EUROPEAN COMMISSION

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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/2015/1794: Wholesale local access provided at a fixed location in the Netherlands

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

1. PROCEDURE

On 28 October 2015, the Commission registered a notification from the Dutch national regulatory authority, *Autoriteit Consument & Markt* (ACM)[1], concerning the wholesale local access market provided at a fixed location[2] in the Netherlands.

The national consultation[3] ran from 17 July 2015 to 11 September 2015.

On 11 November 2015, a request for information[4] (RFI) was sent to ACM and a response was received on 16 November 2015.

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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 Market 3a in Commission Recommendation 2014/710/EU of 9 October 2014 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 295, 11.10.2014, p. 79.

3 In accordance with Article 6 of the Framework Directive.

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

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.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

The full review of the wholesale central access market at a fixed location in the Netherlands was notified to and assessed by the Commission under case number NL/2011/1278[5]. In this decision OPTA (ACM's predecessor) concluded that wholesale access to the copper network at MDF/SDF[6] level and access to fibre to the home (FttH) at ODF level were part of the same market, whereas wholesale access to fibre to the office (FttO) lines[7] was considered to be in a separate market. KPN/Reggefiber[8] was found to have significant market power (SMP) on the former market and made subject to a full set of obligations.

In relation to the imposed remedies, MDF/SDF access over copper loops was regulated by means of a safeguard cap, i.e. a tariff ceiling based on the estimated Embedded Direct Costs (EDC) prices for 2011 and increased with the consumer price index in each year of the charge control period. OPTA thus departed from its standard approach of estimating the charge control for MDF/SDF access based on an EDC cost modelling for every year to better address uncertainty regarding future network volume developments and ensure regulatory certainty and stability of copper access prices. FttH and FttO[9] ODF access were both regulated on the basis of a Discounted Cash Flow (DCF) model which OPTA considered best suited in light of the considerable uncertainties surrounding the ultimate long-term access cost for these new services. The Commission commented on (i) the need for a simultaneous notification of the FttO access market for a consistent evaluation of the wholesale market for physical network infrastructure access in full knowledge of the facts[10], (ii) the lack of a regulated alternative (virtual) access product to SDF physical access, and (iii) the proposed safeguard caps. The Commission underlined the need for cost-orientation of access prices and thus invited OPTA to revisit its

5 C(2011) 10075.

6 The following technical terms will be used and abbreviated as follows: Fibre to the Office (FttO), Main Distribution Frame (MDF), Sub Distribution Frame (SDF), Optical Distribution Frame (ODF) Fibre to the Home (FttH).

7 The market for FttO access was notified and assessed under case NL/2012/1407 (C (2012)9967). KPN was found to have SMP and made subject to a full set of obligations.

8 KPN and Reggefiber B.V. together established a joint venture, Reggefiber Group B.V, with the objective of constructing fibre loop networks.

9 The implementation of the DCF model for FttH ODF access was notified to and assessed by the Commission under case NL/2013/1439.

10 The Commission also urged OPTA to further substantiate the differences between FttH and FttO in the final measure and in future notifications.

price control measure as soon as any EU guidance on costing methodologies was adopted[11].

Price-caps for the one-off and monthly fees for the new service of pair bonding (MDF pair bonding) for the period between 1 January 2013 and January 2015 were set in case NL/2013/1512[12]. The Commission commented on the complexity of the architecture of pricing decisions that ACM was proposing to implement in the different interrelated broadband markets and expressed the view that the wholesale local access should be reviewed as a whole in the next market review, taking utmost account of the Recommendation on non-discrimination and costing.

There were two subsequent notifications from ACM. The first (case number NL/2014/1601[13]) implemented certain changes to the calculation of price-caps for MDF/SDF access in the period 2009-2011. The second (case NL/2015/1725[14]) imposed price control remedies on new MDF services consistent with ACM's methodology defined in the 2011 decision (case NL/2011/1278 discussed above). The Commission had no comments in both cases.

