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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/2012/1284: Call termination on individual public telephone networks provided at fixed location in the Netherlands**

Commission decision concerning case NL/2012/1285: Voice call termination on individual mobile networks 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 12 January 2012, the Commission registered notifications by the Dutch Regulatory Authority, *Onafhankelijke Post en Telecommunicatie Autoriteit* (OPTA), 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[1] in the Netherlands.

[1] 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.

The national consultations[2] were held from 7 November 2011 until 19 December 2011. On 20 January 2012, a request for information (RFI)[3] 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.

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

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

The fourth round review of the market was notified to and assessed by the Commission under case NL/2010/1079[4]. 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.

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

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

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.

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

[2] 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 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).

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

[4] SG-Greffe(2010)D/7848.

apply until OPTA adopts a new decision on the price caps for fixed termination rates.

Voice call termination on individual mobile networks

The third round review of the market was notified to and assessed by the Commission under case NL/2010/1080[5]. 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 services.

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

MTRs 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

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 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.

II.2. The notified draft measure

II.2.1. Market definition

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

OPTA includes 085, 084/087 numbers (without a subsequent service), 088, 122, 14xy and 116xyz in the market definition.

Voice call termination on individual mobile networks

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

II.2.2. Finding of significant market power

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

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

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

II.2.3. Regulatory Remedies

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

OPTA proposes to set the price caps for fixed termination rates on the basis of the BULRIC plus costing methodology. OPTA sets the price cap at EUR 0.0037/min (compared to EUR 0.0036/min in the decision of 7 July 2010).

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).[6]

OPTA proposes to implement this price cap as of 1 May 2012. From the entry into force of the new decision until 1 May 2012, OPTA proposes to apply the price cap of EUR 0.0072/min for regional fixed calls and EUR 0.0053/min for local fixed calls.

Voice call termination on individual mobile networks

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.

Direct interconnection rates

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. 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 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.

III. ASSESSMENT

The Commission has examined the notifications and the additional information provided by OPTA. OPTA's draft measures concerning 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 fall 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

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6 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.

of undertakings established in other Member States to offer electronic communication services. They comprise measures that have a significant impact on operators or users in other Member States, *inter alia* measures which affect prices for users. Consequently, such draft measures may affect the patterns of trade between Member States[7].

The Commission has serious doubts as to the compatibility with EU law of OPTA's draft decision concerning 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 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 reasons:

The need to ensure that customers derive maximum benefits in terms of efficient cost-based termination rates

The Commission agrees that based on the competition problem indentified 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.

The Commission notes that OPTA proposes to implement price caps for fixed and mobile termination rates as well as for interconnection rates based on the BULRIC plus methodology in accordance with the Tribunal's ruling[8], from 1 May 2012 for fixed rates and from 1 September 2012 for mobile rates, until the end of the three-year review period.

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 refers to Article 8(4) of the Access Directive[9] which requires the 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 refers to Article 16(4) of the Framework Directive which requires NRAs to impose on SMP undertakings appropriate regulatory obligations.

In addition, the Commission underlines 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

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7 See Recital 38 of the Framework Directive.

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

9 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).

Specific Directives (together, the "Regulatory Framework").

In this regards, the Commission points out that it may issue recommendations[10] 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 "Recommendation")[11], setting out a consistent approach that the NRAs should in principle follow regarding price control obligations for fixed and mobile termination rates.

For this purpose, the Commission recommended that NRAs should ensure that the termination rates are implemented at a cost efficient, symmetric level as of 31 December 2012[12]. Moreover, it recommended that the level should be determined including only those costs which would be avoided if a wholesale voice call termination service were no longer provided to third parties[13].

While the Commission recognises that the NRAs have a margin of discretion to propose any alternative methodology to regulate termination rates, 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, such alternative methodology 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.

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 Recommendation, the Commission considers 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 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.

Moreover, the Commission observes thatmobile 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

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10 In accordance with Article 19 of the Framework Directive.

11 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.

12 Recommend 11 of the Recommendation.

13 Recommend 6 of the Recommendation.

fixed-to-mobile and mobile calls, respectively, and between operators with asymmetric market shares in the provision of their on/off-net offers.

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

In particular, the Commission observes that, as far as the fixed termination rates are concerned, the price cap of EUR 0.0037/min, to apply 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 notes that the BULRIC plus price cap of EUR 0.024/min applicable as of 1 September 2012 is double compared to the price cap of EUR 0.012/min calculated by OPTA on the basis of the pure BULRIC methodology in 2010.

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 doubts 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.

In the present case, OPTA did not show that the proposed BULRIC plus methodology would equally allow achieving these regulatory objectives.

Creation of barriers to the internal market

The Commission further notes 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 has adopted the 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.

Moreover, the Commission observes 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.

Conclusion

In this particular case, the Commission observes 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 has 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 and believes, at this stage, that the draft measure would create barriers to the internal 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/EC[14], 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 Commission[15] 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.

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

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14 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.

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