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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 3153501

Dear Mr Fonteijn,

Subject: Commission decision concerning Case NL/2012/1303: Repair decision retail fixed telephony for business customers

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

I. PROCEDURE

On 12 March 2012, the Commission registered a notification from the Dutch national regulatory authority, the Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA) concerning the repair decision on retail market for fixed telephony for business customers.²

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 OPTA identified in 2008, *inter alia*, a retail market for fixed telephony consisting of both access to the fixed telephone network and voice calls for business customers. This market therefore bundles market 1 in Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (the Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65, with market 5 in Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111

The national consultation³ ran from 7 December 2011 until 18 January 2012.

On 20 March 2012 a request for information⁴ was sent to OPTA and a response was received on 22 March 2012.

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 market for fixed telephony in The Netherlands was notified⁵ to and assessed by the Commission⁶ in 2008. OPTA found that the retail fixed telephony market for residential customers no longer met the three criteria test in the presence of wholesale regulation. The retail fixed telephony market for business customers instead would only tend to effective competition in the longer term. OPTA withdrew regulation on the former retail market immediately and opted for phasing out retail regulation on the business market as of 1 January 2010.

In September 2011, the Dutch Court (CBB⁷) annulled OPTA's decision with regard to the retail fixed telephony market for business customers stating that OPTA should not have used the three criteria test as a ground for withdrawing regulation and that it had not sufficiently demonstrated that the market would be characterised by effective competition at the end of the regulatory period or shortly thereafter. The CBB required OPTA to issue a new decision within three months following the ruling concerning the maintenance of retail regulation after 1 January 2010.⁸

On 16 March 2012, OPTA notified its third fixed telephony market analysis (i.e. wholesale and retail).⁹

II.2. Market definition

The current draft remedy decision does not alter OPTA's definition of the relevant

the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 114, 8.5.2003, p. 45. OPTA explains in the additional information provided that currently 98% of customers take retail access and voice calls from one and the same provider (i.e. KPN or others), of which 55% get both products at a flat fee.

³ In accordance with Article 6 of the Framework Directive.

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

⁵ See in particular cases NL/2008/0821 and 0822.

⁶ SG-Greffe(2008)D/207745 and SG-Greffe(2008)D/207746.

⁷ College van Beroep voor het Bedrijfsleven, i.e. the Trade and Industry Appeals Tribunal.

⁸ In its response to the request for information OPTA explains that considering that the national consultation period is 6 weeks, that the notification period lasts 4 weeks and the work involved to research and draft the supplementary decision, it was clear from the beginning that it was impossible to meet the CBB's deadlines. Also based on the CBB decision, OPTA strives to ensure that the supplementary decision will come into effect as soon as reasonably possible.

⁹ Notified to and assessed by the Commission under case number NL/2012/1306. The Phase I deadline for this case is 16 April 2012.

market, as set out in OPTA's notification NL/2008/0821.

II.3. Finding of significant market power

With the present draft repair decision, OPTA executes the CBB's ruling. OPTA considers that it can do so without gathering further market related information. In its response to the request for information, OPTA explains that the CBB ordered it to reassess the 2008 fixed telephony decision with regard to the withdrawal of the retail regulation imposed in 2005. In accordance with the ruling, OPTA undertakes this reassessment taking into account the factual situation as of the end of 2008 when its initial decision for fixed telephony in the Netherlands was published. Events that took place after 2008¹⁰ are thus considered not relevant by OPTA for this particular analysis.

OPTA explains nonetheless that market developments in the period 2009-2011 confirm that the relevant retail market for fixed telephony services for business customers will not be effectively competitive at the end of the current regulatory period. KPN's high market share has decreased more slowly than expected¹¹, the share of fixed telephony business services delivered by means of voice over broadband (VoB) has not grown as quickly as foreseen¹² and OPTA's estimations for high capacity WLR-based connections were also not attained, in particular due to the take-over by KPN of the largest high capacity WLR customer, Atlantic Telecom.

In response to the request for information, OPTA provided the Commission with an updated three criteria test concerning the retail fixed telephony market for business customers, taking into account the presence of wholesale generic (i.e. unbundling, broadband and leased lines) regulation and telephony specific (i.e. C(P)S and WLR¹³) regulation as imposed in the Netherlands. OPTA finds that the market is characterised by high non-transitory barriers to entry. The market share of providers depending on upstream building blocks for the provision of retail fixed telephony business services has hardly grown, nor is it likely to grow in the coming years. While wholesale unbundling and broadband remedies should allow alternative market parties to offer fixed telephony services by means of VoB, such services continue to have a limited importance for the business market. Even in the presence of regulated upstream access services, market entrants must heavily invest in infrastructure and high-quality services to be competitive, reach a minimum scale to be able to compete on prices and have a national coverage to compete for business customers with presence on multiple sites throughout the national territory. Furthermore, the take-over by KPN of Atlantic Telecom has severely undercut the (expected) share of fixed telephony services on the basis of C(P)S/WLR.

OPTA considers that there is no tendency towards effective competition. KPN's market share has not decreased as foreseen and competitors find it difficult to distinguish themselves from KPN as VoB is of limited importance on the business market so far. Furthermore, alternative providers do not have KPN's broad portfolio of services nor its national coverage.

Finally, OPTA does not consider competition law sufficient to tackle the identified

¹⁰ i.e. including CBB's (partial) annulment of the ULL and WBA decisions concerning FttO ODF-access regulation and high capacity WBA regulation, respectively.

¹¹ KPN's [...] % market share decreased by [...] % instead of by the foreseen [...] %.

¹² Instead of growing from 1% to 11%, the share only increased to [...] %.

