7 (the Access Directive), as amended by Directive 2009/140/EC.

(29) In this regard, the Commission pointed out that it may issue recommendations[13] on the harmonised application of the Regulatory Framework in order to further the achievement of the objectives set out in Article 8 of the Framework Directive. This right arises in particular where the Commission finds that divergences in the implementation by the national regulatory authorities of their regulatory tasks under the Regulatory Framework may create a barrier to the internal market. It is in this context that the Commission, in order to ensure a correct and coherent interpretation and application of the relevant provisions of the Regulatory Framework within the EU, adopted a recommendation on fixed and mobile termination rates in the EU (the "Termination Rates Recommendation")[14], setting out a consistent approach that the NRAs should in principle follow regarding price control obligations for fixed and mobile termination rates.

(30) For this purpose, the Commission recommended that NRAs should ensure that termination rates are implemented at a cost efficient, symmetric level as of 31 December 2012[15]. Moreover, it recommended that the level should be determined including only those costs which would be avoided if a wholesale voice call termination services were no longer provided to third parties[16].

(31) While the Commission recognised that the NRAs have a margin of discretion to propose any alternative methodology to regulate termination rates, it underlined that any alternative methodology has to be duly justified, in order to show that it fully complies with the policy objectives and regulatory principles of the Regulatory Framework. In particular, such alternative methodology would have to take into account the characteristics of the specific markets to be regulated and be appropriate in light of the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive.

(32) Indeed, Recital 20 of the Access Directive notes that the method of cost recovery should be appropriate in the particular circumstances, taking account of the need to promote efficiency and sustainable competition and maximise consumer benefit. As also clarified in the Termination Rates Recommendation, the Commission considered that, given the characteristics of the wholesale mobile and fixed termination market, and the associated competitive and distributional concerns, the cost orientation remedy based on the pure BULRIC methodology and symmetrical termination rates would promote competition, by among other things, ensuring that that all users derive maximum benefit in terms of choice, price and quality, in line with Article 8(2) of the Framework Directive, and hence could be considered the most appropriate remedy.

(33) Moreover, the Commission observed that mobile termination rates set at an efficient level contribute to a level playing field among operators, by eliminating competitive distortions between fixed and mobile networks in the provision of fixed-to-mobile and mobile calls, respectively, and between operators with asymmetric market shares in the provision of their on/off-net offers.

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[13] In accordance with Article 19 of the Framework Directive.

[14] Commission Recommendation of 7 May 2009 on the regulatory treatment of fixed and mobile termination rates in the EU, OJ L 124, 20.05.2009, p. 67.

[15] Recommend 11 of the Recommendation.

[16] Recommend 6 of the Recommendation.

(34) In this particular case, the Commission considered that the notified measure does not appear to comply with the above principles and objectives set out in the regulatory framework.

(35) In particular, the Commission observed that, as far as the fixed termination rates are concerned, the price cap of EUR 0.0037/min, whose application OPTA proposes as of 1 May 2012, is more than double compared to the price cap of EUR 0.0016/min calculated by OPTA on the basis of the pure BULRIC methodology. Moreover, as far as mobile termination services are concerned, the Commission noted that the BULRIC plus price cap of EUR 0.024/min applicable as of 1 September 2012 is twice as high as the price cap of EUR 0.012/min calculated by OPTA on the basis of the pure BULRIC methodology in 2010.

(36) The Commission noted that OPTA departed from the pure BULRIC methodology without providing any economic justification showing that the proposed BULRIC plus methodology would equally allow promoting efficiency and sustainable competition and maximising consumer benefit. In fact, the Commission doubted that the proposed BULRIC plus methodology would allow the achievement of those objectives, as it may lead to competitive distortions between fixed and mobile markets and/or between operators with asymmetric market shares and traffic flows.

(37) The Commission considered that in this particular case OPTA did not show that the proposed BULRIC plus methodology would equally allow achieving these regulatory objectives.

