Dear Mr. Fonteijn,

Subject: Case NL/2007/0742: Call termination on individual public telephone networks provided at a fixed location – review of remedies

Case NL/2007/0743: Call termination on individual public telephone networks of Tele2/Versatel and UPC provided at a fixed location

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

I. Procedure

On 14 December 2007, the Commission registered under case numbers NL/2007/0742 and NL/2007/743 two notifications from the Dutch national regulatory authority, Onafhankelijke Post en Telecommunicatie Autoriteit (“OPTA”). The notifications cover (i) the review of remedies imposed on alternative fixed operators other than Tele2/Versatel² and UPC on the market for call termination provided at a fixed location on individual public telephone networks (case NL/2007/0742) and (ii) the markets for wholesale call termination provided at a fixed location on the public telephone networks of Tele2/Versatel and UPC (case NL/2007/0743).

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² Tele2 and Versatel are both subsidiaries of Tele2 Netherlands Holding N.V.
Pursuant to Article 6 of the Framework Directive, the national consultations\(^3\) run in parallel with the Community consultation under Article 7 of the Framework Directive. The deadline for these consultations expires on 18 January 2008.

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 Regulatory Authority concerned.

II. **DESCRIPTION OF THE DRAFT MEASURE**

The notifications follow a national body of appeal\(^4\) ruling concerning OPTA's decision, adopted on 21 December 2005\(^5\). In particular, the ruling annulled OPTA’s decisions to designate Tele2 and UPC as having significant market power in the fixed call termination market, as well as OPTA’s decision relating to the imposition of obligations of transparency, non discrimination and access imposed on fixed network operators other than KPN\(^6\).

The body of appeal asked OPTA to clarify the related imposed obligations in order to improve legal certainty. Consequently, OPTA notified new draft measures in which it amended its initial reasoning concerning these issues in order to remedy the flaws indicated by the national body of appeal. However, the basic reasoning and the remedies remain the same as those previously notified to the Commission.

II.1. **Market definition**

The notification NL/2007/0743 concerns the market for call termination on individual fixed telephone networks, which correspond to markets 9 of the previous Recommendation on relevant markets (“the Recommendation”)*7*. The relevant markets as defined by OPTA are the following:

- the wholesale market for call termination at geographical numbers on the fixed network of Tele2/Versatel in the Netherlands;
- the wholesale market for call termination at 088 numbers\(^8\) on the fixed network of Tele2/Versatel in the Netherlands;
- the wholesale market for call termination at geographical numbers on the fixed network of UPC in the Netherlands;

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\(^3\) In accordance with Article 6 of the Framework Directive.

\(^4\) College van Beroep voor het bedrijfsleven, i.e. The Trade and Industry Appeals Tribunal.


\(^6\) Price control obligations (delayed reciprocity) imposed by OPTA to other fixed operators than Tele2 and UPC was not annulled.


\(^8\) OPTA considers that competitive conditions of call termination to these numbers and to geographical numbers are similar as they all concern call termination on numbers of end-users. OPTA also clarifies that Tele2 currently does not provide services via 088-numbers.
- the wholesale market for call termination at 088 numbers on the fixed network of UPC in the Netherlands.

The geographic market corresponds to the territory of Netherlands.

II.2. Finding of significant market power ("SMP")

In case NL/2007/0743 OPTA intends, on the basis of its market analysis, to designate Tele2/Versatel and UPC as having SMP in the wholesale market for call termination within their individual networks. The main criteria considered by OPTA are (i) market shares\(^9\); (ii) lack of existing competition; (iii) barriers to entry and potential competition; and (iv) lack of countervailing buyer power.

II.3. Regulatory Remedies

On the basis of the market failures identified, OPTA proposes to impose the following obligations on all alternative fixed operators on the market for call termination on individual public telephone networks provided at a fixed location\(^{10}\):

i) access to and use of specific network facilities;

ii) transparency obligation

iii) non-discrimination

In addition to the above mentioned obligations, a price control is imposed on Tele2/Versatel and UPC and continues to be applied also with regard to other fixed operators\(^{11}\). In order to respond to the body of appeal request, OPTA further substantiates the imposition of the remedies.

Concerning the access obligation, OPTA specifies that under this obligation operators shall be obliged to (i) provide co-location or other forms of shared use; (ii) provide direct interconnection; (iii) grant open access to the technical interfaces, protocols, and other key technologies that are essential for inter-operations; (iv) to treat requests for access timely and adequately; (v) to negotiate in good faith; (vi) not withdraw access already granted to facilities.

The transparency obligation sets out minimum requirements for publishing certain informations. Information published by operators should contain: (i) an overview of services; (ii) technical characteristics of fixed telephone networks; (iii) an overview of all locations of the access points; (iv) conditions of payment and invoicing.

By imposing a non discrimination obligation, OPTA's aim is to avoid price, information and quality discrimination.

As regards the price control obligation, in both cases OPTA would impose a price cap based on the cost based termination rates determined by OPTA for KPN three years ago (principle of delayed reciprocity).

\(^9\) OPTA finds that fixed network operators have 100% share in the market for call termination on their individual fixed network.

\(^{10}\) As defined in the notification NL/2005/0284.

\(^{11}\) The price control obligation was not annulled by the Tribunal in its ruling of 21 December 2005.
III. COMMENTS

The Commission has examined the notification provided by OPTA and has the following comment¹²:

Need for a coherent European approach

With a view to the work currently undertaken within the European Regulators Group and the Commission to arrive at a coherent cost accounting method for fixed termination, the Commission invites OPTA to revisit its analysis as soon as a common approach will have been established at European level.

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 measure and, where it does so, shall communicate it to the Commission.

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

Pursuant to Point 12 of Recommendation 2003/561/EC¹³ 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 Commission¹⁴ within three working days following receipt whether you consider that, in accordance with Community and other rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication. You should give reasons for any such request.

Yours faithfully,
For the Commission,
Fabio Colasanti
Director General

¹² Pursuant to Article 7(3) of the Framework Directive.


¹⁴ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.