The full market review was again notified to and assessed by the Commission under case NL/2015/1727[15]. ACM defined the following underlying retail markets: fixed internet access market, fixed telephony markets (single, dual and multiple calls) and business services markets, and concluded that in the absence of wholesale regulation, there is a risk of joint dominance of KPN and UPC/Ziggo on the internet access market and a risk of single dominance of KPN on the fixed telephony markets and the business services markets. ACM then defined the relevant wholesale local access market as comprising access to the copper network at the MDF and SDF, and VULA and FttH access at the ODF, and imposed on KPN, considered to be enjoying single SMP, the following regulatory obligations: access, transparency (including the publication of reference offers for unbundling access and for MDF-access migration), non-discrimination and price control. The Commission issued a serious doubts letter under Article 7 of the Framework Directive in which it considered that ACM has not appropriately assessed the boundaries of the relevant market since it has not considered self-supply by UPC/Ziggo (the cable operator) in the analysis of the market for wholesale local access at a fixed location. The Commission also expressed serious doubts as regards ACM's finding of KPN holding SMP on a potentially broader wholesale local access market. ACM withdrew its notified draft measure during the Phase II investigation.

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[11] Now adopted: Commission Recommendation of 11.9.2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (Costing and non-discrimination Recommendation), C(2013) 5761, OJ L 251, 21.9.2013, p.13.

[12] C(2013) 7876

[13] C(2014) 3907. These amendments result from the Dutch Court ruling (CBb) of 23.9.2013 following an appeal of the original 2009 adopted measure.

[14] C (2015) 2456

[15] C(2015) 3078

2.2. Analysis of underlying retail markets

ACM explains in the response to the RFI that a dominance analysis at retail level is not a requirement in the Dutch Telecommunications Law. ACM adds that given that the local access market is listed in the Recommendation on Relevant Markets, ACM has the authority to regulate it as long as, absent regulation, there is a risk of SMP on at least one of the underlying retail markets.

The analysis of the retail competition on the fixed telephony and business services markets illustrates, in ACM's view, the economic justification of the wholesale local access analysis. ACM explains that while the draft measure defines the boundaries of the underlying retail markets, their precise delineation is not an objective *per se* and may change in forthcoming notifications as a result of, for example, new market developments. ACM refers in this respect to the forthcoming reviews of the wholesale fixed telephony markets and of the HQ-WBA/WLL market the consultation of which is foreseen for the end of Q1 2016.

ACM defines the following underlying retail markets: fixed internet access market, fixed telephony markets (single, dual and multiple calls) and business services markets.

ACM concludes that in the absence of wholesale regulation, there is a risk of KPN having SMP in all the retail markets listed above except for the internet access market. On the latter, ACM finds that a number of market characteristics contribute to the creation of joint SMP. ACM considers, however, (and further confirms) in the response to the RFI that there is too much uncertainty about the standard of proof in assessing joint dominance in a hypothetical situation of the market absent regulation and on a forward-looking basis. ACM, therefore, does not conclude on the existence of joint dominance on the retail access market.

ACM further clarifies that the analysis shows that absent regulation there will be consumer harm in all the underlying retail markets. While this consumer harm conclusion is based on an SMP finding in the fixed telephony and business services retail markers, the existence of consumer harm on the retail internet access market (where no clear indication of SMP was found) is based on two main elements, i.e. prices would be set at an above-competition level and the services offered would be of lower quality.

2.3. Market definition

The notified draft measure concerns the full analysis of the wholesale local access market provided at a fixed location. ACM defines the relevant wholesale market as comprising access to the copper network at MDF and SDF (including VULA), and FttH access at the ODF. The geographic market is national in scope.

