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Onafhankelijke Post en
Telecommunicatie Autoriteit
(OPTA)

Zurichtoren – Muzenstaat 41
2511 WB Den Haag

For the attention of:
Mr Chris A. Fonteijn
Chairman

Fax: + 31 70 315 92 04

Dear Mr Fonteijn,

Subject: Commission decision concerning Case NL/2012/1299: Wholesale broadband access (Market 5) and wholesale terminating segments of leased lines (Market 6) in the Netherlands

Opening of Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC

I. PROCEDURE

On 21 February 2012, the Commission registered a notification by the Dutch Regulatory Authority, *Onafhankelijke Post en Telecommunicatie Autoriteit* (OPTA), concerning the third review of the market for wholesale broadband access¹ and for wholesale terminating segments of leased lines² in the Netherlands.

The national consultations³ were held from 6 October until 17 November 2011. On 6

¹ Corresponding to market 5 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 (the "Recommendation").

² Corresponding to market 6 in the Recommendation.

³ In accordance with Article 6 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, OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC (Better Regulation Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111

March 2012, a request for information (RFI)⁴ was sent to OPTA, and a response was received on 9 March 2012.

Pursuant to Article 7a(1) of the Framework Directive, the Commission may notify the national regulatory authority (NRA) and the Body of European Regulators for Electronic Communications (BEREC) of its reasons that the draft measure would create a barrier to the internal market or its serious doubts as to its compatibility with EU law.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Previous notifications

Wholesale Broadband Access

The first review of the wholesale broadband access ("WBA") market was conducted under case NL/2005/0281. At that time OPTA concluded that two separate relevant markets existed for low-quality WBA and high-quality WBA. With regard to high-quality WBA, OPTA considered that KPN had SMP; consequently OPTA imposed obligations of access, transparency and non-discrimination. However, in the market for low-quality WBA OPTA found that no undertaking had SMP. OPTA considered that the pricing constraint exercised by cable-based broadband services at the retail level had a sufficiently significant impact at the wholesale level to justify its inclusion in the WBA market. The Commission expressed concerns as to whether low quality WBA provided over cable and DSL formed part of the same market and as to OPTA's finding of effective competition in the market for low quality WBA. Finally, with regards to the characteristics of the Dutch broadband market, the Commission did not contest OPTA's findings, but asked OPTA to carefully monitor market developments.

In the second round of review of the WBA market (NL/2008/0827) OPTA maintained the definition of two separate relevant markets for low-quality WBA and high-quality WBA. Similarly to the first round of review, in the market for low-quality WBA OPTA considered, after analysing direct and indirect constraints, that cable should be included in the market definition on the basis of indirect constraints. However, unlike in the first review, this time OPTA concluded that KPN had SMP also in the low-quality WBA market. This conclusion was predominantly based on the increased market share in the retail broadband market ([...]), the acquisition of a significant LLU operator (Tiscali), as well as credible plans/announcements of the roll-out and migration towards a fibre-based All-IP network.⁵

In the market for low-quality WBA, OPTA imposed obligations of access, transparency and non-discrimination; these obligations were, however, limited to copper-based products. With regard to the regulation of fibre, OPTA proposed to mandate unbundled access to fibre (ODF access) in Market 4, and concluded that it would not be appropriate to mandate fibre access in the low quality WBA market at this stage. In the high-quality WBA market OPTA maintained the remedies already in place, and supplemented them by granting access to fibre-based WBA products.

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).

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

⁵ As a consequence of such migration plans by KPN alternative DSL-suppliers (LLU operators) suspended further plans to roll-out own networks.

The Commission commented on the inclusion of cable-based WBA in Market 5, and on the lack of regulation of fibre in the low-quality WBA and the need to closely monitor the effectiveness of fibre unbundling (on Market 4, upstream from WBA), and depending on the success of its implementation, the need to mandate WBA over all fibre networks.

Wholesale terminating segments of leased lines

The first review of this market was conducted in case NL/2005/0282. At that time, OPTA concluded that KPN should be designated as an SMP operator on the following three wholesale markets: wholesale terminating segments of leased lines of a capacity lower than 2Mbit/s, wholesale terminating segments of leased lines of 2Mbit/s capacity, and wholesale terminating segments of leased lines of a capacity higher than 2Mbit/s capacity. Consequently OPTA imposed on KPN a number of regulatory obligations. The Commission provided comments on the related retail markets (minimum set of leased lines), but not on the wholesale markets.

