EUROPEAN COMMISSION

Brussels, 31.7.2013
C(2013) 5096 final

Autoriteit Consument & Markt
(ACM)
Zurichtoren – Muzenstraat 41
2511 WB Den Haag
Netherlands

For the attention of
Mr Henk Don
Vice Chairman

Fax: +31 70 722 23 55

Dear Mr Don,

Subject: Commission Decision concerning Case NL/2013/1481: Fixed and mobile call termination in the Netherlands.

Article 7(3) of Directive 2002/21/EC: No comments

I. PROCEDURE

On 2 July 2013, the Commission registered a notification from the Dutch national regulatory authority, Autoriteit Consument & Markt (ACM)[1], concerning the wholesale markets for fixed and mobile call termination[2] in the Netherlands.

The national consultation[3] was launched on 16 April 2013 and lasted for 6 weeks.

On 15 July 2013, a request for information[4] was sent to ACM and a response was received on 18 July 2013.

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

1 Under Article 7 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), 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 Corresponding to markets 3 and 7 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 (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

3 In accordance with Article 6 of the Framework Directive.

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

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The fourth round review of the fixed call termination market was notified to and assessed by the Commission under case NL/2010/1079[5]. OPTA[6] proposed to designate all active operators as having significant market power (SMP) and to impose the remedies of access, transparency, and price control on the basis of the pure BULRIC methodology. OPTA's subsequent final decision of 7 July 2010 imposed local and regional fixed call termination rates by means of a glide path towards 0.0036 EUR/min which would apply from 1/09/2012 onwards. OPTA's decision of 7 July 2010 was, however, partially annulled by the Trade and Industry Appeal Tribunal (the "Tribunal") on 31 August 2011. The Tribunal ordered OPTA to take a new decision regarding both the price caps for fixed call 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 adopted a new decision on the price caps for fixed call termination rates.

The third round review of the mobile call termination market was notified to and assessed by the Commission under case NL/2010/1080[7]. OPTA proposed to designate all active operators as having SMP and imposed the remedies of access, transparency, and price control. It proposed to set a price cap for mobile call termination rates and direct interconnection based on the pure BULRIC costing methodology. OPTA's subsequent final decision of 7 July 2010 imposed mobile call termination rates by means of a glide path towards 0.012 EUR/min which would apply from 1/09/2012 onwards. OPTA's decision of 7 July 2010 was partially annulled by the Tribunal on 31 August 2011. The Tribunal ordered OPTA to set a price cap glide path towards EUR 0.024/min as of 1 September 2012, as determined by it on the basis of a 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.

On 12 January 2012, the Commission registered the notification of the partial revision of the two above mentioned markets, following the Tribunal's annulment, on 31 August 2011, of the 2010 decisions. OPTA proposed to set the price caps for fixed and mobile call termination rates as well as the direct interconnection rates on the basis of the BULRIC-plus methodology in line with the ruling of the Tribunal, i.e. on the one hand 0.0037 EUR/min for fixed call termination as of 1 May 2012 and until then 0.0072 EUR/min for regional fixed calls and 0.0053 EUR/min for local fixed calls, and on the other hand for mobile calls 0.027 EUR/min until 1 September 2012 and 0.024 EUR/min thereafter. OPTA proposed to apply the same direct interconnection rates, retroactively as of 1 September 2010, for both the fixed and mobile call termination markets.

Following a Phase II investigation[8] the Commission issued on 13 June 2012[9] a recommendation pursuant to Article 7(5)(a) of the Framework Directive requiring OPTA

[5] C(2010) 3765.

[6] OPTA merged on April 1, 2013 with the Netherlands Competition Authority and the Netherlands Consumer Authority into the newly formed entity named Authority for Consumers and Markets (ACM).

[7] C(2010) 3765.

[8] C(2012)1038

[9] C(2012)3770

to amend or withdraw the remedies containing the price control obligation relating to the rates charged by SMP operators on the fixed and mobile call termination markets in the Netherlands to ensure that the evaluation of the efficient costs for the rates applied on these markets is based on a pure BULRIC methodology, the latter being the most appropriate methodology for the regulation of the rates applicable on the fixed and mobile termination markets taking account of Article 8 of the Framework Directive. On 2 July 2012, OPTA published its final measure, where it did not follow the Commission's recommendation.

II.2. Market definition

As regards the product market definition, the network of each of the active fixed and mobile operators constitutes a distinct product market. ACM includes in the relevant product market for fixed call termination again the services of call termination on geographical numbers, on 085, 088 and on 084/087 numbers as well as on 112, 14xy and 116xyz numbers[10], and in the relevant product market for mobile call termination again the 06 numbers.

ACM proposes to include also 0970 numbers in both the fixed and mobile call termination markets. These numbers are used since 1 March 2013 for automated machine to machine (M2M) applications[11], which mainly concern data traffic. ACM explains in its response to the request for information that prior to the introduction of the new 0970 number type, the mobile 06 numbering was used for M2M services and that these services were already included in the product market definition in previous market analyses. ACM clarifies that it excludes all data traffic termination from the market definition, and that it only includes the limited share of actual conversation calls within M2M. ACM concludes that these are comparable to call termination on geographical numbers in case of fixed termination and on mobile numbers in case of mobile termination[12].

According to ACM, the relevant geographic scope of the identified product markets is national and limited to the Netherlands.