ACM excludes cable from the market since there is no direct substitution between unbundled access and cable access. ACM explores cable unbundling at the multitab and cable unbundling by spectrum sharing. With respect to the former, ACM explains that it is not economically feasible since operators, in order to get access to point-to-point connections, have to roll-out networks to the multitab (500,000 in the Netherlands), which means that they have to replicate almost the entire cable network, which makes any new entry impossible. This is in ACM's view confirmed by purchasers of unbundled access who do not see cable unbundling as an economically valid alternative. As regards spectrum sharing, ACM notes that the latter is inefficient since it is leading to reduced capacity and quality of the service to the end-user.[16]

The exclusion of cable from the market is also confirmed by ACM's analysis of the indirect constraints of cable on wholesale access prices for copper and fibre. To this effect, ACM carries out a critical loss analysis to assess whether cable is exercising sufficient indirect price constraints on copper and fibre. ACM concludes that in the case of a 10% increase in wholesale prices for copper- or fibre-based access services or of a simultaneous price increase in both copper and fibre access services, the share of retail customers switching to cable would not be sufficient to make the price increase unprofitable.

In addition to indirect constraints from the retail level, ACM considers indirect pricing constraints coming from the low quality wholesale bitstream access market. ACM explains that there is no indirect pricing pressure from this market since cable networks do not deliver external wholesale bitstream access at a significant scale[17]. According to ACM, this implies that operators, when faced with KPN's price increase of its access products, cannot switch to a large enough extent to wholesale products over cable to discipline KPN on the wholesale local access market.

Finally, ACM assesses whether VULA over cable is a substitute for unbundled access. ACM refers in its assessment to cable regulation in Belgium and Denmark. ACM notes in this respect that in both countries the relevant product is part of the wholesale bitstream access market and that it is not suited for business users in Belgium. ACM concludes that some form of cable active access is possible but that such access does not fulfil the three criteria set by the Recommendation on relevant markets.[18]

16 According to ACM, in case of spectrum sharing different operators use different frequency slots, which implies that the available capacity (which is limited), should be shared among the operators, thus leading to reduced capacity. Moreover, available capacity is not maximally used by different operators' slots, i.e. while there will be a capacity shortage for some operators, others will have excess capacity.

17 ACM explains that joint market share of cable operators offering some form of access is less than 5%. ACM further notes that UPC/Ziggo does not deliver external bitstream access.

18 ACM refers to two possible types of access: centralised and decentralised, which are in ACM's view comparable to bitstream access. ACM explains that the first criterion (localness) is not met by the centralised access which is offered at national level, and that while decentralised access offered at the CMTS locations can be considered as complying with this first criterion, it provides shared connections to end-users (contrary to unshared MDF access connections). ACM considers that also the second criterion (guaranteed bandwidth) is not fulfilled since cable access can deliver neither high quality connections to business customers during peak hours, nor be offered at a large scale, the latter being possible only at the expense of internet connection speed. In this respect, ACM also refers to Tele2's submission which explains that the availability of cable networks on business locations is very limited and that it is crucial for the economic feasibility of larger scale roll-out to CMTS locations to reach also business customers since they generate on average bigger profits per connection. As to the third criterion, (control over the network and scope for product differentiation), ACM considers that it is not met. ACM notes in this respect that cable access does not allow alternative operators to offer their own TV streams, and that even if this would be possible by the use of multicast technology, extra capacity would have to be reserved for alternative operators at the expense of maximum attainable internet speed and consumer TV services.

2.4. Finding of significant market power

ACM proposes to designate KPN with significant market power in the market for local access at a fixed location. The criteria used by ACM are *inter alia*: market shares[19], not easily replicable infrastructure, countervailing buyer power, and high entry barriers. Moreover, on the basis of the critical loss analysis used in the context of the market delineation, ACM concludes that cable does not exercise sufficient indirect (retail level) constraints on KPN.

ACM also carries out a robustness analysis to verify whether KPN would have SMP in a hypothetical broader market which would include cable[20]. ACM's robustness analysis is based on a scenario where there is not yet a cable local access product available, but such a product would possibly become available in the longer term (period of 6-10 years)[21]. In addition, this scenario also envisages the possibility over time that cable access belongs to the market for unbundled access through indirect pricing pressure from the underlying markets.