The second review of this market was conducted in case NL/2008/0823. OPTA defined two wholesale markets for terminating segments of leased lines: low capacity (i.e. below and equal to 20 Mbit/s) and high capacity (above 20 Mbit/s). The main argument for the distinction between the two markets was that the higher capacity bandwidth would require fibre infrastructure, whereas the copper network could serve the lower-capacity market. The fibre network did not have the coverage of the copper network, resulting in higher cost and low substitutability.

OPTA determined that KPN had SMP in both wholesale markets and imposed obligations including access, transparency, non-discrimination, price control and accounting separation. The access remedy was mandated at the local, metro and regional level, with the latter only imposed if metro level access was not possible. The Commission commented that the adopted measure should make clear that regional-level access was imposed to remedy the lack of competition in the wholesale markets for terminating segments of leased lines, and that it did not intend to regulate trunk segments of leased lines. Unlike in 2005, OPTA did not regulate any of the related retail markets.

OPTA's regulatory decisions from 2008 concerning high-quality WBA and wholesale leased lines have been appealed by KPN. The decision for wholesale leased lines was annulled by the Dutch appellate tribunal in April 2010, and for high capacity WBA in May 2011.

II.2. The notified draft measure

II.2.1. Market definition

OPTA defines two separate wholesale markets for low-quality WBA and high-quality WBA, the latter encompassing also wholesale leased lines services. The distinguishing factors between the two markets are the quality parameters (SLAs, customer service, fault repairs guarantees) and contention (overbooking) ratio. All products with a contention ratio of a lower quality than 1:20 fall into the low-quality WBA.

In the same way as in the previous market review, OPTA concludes that access via copper, coaxial cable and optical fibre all belong to the same relevant market in the low-quality WBA. With regard to the inclusion of coaxial cable in the market for low-quality WBA, OPTA concludes that on the supply side there are at least some operators that offer cable-based WBA products in the Netherlands; further, that the cost structure, quality parameters, product range and geographical coverage of cable-based WBA is a substitute for copper-based WBA. OPTA observes also that the choice of a certain technology is frequently a long-term choice due to high transition costs. Purchasers of

WBA via copper, or coaxial cable, would not switch to the other platform due to high investments in network-specific equipment, as well as the need to physically migrate end users to the other network. Furthermore, the inclusion of WBA over the coaxial cable in the relevant market for low-quality WBA is justified by reasons of strong indirect effects stemming from the retail broadband access market.

In the market for high-quality WBA the relevant products include WBA via copper and optical fibre, but exclude WBA over coaxial cable. This is justified by the lack of appropriate quality parameters (lack of possibility to guarantee a certain contention ratio due to technical network characteristics), and SLAs.

Contrary to the distinction between Market 5 and Market 6 in the Recommendation, OPTA includes wholesale terminating segments of leased lines in the high-quality WBA market.

OPTA finds that there is a difference between leased lines and high-quality WBA because the contention ratio for leased lines is 1:1, whereas for high quality lines it could be up to 1:20. However, both products are used to satisfy the same demand for business network services (as opposed to low-quality WBA, which is primarily used for internet access). From a demand side perspective, increased capacity in high quality WBA results in greater substitutability, and the price of leased lines has been decreasing, pointing towards competitive pressure from WBA on leased lines despite lower capacity guarantees. Further, both segments share upload capacity (up to 100 Mbit/s for more than 95% of all services), they have similar SLAs, accessibility, they are sold by the same commercial sales force and provided via the same networks. The structure of competition in the two types of products also has some consistency, with KPN having a market share of around [...] in both segments, and Tele2 being its largest competitor on both segments with a share of 20-40%.

OPTA also concludes that the relevant geographical market for both high-quality WBA and low-quality WBA is national.

II.2.2. Finding of significant market power

OPTA considers that KPN has no SMP on the market for low-quality WBA.

OPTA considers that KPN has SMP on the market for high-quality WBA.

With regard to the low-quality WBA OPTA concludes that KPN's market share has decreased since the last review.⁶ According to various scenarios developed for the wholesale and corresponding retail market, OPTA concludes that KPN's market share will maintain a decreasing trend, reaching [...] ⁷ (for low-quality WBA) and [...] (at the retail level) in 2014.

Furthermore, OPTA recalls that in its previous (second) market analysis it concluded that KPN would have SMP on the market for low-quality WBA mainly due to KPN's (credible) plans to roll-out fibre-based access networks, and to phase out MDF access over copper network. As a result of KPN's plans, alternative operators withheld further investments in LLU, which in turn led OPTA to believe that KPN's market share on the low-quality WBA market would increase. OPTA now argues that this phase-out has not

⁶ In the market for low-quality WBA KPN had [...] in Q4 2011, [...] in Q4 2010, [...] in Q4 2009 and [...] in Q4 2008 respectively.