3.2. Creation of barriers to the internal market

(38) The Commission further noted that if the termination rates are set by one NRA above the efficient level, the terminating operators in this Member States will be able, on the basis of the calling party pays principle, to benefit from this rate at the expense of the operators, and ultimately the consumers, in the Member State from which the call originates. Hence, the considerable difference in absolute terms derived from price cap based on methodologies which would not ensure a cost-efficient level would be incurred at the expense of the operators, and eventually consumers, in the Member States from where the fixed/mobile calls originate. It is exactly for that reason that the Commission had adopted the Termination Rates Recommendation to ensure a harmonised application of the Regulatory Framework in order to further the achievement of the objectives set out in Article 8 of the Framework Directive.

(39) Moreover, the Commission observed that mobile termination rates set at an efficient level contribute to a level playing field not only at national but also at EU level, by eliminating competitive distortions between fixed and mobile networks.

3.3. Conclusions provided in the letter of serious doubts

(40) In this particular case, the Commission observed that OPTA's notification does not provide sufficient justification of why the proposed approach for the two markets in question meets the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive, and can be considered to be in line with Article 8(4) of the Access Directive. Hence, the Commission expressed serious doubts that OPTA's proposal on termination rates can be considered appropriate in the given termination markets within the meaning of Article 16(4) of the Framework Directive and justified in light of the objectives laid down in Article 8 of the Framework Directive, and in particular the objectives of promoting competition and user benefits pursuant to Article 8(2) of the Framework Directive. Further, the Commission expressed the

belief, at that stage, that the draft measure would create barriers to the internal market.

4. PROCEDURE FOR CONSISTENT APPLICATION OF REMEDIES

4.1. BEREC's opinion

(41) On the basis of its economic analysis, BEREC provided the opinion that the Commission's serious doubts, as expressed as in the Commission's serious doubts letter, are justified.

(42) As regards the serious doubts expressed by the Commission on the compatibility with EU law, BEREC considers that OPTA has not offered appropriate economic reasoning to demonstrate that a measure based on BULRIC plus is as appropriate for the Dutch market as a measure based on pure BULRIC taking account of the specificities of the termination markets, and, in particular, the need to promote efficiency and sustainable competition and maximise consumer benefits set out in Recital 20 of the Access Directive.

(43) BEREC provided the opinion that, in the case of termination services, a pure BULRIC approach is generally the most appropriate for the following reasons:

(44) First, BEREC pointed out that according to recital 20 of the Access Directive, the method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximize consumer benefits. Termination markets are an instance of two-way access where both interconnecting operators are presumed to benefit from the arrangement but, as these operators are also in competition with each other for subscribers, termination rates can have important strategic and competitive implications. A pure BULRIC approach takes into account this specific characteristic of the termination markets, as it takes into account that common costs can be recovered from services other than termination. The notified measures do not justify why BULRIC plus should be more appropriate to the circumstances of the Dutch termination markets.

(45) Second, BEREC highlighted that there is an objective reason to recover common costs on retail markets rather than on the wholesale termination markets. By taking into account pure incremental costs when determining termination rates operators are being encouraged to recover their common costs on retail markets (on which there is a price constraint) and not on a monopolistic market (on which there is a risk of excessive prices). Moreover, operators have a disincentive to lower their off-net call prices because by so doing they generate more outbound traffic which attracts out payments to rivals. BEREC considered that if termination rates decrease, the cost of terminating calls decreases for each operator and retail price competition increases as operators have stronger incentives to reduce their call charges. Lower termination rates would increase competition in call charges, so pure BULRIC delivering lower termination rates should be preferred in general to BULRIC plus. Pure BULRIC is therefore generally more appropriate to promote competition and to ensure that users derive maximum benefit in term of price. The notified measures do not justify why BULRIC plus would be a more appropriate cost standard in light of these objectives in the Dutch market.

(46) Third, BEREC considered that the pure BULRIC method is also more appropriate to reduce competitive distortions between fixed and mobile operators. MTRs generally include part of the mobile access costs that are therefore recovered from fixed callers. On the other hand, all fixed access costs are recovered through retail charges.

