



## Market analysis of Wholesale Fixed Access

### Summary

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Muzenstraat 41 [www.acm.nl](http://www.acm.nl)  
2511 WB Den Haag 070 722 20 00

## Summary

### *Introduction*

Shortly after the market analysis decision on unbundled access came into force on January 1, 2016, Vodafone and Ziggo launched a joint venture under the name VodafoneZiggo. As a result thereof, two competitors are active on the Dutch market (KPN and VodafoneZiggo), each possessing a fixed network and a mobile network. The symmetry between both market participants has thus increased. Market participants indicate that this may affect the competitive positions on the Dutch telecom markets, as well as affecting the required regulatory framework. A majority of market participants have said that the joint venture warrants reviewing the December 2015 market analysis decision. That is why the Netherlands Authority for Consumers and Markets (ACM) carried out a new market analysis, sooner than initially planned, based on which ACM comes to the conclusion that KPN and VodafoneZiggo have joint significant market power (SMP), and that both will be regulated.

### **Analysis of retail markets**

As is usual with market analyses, ACM began with analyzing the relevant retail markets. In the analysis, the existing regulatory regime is assumed to be non-existent, and where alternative providers are unable to buy regulated wholesale access. In that context, ACM analyzed the retail market for business network services and the retail market for broadband access (or for bundles containing broadband access).

#### *Retail market for business network services*

ACM establishes that a risk exists of KPN having SMP on the retail market for business network services. As opposed to the previous market analysis, ACM comes to the conclusion that open VPNs do not belong to the relevant product market for business network services. Open VPNs serve as complements rather than substitutes for business network services.

#### *Retail market for broadband access (or for bundles containing broadband access)*

Broadband access is increasingly sold in bundles with television services and/or telephony services. ACM establishes that the relevant product market consists of broadband access or bundles containing broadband access. Mobile broadband access and telephony services are not part of this market. ACM establishes that, in the absence of regulation of this market, two competitors dominate, which are KPN and VodafoneZiggo. These two competitors are each other's equals in terms of size and capabilities.

ACM establishes that, in the absence of regulation, a risk of joint SMP by KPN and VodafoneZiggo exists on the market for broadband access (or for bundles containing broadband access). This enables KPN and VodafoneZiggo to set prices above the competitive price level, which is at the expense of end-users. To ACM, these conclusions are a key indication of the necessity of regulating one or more of the upstream wholesale markets in the upcoming regulatory period.

### **Analysis of wholesale market**

Since, in the absence of regulation, a risk of SMP (or joint SMP) exists on various retail markets, ACM assesses whether the requirements that have been imposed on KPN in the highest wholesale market need to be adjusted. First, ACM defined the market for access to fixed networks, which the market for unbundled access is part of. It subsequently assessed whether one or more undertakings have SMP (or joint SMP) on this market. ACM subsequently explored what competition problems resulting from the established joint SMP might occur on the market for access to fixed networks, and what obligations would then have to be imposed in order to deal with these problems.

#### *Market definition*

After the previous market analysis decision, various developments have taken place that affected the opportunities of alternative providers to gain access to KPN's network. The most important development is that KPN started upgrading its copper network. As a result thereof, physical unbundled access is no longer the type of access that offers alternative providers the most options on the retail markets. Unbundled access can only be used for retail services with lower download speeds. Unbundled access to KPN's copper network is thus no longer a future-proof type of access. ACM has established that, in response, alternative providers started purchasing other access services such as virtual unbundled access (VULA) or access to KPN's WBT-portfolio.

Unbundled access to fiber-optic networks however *is* a future-proof type of access. Yet, commercial considerations seem to stand in the way of a nationwide roll-out, which is necessary for using ODF-access FttH nationally. Alternative providers that take out ODF-access FttH are therefore dependent on VULA or on access to KPN's WBT-portfolio.

On the basis of WBT, comparable retail services can be offered as with unbundled access (virtual or otherwise). In addition, pricing is similar. And, switching between these wholesale services takes place. ACM therefore comes to the conclusion that there a broad market exists that includes both unbundled access (virtual or otherwise) and WBT.

Access to cable networks is possible in a way similar to access to KPN's network through WBT. ACM concludes that access to cable networks also belongs to the relevant market because (i) the available capacity of cable networks will increase in the upcoming regulatory period, (ii) comparable retail services can be offered based on access to cable networks, and (iii) indirect price pressure is exerted by retail services over cable on retail services over copper and fiber-optic networks.

