EUROPEAN COMMISSION

Brussels, 21.12.2012
C(2012) 9967

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 70 315 92 04

Dear Mr Fonteijn,

Subject: Commission Decision concerning Case NL/2012/1407: Unbundled access to business fibre networks in the Netherlands, and

Commission Decision concerning Case NL/2012/1408: High-quality wholesale broadband access and leased lines in the Netherlands

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

I. PROCEDURE

On 23 November 2012, the Commission registered two notifications from the Dutch national regulatory authority, Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA)[1], concerning the market for unbundled access to business fibre networks (FttO-ODF access)[2] and the market for high-quality wholesale broadband access and leased lines (HQ WBA)[3] in the Netherlands.

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 4 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 Corresponding to markets 5 and 6 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

The national consultations[4] for both notified draft measures ran from 14 September 2012 for a period of 6 weeks.

On 3 December 2012, a request for information[5] was sent to OPTA and a response was received on 6 December 2012.

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.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

II.1.1. Wholesale market for (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location in the Netherlands

This market was previously notified to and assessed by the Commission under case NL/2011/1278[6]. OPTA found the relevant market to consist of two sub-markets: on the one hand, the market for local loop unbundling comprising Main Distribution Frame (MDF) and Sub-Distribution Frame (SDF) access over copper as well as Fibre to the Home (FttH) Optical Distribution Frame (ODF) access, and on the other hand the market for Fibre to the Office (FttO) ODF access. OPTA found KPN to have significant market power (SMP) on the former market and imposed on it a full set of remedies. The market for FttO ODF access was notified to and assessed by the Commission under case NL/2012/1298. Following the Commission's opening of a Phase II investigation[7] based on the lack of evidence supporting both the finding of a separate FttO ODF access sub-market and the non-existence of an SMP operator, OPTA withdrew its draft measure for FttO ODF access. This market is now being re-notified.

II.1.2. Wholesale market for wholesale broadband access (WBA) and wholesale terminating segments of leased lines (LL) in the Netherlands

This market was previously notified to and assessed by the Commission under case NL/2012/1299. OPTA found the relevant market to consist of two submarkets: an effectively competitive market for low quality (LQ) WBA and a market for high quality (HQ) WBA including LL on which KPN was found to have SMP. While the Commission issued comments on the low quality WBA market, it opened a Phase II investigation[8] concerning the limitation of the access obligation to copper on the HQ WBA/LL market. OPTA adopted its decision deregulating the LQ WBA market and withdrew its notification related to the market for HQ WBA/LL. This latter market is now being re-notified.

Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

4 In accordance with Article 6 of the Framework Directive.

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

6 C(2011)10075.

7 C(2012)2011.

8 C(2012)2228.

II.2. Market definition

II.2.1. FttO ODF access market

FttO ODF access is a form of unbundled access which allows alternative operators accessing the FttO network to provide services to business customers. OPTA excludes from the relevant product market coaxial cable, mobile and wireless connection networks. Following the Commission's comments in case NL/2012/1298 OPTA re-confirms that FttO and, in particular, FttH ODF access are not part of the local loop (over copper/FTTH) market due to (i) differences in roll-out patterns[9], (ii) a very limited overlap[10], (iii) a considerable price difference[11], and (iv) lack of supply-side substitution[12].

The relevant geographic market is national.

II.2.2. HQ WBA/LL market

Contrary to the distinction between Market 5 and Market 6 in the Recommendation on Relevant Markets, OPTA includes both HQ WBA and LL[13] in the same relevant market, irrespective of whether it is delivered over copper or fibre and irrespective of the capacity. HQ WBA/LL over coaxial cable instead is excluded due to technical network characteristics that entail, at least currently, an impossibility to guarantee bandwidth.

OPTA finds that LL and HQ WBA are both used to satisfy the same demand for business network services[14]. From a demand side perspective, increased capacity in HQ WBA results in greater substitutability, and the price of LL 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, are sold by the same commercial sales force and provided via the same networks.

The relevant geographic market is national.

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9 i.e. large scale area glazing and demand bundling for FttH networks, and connection upon individual request or small scale demand bundling for FttO networks.

10 i.e. 1-5% of the businesses with >5 employees located within 250m of the FttO network are in an area where also FttH is rolled-out. OPTA does note that this overlap will increase with the roll-out of FttH networks but will remain limited in the upcoming regulatory period, limiting as such also demand substitutability.