¹³ Carrier (pre-)selection and wholesale line rental, respectively.

competition problems (in particular margin squeeze).

II.4. Regulatory Remedies

OPTA finds that despite the presence of both generic and telephony specific regulation, KPN could behave independently from its competitors and customers, charging excessive prices and engaging in margin squeeze, price discrimination, and bundling and tying.

OPTA proposes to impose a price floor obligation (i.e. a price squeeze test at services level¹⁴) whereby KPN's end-user tariffs should at least be so high as to render all KPN's retail services (stand alone or as part of a bundle) at all times replicable in terms of pricing. In practice this means that KPN's integral retail costs must be covered for all building blocks that are necessary for the provision of traditional fixed telephony (PSTN/ISDN-connections and traffic), i.e. a minimum margin of 18.6%.^{15, 16}

OPTA considers that the group of customers that could suffer from excessive pricing by KPN is too limited to impose further obligations, such as the price cap imposed in 2005. The price squeeze test will allow alternative providers to replicate KPN's offers, thus increase competitive pressure and limit KPN's possibilities to charge excessive prices. OPTA also considers that bundling and tying practices can be limited by means of the proposed retail regulation as it allows KPN's competitors to price replicate bundles. In case lock-in practices occur, OPTA considers that competition law can sufficiently address the issue.

Also the transparency and non-discrimination obligations imposed by OPTA in its 2005 regulatory decision for fixed telephony in the Netherlands will not be continued. Potential price discrimination tactics that could be tackled by a non-discrimination obligation are, according to OPTA, sufficiently tackled by the proposed price regulation. A non-discrimination obligation would furthermore inappropriately limit KPN's commercial freedom in particular with regard to specific user-tailored offers which are characteristic for this market. The transparency obligation is also no longer considered appropriate as it is generally imposed in support of a non-discrimination obligation.

OPTA explains that the proposed retail remedy will not be imposed retroactively as this would breach the principle of legal certainty.¹⁷ Also, the obligation imposed requires KPN to charge certain minimum prices, possibly leading, in certain instances, to KPN having to raise its prices. Retroactively applying the appropriate obligation would not

¹⁴ OPTA considers that the price floor obligation as imposed in 2005 and until 1 January 2010, which consisted of a combined price squeeze test at services and market level, no longer appropriate. OPTA explains that a test at a higher aggregate level (e.g. market level) would allow KPN to selectively provide lower offers, in particular since KPN also services non-price sensitive customers which could be charged higher prices than the price sensitive customers whilst still meeting the market level test.

¹⁵ OPTA explains in its response to the request for information that it no longer considers the incremental retail costs previously used to set the minimum margin, i.e. 1%, suitable because a price floor lower than one based on integral costs does not allow alternative operators to replicate KPN's services in terms of price and would not address the problem of margin squeeze. OPTA further explained that the 18.6% was previously applied at the market level in the combined price squeeze test.

¹⁶ [...]. OPTA considers the issue of compensation as a civil law case.

¹⁷ The validity of the notified draft measure will be limited to a transitory period of 3 to 6 months, i.e. until the implementation of the regulatory measures proposed on the basis of the third round analysis of the fixed telephony market in The Netherlands (wholesale and retail).

benefit competition.¹⁸

III. COMMENTS

On the basis of the present notification and the additional information provided by OPTA, the Commission has the following comment¹⁹:

Need for an updated three criteria test in the final repair decision

The Commission notes that with the present draft measure, OPTA executes the national Court's decision to assess whether the retail obligations imposed on KPN in the fixed telephony decision of 2005 should be continued after the date of withdrawal of retail fixed telephony obligations (with regard to access and voice calls for business customers) as set out in the decision of 2008, i.e. until 1 January 2010. The Court ruled that OPTA could not discontinue, in the regulatory period 2009-2011, the regulation imposed in 2005 solely on the basis of the three criteria test and despite having found an operator with significant market power. The Court found that OPTA had not sufficiently justified that the market would tend to effective competition at the end of the regulatory period or shortly thereafter.

OPTA considers that, in order to execute the Court's ruling, it has no obligation to provide further market based information. However, OPTA provides the general lines of the actual market developments in the period 2009-2011, which are used also in its third round fixed telephony market analysis notified to and assessed by the Commission in parallel under case NL/2012/1306, to underpin its finding that the market is not effectively competitive and that its finding of SMP on the relevant market as identified in the 2008 fixed telephony decision is not altered in essence.

The Commission notes, however, that OPTA does not provide the revised three criteria test in its draft repair decision. OPTA only provided it in answer to the Commission's request for information. The Commission therefore invites OPTA to include the revised assessment of the three criteria in the final version of its repair decision. In the absence of evidence that the three criteria are fulfilled and therefore that the identified market, which is not listed as such in the Recommendation on Relevant Markets, is susceptible to ex ante regulation, OPTA's repair decision would still be based on its previous conclusion, namely that the three criteria are not met and the relevant market is therefore not susceptible to ex ante regulation as of 1 January 2010.

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

¹⁸ Installed base price modifications for agreements prior to the publication of the present draft repair decision related to will have to be implemented within 6 months; installed base price modifications for agreements reached between the publication of the current draft repair decision and its entry into force will have to be implemented within 10 days; active portfolio price modifications will have to be implemented within 10 days after entry into force of the repair decision.

¹⁹ In accordance with Article 7(3) of the Framework Directive.

position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC²⁰ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission²¹ 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 publication²². You should give reasons for any such request.

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

²⁰ 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.

²¹ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

²² The Commission may inform the public of the result of its assessment before the end of this three-day period.