⁷ Although OPTA states that according to its scenarios KPN's market share will continue to decrease, the estimate of [...] is above its current market share.

materialized over the past review period; KPN in the meantime started to invest again in upgrading the copper network (by rolling out VDSL equipment) and has no plans to phase out its copper network in the near future.

With regard to high-quality WBA OPTA concludes that KPN's market share has decreased, [...].⁸ Based on the scenarios for future market development OPTA considers that KPN's market share will further decrease to [...], and the share of its nearest competitor (Tele2) [...]. Furthermore, the growth of the market for high-quality WBA is mainly driven by the development of fibre-based networks, on which KPN is also the leading market player. The relatively high and stable market shares, coupled with other indicators (vertical integration, economies of scale and scope, lack of countervailing buyer power, switching costs, geographical fragmentation of alternative fibre networks) point towards the conclusion that KPN will have SMP during the next review period.

II.2.3. Regulatory Remedies

OPTA intends to maintain the following obligations on KPN with regard to the market for high-quality WBA:

- access obligation on the copper-based network (but not on fibre);
- transparency and reference offer;
- non-discrimination.

OPTA considers it appropriate to impose obligations on KPN's copper-based WBA only for various reasons that are further explained below and since OPTA concluded that KPN has no SMP on the market that is upstream from the market for fibre-based WBA, namely the market for local loop unbundling for Fibre to the Office (FttO).⁹

Furthermore, OPTA concludes that in the presence of access and non-discrimination there is no need to impose tariff regulation.

III. ASSESSMENT

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

Finding of effective competition on the market for low-quality WBA

The Commission notes that OPTA changed its conclusion with regard to KPN's SMP on the market for low-quality WBA, from an initial finding of effective competition (in 2005), to SMP (in 2008), and again to effective competition in the current draft measure. The Commission notes that the market share of KPN has over the years remained high and relatively stable, with only minimal variation over time. Moreover, it seems that since 2005 KPN has strengthened its market position (from [...] in 2005 to [...] in years 2009 and 2010, and [...] in 2011), and according to OPTA's scenarios for future market development, KPN may further increase its market share (up to [...]).

Furthermore, the Commission notes that the competitors of KPN have also

⁸ In the market for high-quality WBA KPN had [...] in Q3 2011, [...] in Q4 2010, [...] in Q4 2009 and [...] in Q4 2008 respectively.

⁹ OPTA defined a separate market for Fibre to the Office (FttO); this market has been notified to the Commission in parallel and is currently under assessment (case NL/2012/1298).

maintained relatively stable and low market shares on the market for low-quality WBA, except for Reggefiber (see further below). If both self supply and merchant sales are considered, [...]); other LLU operators have lost [...], and Reggefiber as a distant competitor gained [...].

If however only sales on the merchant market are considered, KPN has [...] of the market, LLU operators jointly [...], while all cable operators [...].¹⁰ On the merchant market the only “maverick” is Reggefiber which managed to gain [...] in a relatively short time frame. In this regard the Commission notes that KPN plans to increase its shareholding in Reggefiber (subject, the Commission understands, to approval by the Dutch Competition Authority), after having acquired joint control in 2008.

Finally, the Commission notes that the development of fibre-based access networks and the phasing out of MDF access in the Netherlands played an important role in OPTA's determination of KPN's SMP in the last review in 2008. This NGA roll-out has not been abandoned and KPN is still focusing on the roll-out of fibre, although the process is not progressing as fast as anticipated in 2008/09. Furthermore, KPN's ongoing investments in the upgrade of the copper-based network (VDSL, vectoring, bonding) may render MDF access to the copper network less effective, which may hamper the ability of LLU operators to compete with KPN. Those were the very same grounds which lead OPTA to conclude on KPN's SMP in the last review.

For the above reasons the Commission would like to ask OPTA to review its explanations and conclusion on effective competition in the market for low-quality WBA. In any event, OPTA should closely monitor market developments, and in particular the impact of the fibre roll-out as well as the upgrade of the existing copper networks, on the sustainability of competition in this market.

Furthermore, following the examination of the notification and the additional information provided by OPTA, the Commission considers that OPTA's draft measure concerning the market for wholesale broadband access in the Netherlands falls within Article 7a(1) of the Framework Directive.