11 On the basis of the most recent area glazing FttH ODF access tariffs, OPTA has illustrated what the effects of demand bundling and individual connections would be on CAPEX, depreciation period and penetration for FttO ODF access. It has estimated that FttO ODF access tariffs are likely to lie between a minimum of 35-40€ and a maximum of 100-350€. The range of regulated tariffs for MDF access, FttH ODF access and two or four stacked copper lines lie between 6.54€ and 26€. Price differences between ODF access in FttH and FttO areas are based on differences in underlying costs (location density, digging distance and the type of roll-out). While the investment risk is mitigated for FttO ODF access by customers' contractual commitments, for FttH ODF access this risk is mitigated by the roll-out threshold of 30% pre-subscription.

12 A provider of FttH ODF access cannot start supplying FttO ODF access in case of a price increase as it would first have to roll-out an FttO network.

13 i.e. classic wholesale terminating segments of leased lines; terminating dark fibre (around 5% of all connections).

14 Despite the difference in contention ratio between LL (1:1) and HQ WBA (up to 1:20).

II.3. Finding of significant market power

II.3.1. FttO ODF access market

OPTA finds KPN to have SMP on this market on the basis of market shares[15]; a difficult to replicate FttO infrastructure; advantages from vertical integration enhanced by its network coverage which facilitates in particular the provision of competitive multi-site offers; economies of scale and scope; barriers to switching, insufficient countervailing buyer power; barriers to entry for new market players that could sufficiently discipline KPN.

OPTA finds that KPN's market share, in terms of number of business fibre connections, has increased from […]% in Q4 2008 to […]% in Q1 2012. While Ziggo was in 2008 the second largest FttO ODF access provider with […]%, Eurofiber overtook Ziggo in Q4 2010 and had in Q1 2012 a […]% market share. In 2011 KPN's growth in number of connection lines has been […] as high as the total market growth. While OPTA expects market growth to slow down over time, in the coming years market growth will mainly be related to multi- and single-site contracts switching from copper to fibre connections. Based on an intermediate market growth of 12% per year and on KPN's net growth of […]%, OPTA estimates that KPN's market shares in Q4 2015 could be as high as […]%. If KPN grows at market speed, its share should remain stable at […]%.

OPTA provides an overview of multi-site contract characteristics in the Netherlands. KPN has by far the highest number of contracts and connections. […][16]. OPTA points out that KPN's competitors much depend on FttO ODF access from each other[17] or from KPN while KPN can largely serve such customers by means of its own network generally located closer to the smaller locations. This is an important cost reducing factor for KPN.[18] In 2012, […]% of businesses with five or more employees are located within 150m of KPN's transmission network and […]% within 250m. For Eurofiber this is respectively […]% and […]%. The more distant the location, the smaller the difference in network coverage between the FttO ODF access providers. However, KPN's network coverage is the largest at any distance. The cost per connection decreases as the network is more fine-gridded and the penetration grade increases. KPN's network coverage implies that its average digging costs to new business locations are lower than for its competitors.

Furthermore, business customers that will switch to fibre are currently mainly on the copper network on which KPN has the strongest position. KPN will experience for that reason less switching barriers than its competitors. The customers of the latter face double switching barriers: switching infrastructure and switching provider.

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15 FttO ODF access is currently only supplied internally.

16 […]

17 OPTA refers to a Stratix study which points out that combining coverage of alternative providers for multi-site offers requires far reaching system integration with technical, operational and cost limitations that hamper replication of KPN's offer.

18 KPN has a commercial FttO ODF access offer which is not taken up, contrary to KPN's HQWBA/LL offer over fibre, the tariffs of which are more advantageous.