Also, ACM compares KPN's and UPC/Ziggo's respective positions on the market in terms of control of infrastructure which is not easily duplicated, economies of scale and scope, technological performance and concludes that KPN has advantages over UPC/Ziggo except in terms of economies of scale where none of the operators has an advantage over the other. In terms of barriers to switching to cable, ACM considers that these are high since parties have already invested to gain access on KPN's network and that switching to cable (where they have to interconnect at hundreds of locations) would imply high costs. This is accompanied by uncertainty about technical problems inherent to the launch of a cable access service. In this respect, ACM refers again to cable regulation in Belgium and Denmark and underlines that in Belgium where access to cable is regulated since 2011 there is still no active cable retail offer and that in Denmark there is still not a single alternative provider having switched to cable (while regulation started in 2009). ACM concludes that its proposed SMP analysis is robust since even in a market including cable, KPN holds SMP.

2.5. Regulatory remedies

ACM proposes to make KPN subject to the following obligations: access, transparency (including the publication of reference offers), non-discrimination and price control.

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19 KPN is the only provider of unbundled access to the copper access network and the largest provider of ODF-FttH access. KPN holds a 97% market share on the relevant market for unbundled access. At present, KPN provides the unbundled copper access to itself (self-supply) and third parties, such as Tele2 and Online and the ODF-access FttH to itself (self-supply) and third parties, such as Vodafone and Solcon.

20 KPN's resulting market share in terms of active lines is […] %, and […] % in terms of revenues.

21 ACM thus envisages a shorter time-period for the development of such cable product than the "minimum 10 years" foreseen in WIK's submission to ACM following the Commission's serious doubts letter, i.e. WIK Consult (2015), "Options of wholesale access to Cable-TV networks with focus on VULA,- Special aspect regarding future development of DOCSIS, Response regarding EC CASE NL/2015/1727, Phase II investigation", 8 May 2015.

The access remedy includes the obligation for KPN to provide: (i) MDF-access for full and shared LLU, (ii) VULA, (iii) ODF-FttH access, and (iv) all associated facilities. ACM proposes to withdraw the obligation for KPN to provide SDF-access, including SDF-backhaul. KPN has to meet reasonable requests for MDF access but it will also be allowed under certain conditions not to grant MDF access in order to: (i) apply copper upgrades within the inner rings (street cabinets close to the MDF), and (ii) use vectoring (or other copper upgrades) in the small MDFs (comparable in size to the street cabinets). The applicable conditions to disrupt MDF access are as follows: (a) in the network locations concerned MDF access should not be used and there should not be a request for MDF access; (b) an agreement should be reached between KPN and MDF access users, and (c) in the absence of such an agreement, ACM shall start an implementation phase which would lead to the withdrawing of MDF access only if it leads to an operational, effective VULA service and KPN uses a reasonable phasing-out period for MDF access.

ACM considers that in order to comply with the three criteria relative to local access set in the Explanatory Note to the Relevant Markets Recommendation, KPN's VULA product should be offered at all metro core locations (currently 196 but this figure could be changed if KPN demonstrates that more or less locations could qualify), offer the same technical functionalities as MDF/SDF access (the minimum being the product characteristics used by KPN's downstream organisation), and allow for a sufficient control over the end-user product parameters thus allowing access seekers product differentiation. ACM will not evaluate the VULA offer unless a VULA access seeker requests it.

Under the non-discrimination obligation KPN will be obliged to offer VULA and MDF access on an Equivalence of Output (EoO) basis and ODF-FttH access on an Equivalence of Input (EoI) basis. According to ACM, EoI implementation costs for VULA are too high. Therefore, VULA should rely as much as possible on KPN's current systems/processes applicable to the copper network. This would avoid needless cost rises for alternative providers and an artificial obligation on KPN to self-supply VULA (while actually it self-supplies only MDF/SDF). The non-discrimination obligation also includes the prohibition for KPN to price discriminate and to margin squeeze[22].