Fixed operators are also generally constrained to some extent in their ability to offer flat rates for mobile call services as part of their flat-rate packages, due to MTRs being significantly higher than FTRs. Compared to BULRIC plus, pure BULRIC generally reduces the asymmetry in absolute levels between FTRs and MTRs. Therefore, the pure LRIC methodology in general better meets the objectives of Article 8(2) of the Framework Directive, according to which NRAs should promote competition by ensuring that there is no distortion or restriction of competition in the electronic communication sector. The notified measures do not justify why BULRIC plus would be a more appropriate means of reducing the competitive distortions between fixed and mobile operators in the Dutch market.

(47) BEREC concludes that in light of the Regulatory Framework and in absence of any specific economic reasoning from OPTA, it considers that a measure based on pure BULRIC would likely better satisfy these objectives in the Dutch market.

(48) As regards the creation of barriers to the internal market, BEREC also provided the opinion that the serious doubts expressed by the Commission are justified.

(49) BEREC first assessed whether the caps on termination rates set by NRAs (and by OPTA in particular) are reflected in the termination payments from foreign operators for calls originating from other Member States of the EU and if so, to what extent. To find out to what extent (if at all) termination prices charged by operators for calls originating abroad are influenced by regulated termination prices set by NRAs, BEREC used results of a survey conducted in January 2012 by the Belgian NRA. This survey shows that most EU countries apply the same termination rates for both national and international calls (originating in other EU Member States). This practice is followed also by operators in the Netherlands. Thus, BEREC considered that the Commission's argument seems to be correct in that operators from other EU Member States will be forced to pay higher termination prices to Dutch operators under the regime of prices set using the BULRIC plus model.

(50) Secondly, BEREC tried to estimate whether wholesale termination prices would be passed on to the retail prices charged by the foreign operators to their retail customers and finally assessed whether this behavior itself would create barriers to the internal market. BEREC also points out that the Commission then assumes that higher termination prices will eventually increase retail prices in those Member States from where the calls originate. BEREC expresses its agreement with the Commission on this point, as in general terms higher wholesale costs will translate into higher retail prices in competitive retail markets in other Member States.

(51) BEREC concludes agreeing with the Commission that BULRIC plus termination rates in the Netherlands may create barriers to the internal market.

5. CLOSE COOPERATION BETWEEN THE OPTA, BEREC AND COMMISSION

(52) OPTA, BEREC and Commission closely co-operated to identify the most appropriate and affective measure in line with Article 7a(4) of the Framework Directive. The Commission considers that OPTA's reasons for the adoption of the BULRIC plus methodology given during this co-operation did not provide any additional justification for the notified measures.

(53) During that time the Commission received two third party comments. A comment from a fixed operator supported the adoption of a pure BULRIC methodology and highlighted the need to ensure a consistent application of remedies between fixed and

mobile operators. A comment from a mobile operator underlined the binding nature of the rates set by the Tribunal as regards MTRs.

(54) At the end of three month period following the Commission's notification of its serious doubts to OPTA on 13 May 2012, OPTA did not amend or withdraw its draft measure.

6. Conclusion of the procedure opened to ensure consistent application of the remedies

(55) Since OPTA maintained its draft measures at the end of the three months period following the Commission's notification of its serious doubts in accordance with Article 7a(1) of the Framework Directive, the Commission, taking utmost account of the opinion of BEREC, may issue a recommendation requiring OPTA to amend or withdraw the draft measure or to take a decision to lift its reservations indicated in the letter of serious doubts.

(56) The Commission considers that the reservations expressed in its serious doubts letter are still valid.

(57) Taking account of the particular characteristics of call termination markets in general and given the circumstances of the mobile and fixed telephony markets in the Netherlands, the Commission notes that where termination rates are set above efficient costs, this creates substantial transfers between fixed and mobile markets and consumers as well as competitive distortions between operators with asymmetric market shares. Moreover, high termination rates tend to lead to high retail prices for originating calls and correspondingly lower usage rates thus decreasing consumer welfare.

(58) Furthermore, given that the charging system in the EU is based on calling party pays principle, excessive pricing is also a main competition problem. High termination rates are ultimately recovered through higher call charges for end-users. Taking into account the two-way nature of termination markets, further potential competition problems – common to both fixed and mobile termination markets – include cross-subsidisation between operators. Therefore, in light of the ability and the incentives of operators to raise prices substantially above cost, cost orientation is considered the most appropriate intervention to address this concern.