II.3.2. HQ WBA/LL market

OPTA finds KPN to have SMP on this market[19] on the basis of market shares; difficult to replicate copper and fibre infrastructures; advantages from vertical integration enhanced by its network coverage (see above) which facilitates in particular the provision of competitive multi-site offers; economies of scale and scope; and insufficient countervailing buyer power.[20]

KPN's market shares have decreased from […]% in Q4 2009, to […]% in Q1 2012 and are expected to be around […]% in Q4 2015 in the presence of ULL, FttO ODF access and HQ WBA/LL regulation. Tele2, who has a market share of […]% in Q1 2012 and an expected market share of […]% in Q4 2015, has currently […]% coverage of the business locations through local loop unbundling from KPN, and a limited fibre-based coverage. Tele2 is therefore also partly dependent on KPN for HQ WBA/LL supply. KPN, instead, is the only nationwide provider of HQ WBA/LL. According to OPTA, KPN's competitors would, in the absence of HQ WBA/LL regulation, find it difficult to compete on the multi-site market for business services and lead to an increase in KPN's market shares by 2015 (between 60 and 75%).

OPTA explains that where KPN can supply, over the copper network, 100% of the demand for an average contract with 8 locations, Tele2, with its network coverage of […]%, can only supply 17% of the demand. KNP's fibre network is also more extensive (albeit not national) than the one of its individual competitors. This translates in a better starting position for KPN with regard to multi-site demand and digging distances in future network extensions. While competitors have engaged in interconnection agreements with several parties for multi-site supply, it considered by those parties expensive and cumbersome. According to OPTA, this has lead market parties to increasingly turn to KPN's FttO connections since 2011.

II.4. Regulatory remedies

II.4.1. FttO ODF access market

OPTA proposes to impose on KPN the following obligations: (i) FttO ODF access on both Metro Bridge Location and Metro Access Location[21] and access to associated facilities including ODF-backhaul[22] and near-net service[23], (ii) non-discrimination on the basis of Equivalence of Output (EoO)[24], including a prohibition to differentiate tariffs

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[19] OPTA notes that the total market for HQ WBA/LL has shrunk and that business demand will increasingly be directed towards fibre-based services. In 2015, between 35% and 45% of HQ WBA/LL connections will be fibre-based if the current trend continues. HQ WBA/LL services are provided internally and externally (30% of all connections). KPN and in particular Tele2 are the largest external providers on the total merchant market.

[20] OPTA recalls that KPN increased its WBA price in specific areas by 25% after annulment by the competent Dutch Court of OPTA's 2008 WBA regulatory decision and considers this an indication that KPN can behave, in the absence of regulation, independently of its competitors.

[21] Comparable to unbundled copper access on MDF and SDF level, respectively.

[22] Between the ODF-location and the network level comparable to MDF, i.e. below the local level.

[23] KPN is obliged as part of its access obligation to connect a not yet connected location to its FttO-local loop, upon request of a wholesale customer.

[24] OPTA states that currently KPN already offers NGA services via delivery, service and invoicing systems that have been especially developed for external customers.

that have the effect of hampering competition [25], (iii) transparency and publication of a reference offer to be made available within one month from the adoption of the present decision, and (iv) tariff regulation based on a discounted cash flow (DCF) methodology[26].

Near-net obligation

OPTA notes that about 25% of business customer locations are already connected to an FttO network; the last few hundred meters to each individual customer still need to be dug and connected. The provider that can connect the individual customers at the lowest price, i.e. who is closest to the customer, has a competitive advantage over the other providers, in terms of single-site customers and even more in terms of multi-site customers. OPTA considers that, given the importance of network coverage and the advantages that KPN derives from this in relation to alternative suppliers, it is insufficient to impose only an on-net access obligation on KPN. KPN would have an unequal advantage in the competition for new customers on FttO.

OPTA therefore considers it appropriate and proportionate to impose a <250m near-net service. In motivating the proportionality of the remedy, OPTA underlines that the near-net digging costs amount to 6.000-8.000€ which KPN would be allowed to recover in the monthly FttO line rental. KPN already has in its retail and services offer, near-net connections of up to 250 metres at a one-off tariff[27]. OPTA has foreseen a planning mechanism only for the development of new business areas. KPN will be required to communicate the new business area connection networks at least 2 months prior to it being allowed to offer its services to these newly connected areas at retail or wholesale level.[28]

Non-discrimination obligation

The non-discrimination obligation also includes a prohibition to charge tariffs that would lead to margin squeeze[29] (i.e. the so-called ND-5 obligation applicable at any time and in any geographic location as of three months following the adoption by OPTA of its final measure). To assess whether a downstream service is economically replicable, OPTA considers the following cost elements and cost standards (reflecting the degree of competition in the market) to be relevant:

a) purchase costs of the regulated wholesale modules based on regulated DCF-based tariffs from the reference offer (if available);

[25] e.g. selective pricing, loyalty discounts. Tariff differentiation such as quantity discounts, geographical differentiation or cost advantages would require approval by OPTA.