Draft measures imposing regulatory obligations on undertakings with SMP in the Netherlands may have an influence, direct or indirect, actual or potential, on the ability of undertakings established in other Member States to offer electronic communication services. They comprise measures that have a significant impact on operators or users, *inter alia* measures which affect prices for users. Consequently, such draft measures may affect the patterns of trade between Member States¹¹.

The Commission has serious doubts as to the compatibility with EU law of OPTA's draft decision concerning the market for wholesale broadband access in the Netherlands in its current form, in particular with the requirements referred to in Article 16(4) of the Framework Directive and Article 8(4) of the Access Directive in conjunction with Article 8 of the Framework Directive. Furthermore, the Commission considers, at this stage, that the draft measures may create barriers to the internal market.

The Commission expresses serious doubts in this regard for the following principal

¹⁰ In table 12 in the draft measure OPTA indicated [...] for external sales on the merchant market of low-quality WBA for all cable based operators. [...]

¹¹ See Recital 38 of the Framework Directive.

reasons:

Non-imposition of effective access obligation on the market for high-quality Wholesale Broadband Access

Compliance with Article 8(4) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16(4) of the Framework Directive

The Commission points out that remedies imposed under Article 16 of the Framework Directive in conjunction with Article 8(4) of the Access Directive should be 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 refers to Article 16(4) of the Framework Directive, which requires NRAs to impose on SMP undertakings appropriate regulatory obligations.

In this regard, the Commission points out that it may issue recommendations¹² 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 regulated access to Next Generation Access Networks (the "NGA Recommendation")¹³, setting out a consistent approach that the NRAs should follow regarding regulation of the markets for wholesale network infrastructure access (Market 4) and wholesale broadband access (Market 5).

For this purpose, the Commission recommended that NRAs should ensure that access remedies are maintained or amended where SMP is found on Market 5¹⁴, unless in a particular given geographic area there is effective access to the unbundled fibre loop of the SMP's operator's network and such access is likely to result in effective competition on the downstream level¹⁵.

While the Commission recognises that the NRAs have a certain margin of discretion, which allows them to take into account national circumstances, the Commission underlines that any alternative approach 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 approach would have to take into account 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.

In this case, OPTA considers that in the market for high-quality WBA it is not necessary to impose access obligations on KPN's fibre network, despite the fact

¹² In accordance with Article 19 of the Framework Directive.

¹³ Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), OJ L 251, 25.9.2010, p.35-46.

¹⁴ Recommend 31 of the NGA Recommendation.

¹⁵ Recommend 37 of the NGA Recommendation.

that both copper-based and fibre-based infrastructures are considered to be part of the same market. OPTA considers that currently copper-based high-quality WBA still represents a significant part of the market, and even in the case of refusal to give access to the fibre-based high-quality WBA, alternative providers could still compete with KPN on the basis of regulated copper access or could purchase access to fibre from other operators at the wholesale level. Furthermore, OPTA considers that the upgraded copper-based infrastructure, offering symmetric data transfers above 20 Mbit/s, is a substitute to fibre-based connections. OPTA also considers that on the basis of its information, in absence of regulation KPN would still continue to offer high-quality WBA over fibre.

The Commission notes that the different treatment of copper and fibre access within the boundaries of the same product market would result in unjustified discrimination between operators seeking access on copper and those seeking access on fibre, resulting in a distortion of competition contrary to the objectives of Article 8(2) of the Framework Directive. Those seeking access on fibre would not be able to rely on regulation to access a nation-wide network such as KPN's, and would only be certain of KPN's access obligations over the copper network.

The Commission has serious doubts as to whether a realistic alternative to KPN's fibre infrastructure exists on the market for high-quality WBA in the Netherlands. Despite some evidence of the existence of fibre-based networks owned by other operators, the Commission questions that such fibre connections, supplied by other operators, represent a sufficient alternative to KPN's fibre network. According to OPTA the roll out of fibre, which constitutes a building block for high-quality WBA (it can be assumed that a high proportion of such high-quality WBA over fibre corresponds to Fibre to the Office (FttO), subject of the related analysis of Market 4), is not ubiquitous, but is developed "on-demand" only in order to connect individual retail consumer or a group of individual consumers (demand bundling). Therefore, even by combining the elements of fibre networks of various alternative operators, it would not be possible to reach all final consumers, bypassing KPN's network.