II.3. Finding of significant market power

ACM proposes to designate all active operators providing fixed and mobile call termination as having SMP on their respective markets. The criteria considered by ACM when reaching its conclusion are *inter alia* 100% market share of each individual operator on the relevant markets, the fact that a smaller retail market share of an operator increases the likelihood of it being able to charge higher call termination rates on the retail markets than the larger operators[13], entry barriers, and insufficient countervailing

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[10] 088 numbers are intended for companies or institutions; 085 for non-geographic numbers for nomadic use; 084/087 for personal assistance services; 112 emergency number; the numbers 14xy are part of the national number plan since 04/2006 and are intended *inter alia* for use by town halls (no fees may be charged for the information); 116xyz are numbers of social importance across Europe, such as 116000 for missing children.

[11] ACM identifies four categories of M2M applications: Machine to Machine, Machine to Human, Human to Machine and Human to Human.

[12] E.g. a signal sent to the emergency room after a car accident, after which a telephone call is initiated by the emergency room, with the driver being connected to the emergency assistant.

[13] ACM explains that this is caused by the fact that (i) higher fees for call termination from a smaller provider are mostly not passed through into increases in the retail rates to that specific destination, and (ii) even where the tariff increase is translated into a higher rate to that specific destination, this is barely known by the end user. Thus price elasticity of connecting with small providers is lower than

buyer power.

II.4. Regulatory remedies

To remedy the identified potential competitive failures of excessive tariffs, margin squeeze and access related barriers, ACM proposes to impose on all SMP operators the obligation to provide access, including colocation and direct interconnection, while meeting additional regulatory requirements to avoid *inter alia* delivery delays, unfair conditions, quality differentiation and strategic product design. In this analysis, however, ACM proposes to limit the fixed network access obligation to the regional level[14], to reflect the regional access obligation imposed on the call origination market[15]. ACM furthermore imposes transparency and price control obligations. In terms of the transparency remedy, only KPN is required to provide a reference offer for fixed call termination at regional level due to its leading position vis-à-vis other fixed and mobile call termination providers.

As to the price control obligation, ACM proposes to regulate the mobile and fixed call termination rates as well as direct interconnection rates in the Netherlands on the basis of a pure BULRIC methodology[16], in line with the Commission's Recommendation on Termination Rates[17]. Against the background of the Tribunal's August 2011 ruling, ACM demonstrates in its present notification its discretion and assessment of the implementation of the regulatory concept of cost orientation in the light of EU and national law as well as of judgements by the Court of Justice and the national courts. ACM also further motivates the appropriateness of the pure-BULRIC methodology by explaining that, since the previous regulatory period, most Member States have applied a pure BULRIC methodology to set cost oriented call termination rates. The ACM clarifies that not only does the pure BULRIC methodology eliminate the risk of excessive pricing and margin squeeze, stimulate competition, and promote end-user interests, but also that the use by the Dutch regulator of the EU recommended costing methodology, similar to its counterparts in the other Member States, promotes the development of the internal market. In this respect, ACM refers to cross-border traffic that characterises the call termination markets[18] and explains how call termination rates based on a BULRIC-plus methodology only in the Netherlands would lead to an unfair competitive advantage for call termination providers in the Netherlands vis-à-vis call termination providers elsewhere in the Union. Finally, the ACM recognises the importance of NRAs contributing to legal certainty within the EU with regard to providing the correct investment stimuli and reducing regulatory costs.

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that of large providers. Due to this lower price elasticity results small providers can profitably charge higher fees than large providers.

14 I.e. 20 interconnection locations for fixed call termination, PSTN and new interconnection together; 5 interconnection locations for fixed call termination for IP interconnection; and 5 interconnection locations for mobile call termination.

15 NL/2012/1306, C(2012)2663.

16 The ACM models *inter alia* a hypothetical efficient existing fixed call termination provider with a scale of 50% (N=2) and a hypothetical efficient existing mobile call termination provider with a scale of 33% (N=3), dimensions the mobile network on the basis of total traffic, proportionately relates GSM-900 and DCS-1800 frequency costs to the incremental mobile call termination costs; maintains frequency costs in line with the previous BU model; and only includes traffic sensitive VoIP licence costs.

17 Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (Termination Rates Recommendation); OJ L 124, 20.5.2009, p. 67.

18 According to ACM's sources, 7 to 9% of calls terminated by mobile operators originate from abroad.

The following symmetric regulated rates set by the ACM on the basis of a pure BULRIC methodology will apply as of 1 September 2013:

Fixed call termination (EURcents/min)	0.108
Mobile call termination (EURcents/min)	1.019
Direct interconnection	
Preparation and testing	
New connection (EUR)	61.337
New interconnection location (EUR/location)	39.899
Expansion of ports on existing interconnection location (EUR)	2.184
Termination of interconnection (EUR/location)	8.972
Monthly tariffs	
Costs per supplier for all locations (EUR/month)	1.906
E1 interconnection port	64
Co-location tariffs	
Footprint per 2m2, plus energy, air conditioning and cabinet (EUR/month)	320

III. NO COMMENTS

The Commission has examined the notifications and the additional information provided by ACM and has no comments.[19]

Pursuant to Article 7(7) of the Framework Directive, ACM may adopt the draft measure and, where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC[20] 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 Commission[21] within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential

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

[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: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

information which you wish to have deleted prior to such publication.[22] You should give reasons for any such request.

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

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