[26] The cost allocation system must be submitted to OPTA within three months from the final measure.

[27] i.e. between 0-1.000€.

[28] OPTA underlines that KPN is not however bound to provide near net access in a number of cases: when (i) structural works are required; if polluted ground is present; (ii) the location concerned is already connected to the FttH network; (iii) KPN does not offer the customer location concerned in its own standard near-net conditions. In the past, OPTA imposed a manhole access obligation on KPN but several parties indicated that there is no FttO business case in digging and connecting several bits and pieces of local fibre.

[29] OPTA uses the Equally Efficient Operator (EEO) as a reference.

b) fully allocated costs based on EDC-minus[30] of the unregulated wholesale modules corresponding to KPN's fixed network;
c) long-run incremental costs (LRIC) of the remaining unregulated wholesale modules or a tariff representative[31] of what KPN charges;[32]
d) purchasing costs of the wholesale modules that KPN gets externally;[33]
e) if a retail service: the retail service's associated incremental retail costs.[34]

OPTA proposes to deviate for business fibre from the generally applied ND-5 obligation at individual service level and to apply instead a test per area type[35] (i.e. a form of geographic tariff differentiation). Each area type consists of an aggregate of all connections with the same regulated tariff ceiling for FttO ODF access (distinguished on the basis of underlying cost differences). To this end, KPN will be required to dissemble cost element a) above at regulated network level, starting from either KPN's realised volumes or externally applied tariffs. OPTA considers this deviation necessary to allow tariff differentiation along the demand curve of high- and low-end customers in the different areas. While KPN will be required to provide a quarterly report to OPTA, it will have to carry out its own ND-5 test for all standard downstream services once every three months. Resulting tariff adjustments - at retail or wholesale level as KPN considers it appropriate - to the portfolio on offer will have to be applied within three months and to its installed base within 12 months.

Tariff regulation

While OPTA generally uses an embedded direct costs (EDC) methodology to price regulate fixed network services of KPN, it finds that it needs to deviate from this standard and apply the DCF methodology instead. OPTA considers this methodology better suited for relatively new services, such as Fibre to the Home (FttH) [36] and FttO, with considerable uncertainties surrounding the ultimate long term access cost. The DCF methodology provides the necessary legal certainty as it uses the business model of the

30 i.e. direct and indirect costs (including a reasonable return). OPTA may find it appropriate to deviate in situations in which the application of costs causality would lead to the obstruction of sustainable competition and fair conditions – to be discussed with market parties in the implementation phase prior to the forthcoming tariff decisions to be notified to the Commission in the second half of 2013. OPTA considers EDC-minus appropriate because KPN derives relatively large economies of scale and scope from these network elements and efficient operators should be able to recover, in the long run, at least the costs of their own network investments. In its response to the request for information, OPTA explains that following the 2008 market analysis round, KPN was allowed to develop a LRIC model (instead of the EDC minus cost standard preferred by OPTA). The implementation of this model, however, led to price floors which did not enable access seekers to recover any part of their network investments.

31 i.e. a weighted average on the market.

32 e.g. (1) all modules downstream of the ODF FttH module, in proportion to the use of ODF FttH based services, and (2) any bundled products, such as mobile telephony or TV distribution (unregulated wholesale modules of these bundled products belonging to KPN's fixed network fall under cost element B).

33 e.g. the purchase of content rights, or fixed or mobile termination from other providers.

34 The applicable absolute retail increments on top of the wholesale price are 1% of the regulated and non-regulated wholesale costs for fixed telephony and business network services and 3% for internet access.

35 To check the prices of individual services, OPTA has provided rules to recalculate the test at individual services level which will serve as input for the HQ WBA/LL ND-5 margin squeeze test.

36 C(2011)10075.

regulated provider and it distributes all relevant costs over the entire life time of the active assets (similar to a bottom-up LRIC methodology[37]), providing therefore one cost oriented price that is in real terms valid for the entire life time of each service element, increased only with inflation. Periodic cost and volume verifications can only lead to downward adjustments of the price ceiling; KPN is thus allowed to maintain a certain level of upside profit to compensate for the risk of loss or profit under reasonable return.