The price control obligations to be imposed on KPN consist of: (i) a safeguard cap for existing LLU services (MDF access with some exceptions for MDF pair bonding[23]) based on the previous price cap increased by the CPI (constant in real terms); (ii) cost-orientation (based on the EDC/WPC methodology) for new LLU services; (iii) a price cap on VULA based on the LLU safeguard cap and increased

[22] KPN has to ensure that its downstream service is not priced below the cost level defined in the margin squeeze test as the sum of the costs of regulated wholesale inputs, the EDC minus costs of the non-regulated wholesale services corresponding to KPN's fixed network and retail services, LRIC costs of other non-regulated wholesale inputs as well as the costs of externally purchased inputs.

[23] ACM specifies that as compared to the March 2015 analysis it has introduced two exceptions to this general rule: (i) for the (previously applied) monthly tariff ceiling in which one-off project costs were included, the ceiling will apply until the expiry of the initial 5 years after which the ceiling should be decreased by the project costs (and in subsequent years) further adjusted for inflation, and (ii) the new services' one-off tariffs (which were not representative of the life-cycle average costs) will be based on the WPC/EDC system. These exceptions apply for the time being to MDF pair bonding.

by the EDC of the VULA increment (applicable only in case no alternative commercial agreement is reached between KPN and access seekers); and (v) a price cap on KPN's FttH based on a DCF model using KPN's own internal rate of return (IRR)[24]. The regulated tariffs for LLU and ODF-FttH access will apply with the entry into force of the present draft measure. The tariffs for VULA will be determined in a price decision which will apply only if an alternative operator requests such price decision for VULA. Thus, the tariffs set in the commercial agreements[25] will serve as a price ceiling and will not be assessed by ACM.

With respect to the proposed safeguard caps (instead of cost-orientation) for *LLU*, ACM explains that safeguard caps are more appropriate because of the existing uncertainties as to the remaining life of the copper network (which affects the depreciation period and thus the annual cost), the level of investment and of maintenance costs during the remaining copper lifetime, as well as the volumes in terms of number of active lines in the transition period towards KPN's VULA and FttH offerings. Thus, according to ACM, a price control remedy based on safeguard caps permits to ensure stability of prices as well as regulatory certainty and predictability.

The proposed approach for *VULA* price caps (which would apply only in case there is a request for a VULA price decision) is according to ACM better suited than a BULRIC+ model since it may be applied within a relatively short period of time, thus, providing greater (investment) certainty to market players, and is compatible with the pricing of other regulated services. Moreover, ACM considers that applying EDC to the VULA increment does not lead to uncertain variations in the price caps since this (backbone) part of the network is less subject to volume fluctuations, as it is used for several copper and fibre services. ACM therefore considers that the proposed methodology fulfils the objectives pursued in the Costing and non-discrimination Recommendation, i.e. stable and predictable wholesale prices providing investment incentives[26].

As to its proposal to continue pricing *ODF-FttH access* on the basis of a DCF model, ACM explains that it strikes the balance between encouraging investments (since the model is based on the investor’s business model, accounts for the investment risk and allows for regulatory certainty) and promoting competition. ACM is of the view that withdrawing the use of the currently applicable DCF model (and applying the recommended economic replicability test (ERT) and lifting price regulation from ODF-FttH) would hamper regulatory certainty, thus impacting investment negatively. Moreover, ACM fears that applying an ERT would limit KPN’s price flexibility and have a negative impact on KPN's business case. Finally, ACM stresses the relatively important broadband investments in the country (25% of the households having a FttH line) and notes the importance of regulatory

[24] ACM checks regularly how the IRR calculated in the DCF model relates to the standard IRR of the all-risks WACC and if it is above the standard IRR of the all-risk WACC, then the price caps are reduced. The level of the price caps cannot however be increased. The price caps are only increased with the CPI.

