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Onafhankelijke Post en
Telecommunicatie Autoriteit
(OPTA)

Zurichtoren - Muzenstraat 41
2511 WB Den Haag
Netherlands

For the attention of:
Mr Chris Fonteijn
Chairman

Fax: +31 70 315 92 04

Dear Mr Fonteijn,

Subject: Commission decision concerning case NL/2010/1079: Call termination on individual public telephone networks provided at a fixed location

Commission decision concerning case NL/2010/1080: Voice call termination on individual mobile networks

Comments pursuant to Article 7(3) of Directive 2002/21/EC[1]

I. PROCEDURE

On 27 April 2010, the Commission registered a notification from the Dutch national regulatory authority, *Onafhankelijke Post en Telecommunicatie Autoriteit* (OPTA) concerning the markets for (i) call termination on individual public telephone networks provided at a fixed location and (ii) voice call termination on individual mobile networks[2] in the Netherlands.

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[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 (Framework Directive), OJ L 108, 24.4.2002, p. 33.

[2] Corresponding respectively to markets 3 and 7 of the 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), OJ L 344, 28.12.2007, p. 65-69.

The national consultation[3] runs in parallel to the EU consultation under Article 7 of the Framework Directive. The deadline for both consultations is 7 June 2010.

On 17 May 2010, a request for information was sent to OPTA and a response was received on 20 May 2010.

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

II. DESCRIPTION OF THE DRAFT MEASURES

II.1. Background

II.1.1 Call termination on individual public telephone networks provided at a fixed location

The second round review of the market was notified to and assessed by the Commission under case NL/2008/0830. At the time, OPTA imposed on all operators with significant market power (SMP) the obligations of access, transparency and price control (covering the period 1 January 2009 – 1 January 2012). Furthermore, in case NL/2009/0978, related to the implementation of the price control remedy, OPTA adjusted its embedded direct cost (EDC) model, which lead to new termination rates (at local and regional level). In its comment letters, the Commission invited OPTA to align, in its next market analysis, its cost-accounting methodology with the LRIC cost standard using the current costs of an efficient operator.

II.1.2 Voice call termination on individual mobile networks

The previous review of the market was notified to and assessed by the Commission under case NL/2007/0634[4]. OPTA identified five separate product markets corresponding to the provision of wholesale voice call termination by KPN Mobile, Vodafone, T-Mobile, Orange and Tele2 (the biggest MVNO). All five providers were designated as having SMP in their respective markets. Consequently, OPTA imposed on them the obligations of access, non-discrimination, transparency and charge control.

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.

As in its previous analysis, OPTA includes in the relevant market for fixed call termination the services of call termination on geographical numbers, on 088 and on 084/087 numbers as well as on 112, 14xy and 116xyz numbers[5].

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3 In accordance with Article 6 the Framework Directive.

4 OPTA had previously notified a review of the market (NL/2005/0215) and details of the price control obligations (NL/2006/0420). The Dutch Trade Appeal Council annulled the NL/2005/0215 market review adopted by OPTA. The NL/2007/0634 notification was a re-assessment of the annulled 2005 market review.

5 088 numbers are intended for companies or institutions; 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.

According to OPTA, the relevant geographic market corresponds to the geographic coverage of each operator's network and is limited to the Netherlands.

II.3. Finding of significant market power

OPTA proposes to designate all active operators providing fixed and mobile termination as having SMP on their respective markets. The main criteria considered by OPTA when reaching its conclusion on the SMP designation are: market shares (each operator has 100% market share on its own network), entry barriers, countervailing buyer power and lack of potential competition.

OPTA lists 35 providers of fixed call termination and 10 providers of mobile[6] call termination.

II.4. Regulatory Remedies

OPTA proposes to maintain the previously imposed remedies on all operators, i.e. (i) price control, (ii) access and (iii) transparency.

With respect to the price control remedy, OPTA explains that the first step of the glide paths would apply as of 1 September 2010 (while the draft measures are foreseen to come into force on 1 August 2010 for a three-year period).

The target price caps for both mobile termination rates (MTRs) and fixed termination rates (FTRs) would be based on a BU-LRIC model[7].

<u>Mobile call termination</u>

MTR price caps (in €c/min)			
	01/09/2010[8]- 01/09/2011	**01/09/2011 - 01/09/2012**	**01/09/2012 onwards**
All operators	5.0	3.0	1.2

6 Upon the Commission's request for information, OPTA replies that all additional (by comparison with the previous regulatory decision) mobile operators that it intends to designate as having SMP are MVNOs. In its previous MTRs decision, OPTA designated only Tele2 (the biggest MVNO) as having SMP in order to avoid disproportionate administrative costs. In the present draft measure, it proposes to designate all (even smaller) MVNOs as having SMP.