(59) In light of the above, the Commission also notes the further termination rates move away from incremental cost, the greater the competitive distortions between fixed and mobile markets and/or between operators with asymmetric market shares and traffic flows. An incremental cost approach promotes efficient production and consumption and minimises potential competitive distortions. Therefore, it is justified to apply a pure BULRIC approach whereby the relevant increment is the wholesale call termination service and which includes only avoidable costs.

(60) The Commission also refers to the reasons provided in BEREC's opinion of why a pure BULRIC approach is generally the most appropriate.

(61) Whilst the Commission recognises, in light of Article 19(2) of the Framework Directive, that NRAs have a margin of discretion to propose any alternative methodology to that recommended in its Termination Rates Recommendation, it underlines that any alternative methodology has to be duly justified, in order to show that it fully complies with the policy objectives and regulatory principles of the Regulatory Framework. In particular, any alternative methodology has to take into

account the characteristics of the specific markets to be regulated and be appropriate in light of the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive.

(62) OPTA has not provided further evidence that the alternative proposed methodology, i.e. BULRIC plus, is as or more appropriate to the circumstances of the Dutch termination markets than a measure based on pure BULRIC. The Commission therefore concludes, in line with BEREC's opinion, that OPTA did not provide evidence that its notified measure fully complies with the policy objectives and regulatory principles of the Regulatory Framework.

(63) Second, the Commission considers that, given the characteristics of the specific termination markets to be regulated, the BULRIC plus methodology proposed by OPTA is not appropriate in light of the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive.

(64) The Commission recalls that the objective of promoting competition, as provided in Article 8(2) of the Framework Directive, - by inter alia, ensuring that users derive maximum benefits in terms of choice, price and quality and ensuring no distortion or restriction of competition in the electronic communication sector - is also contained in Article 13(2) of the Access Directive that states that any pricing methodology must serve to promote efficiency and sustainable competition and maximise consumer benefit.

(65) Consequently, the Commission considers that the objectives of the Regulatory Framework are not met by the application of the BULRIC plus methodology as proposed in the Netherlands.

(66) On the basis of the above, and recalling its reasons expressed in the serious doubts letter, the Commission issues the present recommendation requiring OPTA to amend or withdraw the draft measures.

HEREBY ISSUES THIS RECOMMENDATION:

1. OPTA should amend or withdraw the remedies containing the price control obligation relating to the rates charged by SMP operators on the fixed and mobile termination markets (markets 3 and 7) in the Netherlands in order to ensure that the evaluation of the efficient costs for the rates applied on the fixed and mobile termination markets is based on a pure BULRIC methodology, as being the most appropriate methodology for the regulation of the rates applicable on the fixed and mobile termination markets.

2. OPTA should implement the methodology provided in Recommend 1 without delay and in any event no later than 1 January 2013, having regard to the objectives laid down in Article 8 of the Framework Directive, and with particular regard to Article 8(3)(d) of the Framework Directive, which requires OPTA to co-operate with other NRAs, with the Commission and with BEREC so as to ensure the development of consistent regulatory practice, and as recommended by the Commission in the Termination Rates Recommendation, which recognises the pressing need to ensure that consumers derive the maximum benefits in terms of efficient cost-based termination rates.

3. The Commission will publish this recommendation on its web site. OPTA is invited to inform the Commission within three working days following receipt of this recommendation whether it consider that, in accordance with European Union and national rules on business confidentiality, it contains confidential information which OPTA wishes to have deleted prior to publication. Any such request should be reasoned.

4. In accordance with Article 7(7) of the Framework Directive, where OPTA decides not to amend the draft measure on the basis of this recommendation, it shall provide a reasoned justification.

5. In accordance with Article 7(6) of the Framework Directive, OPTA shall communicate the adopted draft measure to the Commission by 13 July 2012. This period might be extended, at OPTA's request, to allow OPTA to undertake a public consultation in accordance with Article 6 of the Framework Directive.

6. This Recommendation is addressed to OPTA.

Done at Brussels,

For the Commission
Neelie Kroes
Vice-President