[25] Commercial agreements have been signed for VULA with the three major unbundlers (Tele2, Vodafone and M7) for a seven years period. They do not cover LLU (physical access) and FTTH.

[26] The LLU safeguard cap for 2015 is €7.87 per month (compared to €7.79 in 2014).

continuity, particularly given that entry at the ODF-FttH level has started to take place and that substantial take-up is expected during the next regulatory period. Finally, ACM stresses that the DCF model allows for relatively high flexibility in prices: (i) KPN is free to apply tariffs below the caps (and it does so in practice), (ii) KPN can apply volume discounts in order to test tariff levels and penetrate the market, (iii) price caps follow KPN's investment costs (a decrease in CAPEX results in lower price caps and vice-versa), and (iv) the investment risk is taken into account since the model permits the investor to achieve a higher rate of return in favourable periods.

3. COMMENTS

The Commission has examined the notification and the additional information provided by ACM and has the following comments:[27]

Need to monitor developments on cable networks in the market

Following the Commission's serious doubts expressed earlier this year in case NL/2015/1727, ACM has performed a new analysis of the retail markets for fixed internet access, fixed telephony (single, dual and multiple calls) and business services markets, and the upstream wholesale local access market. The new draft measure from ACM includes mainly two additional elements when compared to case NL/2015/1727.

First, ACM continues to believe that access to cable networks in the next regulatory period does not belong to the relevant wholesale local access market. However, ACM has substantiated the market definition by including (i) an assessment of indirect constraints on unbundled copper access stemming from the wholesale central access market and of cable access; and (ii) a robustness check of its SMP analysis, in which it demonstrates that KPN would still hold SMP even in a broader market including cable. The starting point in this additional analysis is a scenario in which cable access becomes a substitute to wholesale local access as a result of accelerated technical progress and/or increased indirect constraints coming either from the retail level or from market 3b.

Second, ACM no longer concludes that there is a risk of joint SMP in the retail fixed internet access market absent regulation. Instead, it has provided additional evidence showing that, absent the competitive pressure exercised by access seekers, UPC/Ziggo and KPN have an incentive to compete less, which is likely to lead to consumer harm.

Given the ubiquitous presence of cable in the Netherlands and the potential for cable to act as a competitive constraint on KPN's access network, the Commission asks ACM to monitor developments on cable networks with a particular focus on whether developments lead to (virtual) cable unbundling being both technologically and economically feasible.

The Commission would like to note in this respect that technical considerations do not appear to be the main obstacle to offering a local access product on cable networks, with economic and strategic considerations being the main reason for cable operators not to enter the wholesale access market. According to the WIK

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

reports to which ACM refers in the notified draft measure[28], the technical standard (which may not presently allow the unbundling of the local cable access network) may be expanded if demand from operators grows to a critical mass, leading to discovery of a new market. The report thus emphasises the need for demand[29] rather than standardisation as an important obstacle to (virtual) cable unbundling. The Commission considers, contrary to WIK, that market analysis should also take into account the possible role of regulators in incentivising suppliers and operators of the DOCSIS community into developing a standard allowing VULA-type access to their networks, as happened in the past with copper unbundling on the wholesale local access market - itself the outcome of past regulatory intervention. It is not sufficient to consider only whether the required DOCSIS standard would be actively promoted by the cable community.

The Commission therefore asks ACM, particularly in the context of the next review of the wholesale local access market, to analyse whether the specific technical barriers to providing local access over a cable network have been overcome or have realistic prospects of being overcome, with the effect of potentially broadening the wholesale local access market in the timeframe of the review. Such analysis should not, however, prejudge the question whether local access to cable networks is mandated as a result of an individual or joint SMP finding.