ACM therefore comes to the conclusion that the relevant wholesale market consists of (i) the national market for unbundled access (virtual or otherwise) to the copper and fiber-optic network (SDF-access, MDF-access, OLT-access and ODF-access) and (ii) wholesale broadband access to copper networks, fiber-optic networks, and cable networks. This is an important change compared with the previous market analysis in which the market consisted solely of unbundled

access (virtual or otherwise). ACM calls this newly defined market the market for Wholesale Fixed Access (WFA). ODF-access FttO and access to mobile networks do not belong to this market, just like in the previous analysis.

#### *Competitive analysis*

In the competitive analysis, ACM first established that KPN and VodafoneZiggo have similar market shares and capabilities on the market for WFA. Neither of them have individual SMP. Considering the symmetry of both competitors, ACM assessed whether joint SMP existed.

In its assessment, ACM establishes that KPN and VodafoneZiggo have the incentive and the opportunity to come tacitly to agreed mutual behavior. In ACM's opinion, the mutual agreement will be aimed at refusing entrants access to their own networks. By refusing access, KPN and VodafoneZiggo are able to raise prices on the retail market mutual agreement. Compliance with such a tacit agreement can be monitored easily. Both parties can discipline each other, because, if one of them deviates from the tacit agreement, the other is able to lower retail prices (temporary or otherwise) or may even offer access. The joint refusal to grant alternative providers access enables both parties to increase consumer prices gradually on the retail market for broadband access (or for bundles containing broadband access). Facility-based entrants (entrants that roll-out their own infrastructure), which could disrupt this market outcome, are not expected to enter the market, given the very high investments that are needed to do so. That is why ACM comes to the conclusion that, in the absence of regulation, KPN and VodafoneZiggo have joint SMP.

#### *Potential competition problems*

Given the conclusion that KPN and VodafoneZiggo have joint SMP, ACM is of the opinion that both parties have the incentive and the ability to refuse others access to their own networks. If they did (or had to) grant access, they would have the incentive and the ability to discourage the use thereof, for example, through discriminatory behavior, withholding information, unfair conditions, or strategic product design. In addition, both parties are able to charge wholesale buyers excessively high prices, or to apply price discrimination. These competition problems can be caused by both KPN and VodafoneZiggo.

#### *Obligations*

ACM imposes obligations on both KPN and VodafoneZiggo in order to solve the identified potential competition problems. Regulation of both parties creates options for entrants at the wholesale level. Entrants can decide themselves which network is the most suitable for offering the desired retail services. In this way, multiple providers may become active on VodafoneZiggo's cable network. In particular, end-users that are unable to get sufficiently high speeds over KPN's network will get more choice between various providers of internet services over cable. End-users currently do not have such a choice.

ACM imposes the following obligations.

- The obligation to meet reasonable requests for providing access.

- For KPN, this obligation concerns unbundled access (virtual or otherwise) to the copper network and fiber-optic network, and thereto-related facilities;
  - For VodafoneZiggo, this obligation concerns providing WBT to the cable network at the national level.
  - In addition, KPN and VodafoneZiggo are not allowed to request regulated access to each other's networks, unless that access is not aimed at impeding competition or does not have the effect of impeding competition.
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- For both undertakings, the obligation to observe the principle of non-discrimination, meaning that their own retail organizations are not treated differently than alternative providers are;
  - The obligation to observe transparency, and to publish a reference offer that includes all the information that alternative providers need when taking out access; and
  - Tariff regulation under which ACM is able to set tariff ceilings.

For different types of access, ACM gives KPN and VodafoneZiggo the freedom to negotiate access conditions in consultation with alternative providers. If parties are unable to reach an agreement, ACM has the ability to set the access conditions and the tariffs.

Compared with the 2015 market analysis decision on unbundled access (ULL2015), several obligations have been altered, which are imposed on KPN. For example, KPN is given more room to phase out legacy services on the copper network, such as in fiber-optic areas. Regulation of the copper network thus becomes more future-oriented. In addition, the rules for phasing out access services are relaxed, the obligation regarding margin squeeze is completely lifted (the ND5 obligation), and the option of virtual unbundled access to the fiber-optic network is introduced. These changes offer KPN more room to upgrade its network. This will enable KPN to continue to meet customer demand in the future as well.

With this decision, obligations are imposed on VodafoneZiggo for the first time. VodafoneZiggo will get three months' time to publish an offer. Market participants subsequently have the opportunity to negotiate with VodafoneZiggo about the offer. After completion of the negotiations, there must be an actual purchasable offer.

With the obligations that are imposed on KPN and VodafoneZiggo, ACM ensures that market participants without fixed networks of their own are able to use the fixed networks of KPN and VodafoneZiggo over the next few years. Based on this access, they will be able to offer (or continue to offer) competitive fixed and fixed-mobile services to consumers and businesses. As such, ACM ensures sufficient competition on the retail markets, which leads to more choice, lower prices, and better services for consumers and businesses.