7 OPTA's updated LRIC models for fixed and mobile termination are based on a hypothetical existing operator (HEO) offering national coverage and having a 1/N market share (N being the number of operators modelled). The mobile HEO would (i) have 33.3% market share (assuming N=3, i.e KPN, Vodafone and T-Mobile), (ii) use a mixed 2G/3G technology, (iii) roll-out 2G network in 2004-2005 (service launch in 2005-2006). The fixed HEO would (i) have 50% market share (resulting from N=2, i.e. KPN on the one hand and cable providers on the other), (ii) use NGN technology, (iii) roll-out NGN IP core network in 2004-2005 (service launch in 2005-2006).

8 For the one-month transition period (from 1 August 2010 to 1 September 2010) the current MTR level of 7 €cents/min would apply. With respect to T-mobile, OPTA explains that it will be allowed to maintain its asymmetric (higher) termination rate at the level of 8.1 €cents /min for this period.

Fixed call termination

FTR price caps (in €c/min)					
	2nd half 2010	**1st half 2011**	**2nd half 2011**	**01/01/2012-01/09/2012**	**01/09/2012 onwards**
At local level	0.50	0.52	0.53	0.59	0.45
At regional level	0.71	0.71	0.72	0.59	0.45

OPTA explains that the current price regulation for fixed termination would normally be applicable until 1 January 2012 but that it will be withdrawn and replaced as of 1 August 2010 for a three year period by the notified draft measure[9]. According to the latter, the price caps for termination would however be maintained at the current (WPC-IIa) level (i.e. 0.71-0.72 €c/min for the regional level[10] and 0.52 – 0.53 €c/min for the local level) until the end of 2011. From 1 January 2012 onwards, the price caps for termination at regional and local level are based on a glide path towards a BU-LRIC target level (cf. table above) and are therefore identical[11].

The largest cost element in the total incremental cost for fixed call termination is the license costs for VOIP software amounting to 0.4 eurocents. In the notified draft measure OPTA takes the view that it is appropriate to fully feed these costs as incremental into the model because in some (but not all) of the contracts these VOIP license costs are purely incremental to capacity and termination (while in others they are paid by end-users and therefore non-incremental to termination). In reply to the Commission's request for information OPTA underlined that it is important to take into consideration not only currently existing contracts but also possible future price structures. In particular, OPTA considers that VOIP suppliers and operators may react to the proposed regulation for termination by amending their contracts and making the VOIP license costs purely incremental to voice traffic (or even to call termination), which would result in a change of the incremental amount of the cost.

Furthermore, OPTA explains that the BU-LRIC based price control on the market for fixed call termination should be reflected in the price control obligation on the call origination market with regard to carrier-(pre)select (C(P)S) operators.[12] OPTA intends

9 OPTA considers that there should be a common approach to the regulation of fixed and mobile termination markets, established in a single decision.

10 OPTA explains that, as termination at regional level involves a larger use of KPN’s network than the local termination services; the per-minute cost is higher thus leading to higher price caps for regional termination services.

11 OPTA explains in its reply to the RFI that the prices are identical since the cost-oriented price is based on a fixed NGN network in which local interconnection (if still possible) is no longer the efficient level of interconnection. OPTA further specifies that in an NGN context, costs of termination at local level are not lower when compared with those at regional level.

12 OPTA points out that a BU-LRIC based charge control is valid for situations involving operators which both purchase and offer termination services. OPTA explains that this is not the case for C(P)S operators, since they do not offer but only purchase termination services from KPN and/or other operators. OPTA further explains that regulating fixed call termination on the basis of a BU-LRIC methodology without applying a compensation (i.e. increase) to the charges that C(P)S operators pay for call origination would allow C(P)S operators to benefit from a more advantageous situation on the

to increase prices for call origination provided for C(P)S operators by an amount equal to the difference between the current EDC based price for call termination (i.e.0.7€c/min) and the BU-LRIC target level (0.45€c/min). The resulting 0.25 €c/min increase to the prices of call origination for C(P)S operators would apply as of the date of implementation of the BU-LRIC cost model with respect to fixed call termination, i.e. 1 September 2012.