The Commission would like to note in this respect that the commercial agreements signed recently between KPN and its competitors should have an important impact on a future assessment of the need for regulation. The conclusion of such unconditional agreements with the main access seekers in respect of VULA, as well as certain central wholesale access products, is in the Commission's view already a relevant factor in determining the appropriate level of *ex ante* regulation of the access products in question. This will apply *a fortiori* in the next market review, when the extent to which these agreements were successfully implemented, possible disputes resolved in a swift and timely manner between parties, and the scope enhanced, in the event of there being substantiated demand, to include other relevant local access products (such as for FttH) on reasonable terms consistent with maintenance of investment incentives, should inform ACM in its next market review whether it would be necessary for it to retain its *ex ante* powers to monitor and enforce regulated access conditions in a potentially deregulated wholesale local access market.

Review of markets outside the scope of the presently notified draft measure

ACM plans to notify the full market review (relevant market definition, SMP assessment and remedies) of the wholesale fixed telephony markets, HQ-WBA/WLL as well as underlying retail markets at a later stage, although these markets have already been referred to in some detail in the context of the presently notified draft measure.

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[28] WIK Consult (2014), *Options of wholesale access to Cable-TV* networks *with focus on VULA*, Workshop for ACM, 9 July 2014. The workshop slides conclude that "DOCSIS (3.0/3.1) so far is not intended to support wholesale services in a VULA manner, but may be developed towards such features, if there is demand for it" (slide 65).

[29] Submissions from third parties in case NL/2015/1727 suggest that potential demand exists in the Netherlands.

The Commission reminds ACM that it can only assess the proposed regulatory approach with regard to markets outside the scope of the presently notified draft measure in the context of the forthcoming notification(s) under Article 7 of the Framework Directive, taking into consideration most recent market developments.

Appropriate wholesale price control

With regard to pricing remedies, the Commission notes that ACM is proposing to set (i) a safeguard cap on LLU, except for MDF pair bonding services where cost-orientation would apply; (ii) a price cap based on the LLU cap increased by the incremental costs specific to the product for VULA if there is a request from an alternative operator (the commercial agreements' terms apply otherwise), and (iii) a price cap on KPN's FttH product. The Commission notes that ACM's approach to price controlling KPN's FttH deployments deviates from the Commission's Costing and non-discrimination Recommendation, in that even in the presence of competitive constraints and of high standards of non-discriminatory treatment (EoI), a form of price control is still foreseen going beyond the constraints inherent in an economic replicability test. The Commission recognises that ACM's approach, using a DCF methodology based on KPN's business plan (in terms of the assumed internal rate of return, demand forecast and project lifetime), provides a degree of pricing flexibility to the SMP operator investing in fibre roll-outs, and reflects the approach already applicable since the KPN-Reggefiber merger decision of 31 October 2014. None the less, in a context of generalised infrastructure competition at national level, and in which it has proven to be possible for commercial agreements to be concluded on wholesale local access to other parts of KPN's infrastructure (VULA), the Commission invites ACM to consider in its final measure whether it is necessary to impose *ex ante* price controls on regulated FTTH wholesale local access.

With respect to the legacy product, ACM gives preference to a price-cap based remedy. The Commission recalls that it has already in the past commented on ACM's approach, noting that LLU prices are not cost oriented and that the existence of different pricing methodologies may result in a complex pricing framework for the wholesale services. The Commission therefore invites ACM to re-consider the relevance of using a BULRIC+ approach in the next review, consistent with the Commission's 2013 Costing and non-discrimination recommendation. This being said, the Commission also notes the overall value of stability of regulated prices, in particular for a legacy product such as copper; that ACM's proposed approach results in a LLU tariff close to the lower limit of the indicative band set in the 2013 Costing and non-discrimination recommendation; and that by the time the next market review is conducted, complexity may be reduced if the VULA price is effectively set by the market, and if a more flexible pricing approach for FttH products is considered to be appropriate.

Pursuant to Article 7(7) of the Framework Directive, ACM shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; 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[30] 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[31] 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 publication.[32] You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

[30] 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.

[31] Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

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