Furthermore, OPTA considers that even in the absence of access to fibre networks, alternative operators could compete with KPN on the basis of regulated access to the copper infrastructure. In other words, OPTA considers that the (upgraded) copper networks are a substitute for fibre-based infrastructure. The Commission questions that on a forward looking basis, all access seekers would consider that the copper infrastructure is substitutable to fibre connections. OPTA itself, in its response to a request for information, stated that a price increase in fibre would slow the rate of customer switching from copper to fibre, but did not suggest that customers that had already migrated to fibre would switch back to copper.

The Commission notes that, according to OPTA, fibre-based connections are increasingly important in the market for high-quality WBA. According to OPTA's notification¹⁶ it appears that in 2011 the majority of the newly concluded contracts contain at least one fibre circuit. For KPN that is [...] of the newly concluded contracts, for Vodafone [...] and for Bbeyond [...]. Moreover, a significant part of the new contracts are exclusively realized over fibre connections.

¹⁶ See footnote 255 of OPTA's notification.

For the above reasons the Commission considers, at this stage, that the limitation of the access obligation only to the copper network would not be appropriate to address the competition problems identified in the market for high-quality WBA. In view of the development of this market and the transition towards fibre-based networks, and in conjunction with the proposal not to regulate access to part of the fibre network (FttO) in Market 4, the Commission has serious doubts that this approach would not result in the strengthening of KPN's SMP position on this market. Consequently, the draft measure does not appear to be compatible with EU law, in particular with the policy objectives and regulatory principles as set out in Article 8(4) of the Access Directive in conjunction with Articles 8 and 16(4) of the Framework Directive.

Creation of barriers to the internal market

The Commission notes that OPTA has concluded that on the market for high-quality WBA both copper and fibre networks are part of one single market, on which KPN has significant market power. The Commission considers, at this stage, that a barrier to the development of the internal market would arise with the failure to impose access remedies on infrastructure that constitutes an important and growing part of the single product market, which is characterised by the presence of an SMP undertaking. Without regulation of the fibre element of the high-quality WBA offer, KPN will be able to limit the expansion of alternative providers of high-quality broadband access at the retail level by withholding access to a necessary input. This would impact on the ability of such alternative operators to offer to their retail (business) customers pan-European connectivity and other cross-border services.

In the light of the above, at this stage the Commission takes the view that the notified regulatory measure would create a barrier within the single market.

The above assessment reflects the Commission's preliminary position on these particular notifications, and is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

The Commission points out that, in accordance with Article 7a of the Framework Directive, the draft measure regarding the wholesale market for call termination on individual public telephone networks provided at a fixed location and the wholesale market for voice call termination on individual mobile networks in the Netherlands shall not be adopted for a further three months.

Pursuant to Recital 17 of Recommendation 2008/850/EC¹⁷, the Commission will publish this document on its website, together with a notice inviting third parties to submit observations on this serious doubts letter within ten working days. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission¹⁸ within three working days following receipt whether you consider that, in accordance with European Union and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication. You should give reasons for such request.

¹⁷ 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, OJ L 301, 12.11.2008, p. 23.

¹⁸ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.

Yours sincerely,
For the Commission
Neelie Kroes
Vice-President of the Commission



EUROPEAN COMMISSION

Brussels, 27/03/2012
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Onafhankelijke Post en
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(OPTA)

Zurichtoren – Muzenstaat 41
2511 WB Den Haag

For the attention of:
Mr Chris A. Fonteijn
Chairman

Fax: + 31 70 315 92 04

Dear Mr Fonteijn,

Subject: Corrigendum of the Commission decision C(2012) 2008 of 21/03/2012 related to case NL/2012/1299: Wholesale broadband access (Market 5) and wholesale terminating segments of leased lines (Market 6) in the Netherlands

Opening of Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC

Please note that:

- II.1. seventh paragraph shall read "(...) proposed to impose obligations including access, transparency, non-discrimination, price control and accounting separation" instead of "(...) imposed obligations including access, transparency, non-discrimination, price control and accounting separation".
- The penultimate paragraph of the decision shall read

"The Commission points out that, in accordance with Article 7a of the Framework Directive, the draft measure regarding the market for wholesale broadband access and for wholesale terminating segments of leased lines in the Netherlands shall not be adopted for a further three months."

instead of

"The Commission points out that, in accordance with Article 7a of the Framework

Directive, the draft measure regarding the wholesale market for call termination on individual public telephone networks provided at a fixed location and the wholesale market for voice call termination on individual mobile networks in the Netherlands shall not be adopted for a further three months."

Yours sincerely,
For the Commission
Neelie Kroes
Vice-President of the Commission