OPTA does not propose non-discrimination and accounting separation obligations. OPTA is of the view that a non-discrimination obligation would obstruct bill and keep agreements between providers. Considering (as in its second-round market analysis) such voluntary arrangements as being beneficial for competition and end-users, OPTA does not intend to impose a non-discrimination obligation on the SMP operators. As regards accounting separation, OPTA considers that the potential problem of margin squeeze by KPN is addressed by (i) the price control obligation imposed on KPN in the termination markets and (ii) the fifth rule of conduct imposed on KPN on the call origination market, according to which KPN cannot price discriminate between its downstream arm on the one hand and its wholesale customers on the other.

III. COMMENTS

On the basis of the present notifications and the additional information provided by OPTA, the Commission has the following comments[13]:

Need to notify the designation of additional SMP operators

The Commission acknowledges OPTA's decision to designate all active MVNOs, contrary to previous practice, as SMP operators, regardless of their size. The Commission would like to remind OPTA that according to Article 16 (§4 and §6) of the Framework Directive all upcoming decisions identifying new entrants as SMP operators in their respective markets and the imposition of obligations on them should be notified under the Article 7 notification procedure. In that respect, the Commission would also like to recall that the Commission's Procedural Recommendation[14] has significantly lessened the procedural burden on NRAs by giving them the possibility to use a short notification form when proposing to extend existing measures on a relevant market (that has already been analysed) to another market player in a similar situation, without materially changing the principles applied in the previous notification.

Need for an appropriate glide-path for fixed termination rates

The Commission welcomes OPTA's proposal to set fixed termination rates at an identical (for termination at both regional and local level) efficient cost-level by September 2012, thus complying with the Termination Rates Recommendation. The Commission notices that the intermediate step towards a BU-LRIC target

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market as compared to KPN. Since OPTA considers that the competitive balance resulting from the EDC system should be kept, it finds it appropriate to introduce a compensation (mark-up) for non-incremental costs with respect to the price applied vis-à-vis C(P)S operators.

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

14 Commission Recommendation 2008/850/EC from 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.

price level (i.e. 0.45 €c/min) is set at 0.59 €c/min for the period from January 2012 to September 2012. This represents a temporary increase in the fixed termination rates at local level compared to the 0.53 €c/min charge applicable for the second half of 2011. The Commission therefore urges OPTA to set in its final measure the intermediate step in the glide path at a level between that foreseen for 2011 and the efficient target BU-LRIC tariff of 0.45 €c/min.

Proposed price control on the wholesale market for fixed call origination

The Commission takes note of OPTA's intention to increase prices for offering wholesale call origination service to C(P)S operators. This increase is, in OPTA's view, necessary in order to take into consideration the one-way nature of the termination for C(P)S operators (i.e. the fact that they benefit from lower termination BU-LRIC charges when purchasing the termination service while not offering it to other providers). The Commission is of the opinion that OPTA should not prejudge the outcome of the forthcoming call origination market review. In that respect, the Commission would like to stress that remedies imposed under Article 16 of the Framework Directive in conjunction with Article 8 of the Access Directive should be based on the nature of the problem identified and should be proportionate to the objectives laid down in Article 8 of the Framework Directive. In particular, the proposed call origination price obligation should address the problem of inefficient competition identified in the course of a market analysis and SMP designation on the relevant market, i.e. the call origination market. Therefore, the Commission urges OPTA to remove from its final termination rate decisions any reference to the calculation of future call origination charges in order not to prejudge the outcome of the next call origination market review and to allow the other NRAs and the Commission to assess the proportionality and justification of such an approach in the context of OPTA's next notification of its call origination market analysis. Meanwhile, the Commission invites OPTA to cooperate closely with other NRAs and the Commission towards a coherent approach on treating C(P)S specificities in the context of the implementation of the Termination Rates Recommendation.

VOIP licence fees as increment of fixed call termination

According to the Termination Rates Recommendation, only those costs which are incremental to the termination of calls should be taken into account when setting termination rates[15]. The Commission invites OPTA to further analyse before adopting the final measure to which extent VOIP licence fees are to be considered fully or partly incremental costs of call termination, bearing in mind that the licence contracts and the relevant fees are not only covering VOIP call termination, but also VOIP call origination and that some of these contracts are capacity based or that licensing conditions may even change in the future. The current and future licensing conditions are therefore not a suitable basis to establish the incremental costs for fixed call termination as the allocation of the costs is subject to commercial negotiations between the licensor and the fixed network operator, who is dominant as regards the provision of termination services, and may thus lead to an unjustified allocation of all or parts of these fees

15 See point 2 of the 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.

to the provision of fixed termination services.

Pursuant to Article 7(5) of the Framework Directive, OPTA shall take the utmost account of comments of other NRAs 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 position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC[16] 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[17] 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[18]. You should give reasons for any such request.

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

[16] 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.

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

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