OPTA notes that when it assessed the EDC methodology for FttO ODF access, it resulted in too high tariffs, i.e. tariffs above the level of those offered by KPN to the market. This is due to the fact that the EDC methodology uses the costs as reported by KPN, with linear depreciation and current sales, all of which are relatively high for new services.

OPTA indicates that a separate, subsequent decision will implement the DCF costing model and the tariff ceilings resulting from it. Until then, KPN is to charge provisional tariffs which must comply with the ND-5 margin squeeze test.

II.4.2. HQ WBA/LL market

OPTA proposes to impose on KPN the following obligations: (i) HQ WBA/LL access over copper and fibre including access to associated facilities and, with regard to HQ WBA/LL access over fibre, a near-net service similar to the obligation in the FttO ODF access market; (ii) non-discrimination on the basis of EoO, including a prohibition to differentiate tariffs that have the effect of hampering competition and the same ND-5 margin squeeze test as for the FttO ODF access market, except that cost element a) is based on regulated EDC-based tariffs; (iii) transparency and publication of a reference offer to be made available within one month from the adoption of the present decision; and (iv) tariff regulation based on an EDC methodology[38].

With regard to the ND-5 margin squeeze test OPTA notes that if the (DCF-based) local loop unbundling (ULL) ND-5 test that sets the lower limit for HQ WBA/LL tariffs is above the HQ WBA/LL (EDC-based) regulated price ceiling, then the price ceiling must be adjusted to the ND-5 lower limit. As such, the ND-5 ULL margin squeeze test has precedence over cost-orientation to set the price regulation of HQ WBA/LL.

OPTA also specifies that besides testing economic replicability on the downstream retail markets, KPN will also be required to leave sufficient margin between HQ WBA/LL on the regulated network level and HQ WBA/LL on the non-regulated higher-up network level.

<u>Tariff regulation</u>

OPTA finds its standard EDC methodology for tariff regulation of KPN's network services also appropriate for HQ WBA/LL. Investments in this service's equipment, of which the economic lifetime is limited (e.g. Ethernet), are most important for HQ WBA/LL, and active network elements (e.g. transmission network for backhaul, trunk segments) have already been invested in and are shared between different services including leased lines and fixed telephony.

While cost causality is the main underlying principle, OPTA proposes that KPN, where

[37] BULRIC is considered by OPTA more suitable for the symmetric regulation of a large group of providers that require the modelling of one hypothetical efficient operator which is not the case here. Also, such a model uses many confidential KPN data and could thus not be made public in its entirety.

[38] The cost allocation system must be submitted to OPTA within three months after the adoption of the final measure.

the latter considers it appropriate, is allowed to allocate fixed costs[39] to users on the basis of the value that these users generally link to the service ("benefits received" principle).[40] This will allow proportional tariff differentiation between services with low and high capacity, in line with customer needs.

OPTA indicates that a separate, subsequent decision will implement the EDC costing model and the tariff ceilings resulting from that model. Until then, KPN is to charge provisional tariffs which must comply in any case with the ND-5 margin squeeze test.

III. COMMENT

The Commission has examined the notification and the additional information provided by OPTA and has the following comment:[41]

Price regulation and forthcoming guidance on non-discrimination and costing methodologies

The Commission notes that OPTA proposes to mandate cost-oriented tariffs for both FttO ODF access and HQ WBA/LL and that the methodologies to set those regulated tariffs differ. OPTA intends to set regulated HQ WBA/LL tariffs on the basis of the EDC methodology which it has always used for setting regulated access prices to KPN's fixed network. The regulator does not see grounds to deviate from this approach since the active network elements of HQ WBA/LL have already been invested in, are shared between different services and have a shorter economic life cycle than passive network elements (i.e. FttH and FttO). Instead, for FttO ODF access, as for FttH ODF access, OPTA intends to set regulated prices on the basis of the DCF methodology which it considers particularly suitable for new services, for which the demand is uncertain and the initial investment costs high, as it leads to stable and predictable tariffs over the entire lifetime of the asset. The Commission also notes that OPTA proposes to apply different costing methodologies for the various cost elements in the ND-5 margin squeeze test, partly derived from the choice of different cost orientation methodologies and partly reflecting the level of competition in the market. OPTA also confirmed in its response to the request for information that the local loop unbundling ND-5 margin squeeze test outcome would have precedence over cost orientation to set the regulated price of HQ WBA/LL.

The Commission underlines that with regard to FttO ODF access and HQ WBA/LL it is unclear from the present notification whether OPTA's use of distinct methodologies for the price control obligation and in particular within the margin squeeze tests, will send reliable buy or build signals for investment in NGA infrastructures in the Netherlands. The Commission also notes in this regard that OPTA plans to consider in more detail, during the preparatory discussions with market parties to be held prior to submitting the forthcoming implementing

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39 i.e. not incremental to the capacity of the individual service. Within HQ WBA/LL there is a relatively large differentiation of services on the basis of capacity (bandwidth) and quality (e.g. overbooking ratio). These services use a common infrastructure that has relatively high fixed costs.

40 The value is to be quantified by KPN who, according to OPTA, has an incentive to allocate fixed costs in an optimal way taking into account end user willingness to pay. If KPN uses strategically priced retail services to determine a difference in value, OPTA will correct the value. Market parties will be involved in this process and the results will be part of the forthcoming tariff decision.

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

tariff decision to the EU consultation procedure in the second half of 2013, different balancing options, such as deviating from the cost causality principle and allowing for "per area type" and "benefits perceived" tariff differentiations.

OPTA's forthcoming implementing tariff decision should provide a clearer picture of the actual tariff choices and calculation outcomes, and therefore of the relative pricing of copper and fibre-based business services. In this regard, the Commission invites OPTA to exhaustively describe and justify in its forthcoming tariff notification what regulatory choices it has made, and the impact these regulatory choices have on the final regulated tariffs in the Netherlands. OPTA should also analyse the interaction between the price control obligations resulting from the implementing tariff, the ND-5 obligations, and the other imposed obligations such as the near-net obligation, which will have an impact on the capacity of access seekers to replicate the SMP operator's offer in this market. OPTA should similarly analyse, explain and justify the direct and indirect impact that the proposed regulatory obligations on KPN will have on other infrastructures and their capacity to compete.

Therefore, the Commission invites OPTA to further explain in its final measure and in the implementing tariff decision how the overall regulatory outcome with regard to the entirety of markets 4 and 5 in the Recommendation on Relevant Markets satisfies the regulatory principles of safeguarding competition and promoting efficient investment in Article 8.5(c) and (d) of the Framework Directive.

Given the importance of regulating key wholesale access products in the transition period to NGA networks in an effective and consistent manner across the EU, the Commission is currently working on a recommendation that sets out the regulatory principles to enhance the broadband investment environment: it will provide guidance on the implementation of the non-discrimination obligation and costing methodologies for key access prices. The Commission therefore invites OPTA to review its costing methodologies in the light of the forthcoming recommendation once adopted.

The Commission also points out that an *ex ante* price control obligation for fibre infrastructure would not be necessary if there were sufficient competition safeguards in place. In the latter case, OPTA should consider imposing at least the following:

(a) Equivalence of input (EoI), which generally requires SMP operators' own downstream operations to use the same products, processes, and prices as those used by their retail rivals. As equivalence of input can only be fully implemented over a longer time period, this requirement could consist in immediate terms in a firm obligation on and commitment by the SMP operator to undertake certain key initiatives over a set time period. OPTA may consider engaging as soon as possible in dialogue with stakeholders to assess the feasibility of implementing EoI in the Netherlands;

(b) A transparency obligation regarding fibre, comprising a number of clearly specified KPIs, an effective enforcement and monitoring mechanism (such as internal or external regular audits) and publication of the KPIs;

(c) A replicability requirement also for fibre-based retail products;

(d) An accounting separation obligation also covering fibre products.

Against this background, OPTA should lift the cost orientation requirement for the SMP operator's fibre lines as soon as the above safeguards are effective in the Netherlands and OPTA would establish that the SMP operator's pricing behaviour is properly constrained by either cost-oriented copper prices or by significant competitive constraints, indicated in particular by the presence of well-developed alternative infrastructures with comparable reach.

Pursuant to Article 7(7) of the Framework Directive, OPTA 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[42] 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[43] 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.[44] You should give reasons for any such request.

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

42 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.

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

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