

To the Independent Postal and Telecommunications Authority  
(Onafhankelijke Post en Telecommunicatie Autoriteit)

**Sent by email ([All-IP@opta.nl](mailto:All-IP@opta.nl))**

Place/date : Utrecht, 20th of June 2006  
Subject : All IP consultation

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Dear Sir, Madam,

In this letter Tiscali would like to react to the Issue Paper of OPTA "KPN's Next Generation Network: All-IP" dated 22<sup>nd</sup> of May 2006 (ref.: OPTA/BO/2006/201599). Tiscali will herewith emphasize its points of view besides the ACT response to this consultation.

Tiscali appreciates the initiative of OPTA to consult the market parties on KPN's All-IP plans as these plans will have major impact on the relevant markets. Only KPN announcing these plans already led to an investment stop of most market parties. At all times it should be prevented that the end user will be confronted with the negative consequences (e.g. less service diversification, increasing prices) of a decrease in competition on the relevant markets. Therefore Tiscali is of the opinion that OPTA should now play a pro-active role in this process to safeguard competition on the relevant telecommunication markets in the future.

First of all Tiscali will make some general comments regarding the All-IP plans, followed by a reaction on the issue paper. Tiscali is not able to answer all questions in detail at this point in time (which does certainly not imply that Tiscali finds these questions less relevant). However, the most important issues will of course be addressed.

### **General comments**

#### *All-IP is KPN initiative*

From the end of 2005 KPN has been announcing selective information regarding its long term strategic plans called All-IP. It is essential to note that these plans regarding the access network of KPN have not been discussed with, let alone come forth from requests from market parties that make use of KPN's access network.

Tiscali believes that these plans are driven by the need for KPN to save operational costs (which has also been confirmed by KPN itself). Besides the cost reduction, these plans will also give KPN a stronger hold on the market developments and enable KPN to (re)gain market shares that have been lost to alternative market parties in the past years. Especially closing down access to the main distribution frame (MDF collocation) in the near future will have major impact on the business model of Tiscali and other DSL operators. Tiscali's business model is merely built on MDF access, which creates the possibility for Tiscali to build its own DSL access services with its own unique functionalities and characteristics and to control the value chain, the customer proposition and the related cost structure. It is evident that closing down

MDF collocation services consequently will have major impact on these business models. The alternatives for MDF services as presented by KPN, will gain full control of KPN on the market developments as Wholesale Broadband Access (“WBA”) is based on services and conditions dictated by KPN and a substantial network coverage based on Subloop Unbundling (“SLU”) will not be economically feasible for alternative market parties. Tiscali will go into further detail on these issues below.

KPN presents its All-IP plans as a necessity to survive in the telecommunication markets and to be able to compete with cable operators. Tiscali strongly doubts the economic necessity of All-IP at this point in time. Market parties have been investing heavily in the upgrade of their networks in the past few years: this on going development has given the consumers a wide range of different choices in the market, which has made the Netherlands one of the most advanced markets in the world with regard to broadband penetration. Tiscali believes that the current networks (e.g. ADSL2+ and cable networks) offer more than sufficient capacity to fulfill the market needs, to maintain this leading position and to enable the development of new broadband services on these networks.

Just to be clear, Tiscali does not in any way want to prevent technological progress. However, Tiscali is of the opinion that developments such as All-IP should be driven by market needs and not by improper arguments.

#### *KPN controls market developments*

As mentioned above, just the announcement of the All-IP plans by KPN has already had a major impact on the relevant markets. Tiscali can not further invest in the expansion of its network as long as there is too much insecurity regarding the return of such investments. From this situation Tiscali already suffers damages as this prevents Tiscali from expanding its network to be able to gain more market share and make better use of economies of scale. Tiscali has understood the same from the other alternative DSL operators, currently operating in the Dutch markets, which directly leads to negative impact on economic growth.

This situation is also directly noticeable on the wholesale broadband access market. Tiscali is one of the very few suppliers of wholesale broadband access on the wholesale broadband access market in the Netherlands. From the beginning of 2002 Tiscali has developed sustainable customer relationships with more than thirty internet service providers. These internet service providers, which vary from small up to medium large service providers, have been able to gain a fair market share on the retail broadband internet market based on the wholesale offerings of Tiscali and other wholesale DSL providers.

KPN’s All IP plans are leading to a reconsideration of the business plans and strategies also by those internet service providers. Again the announcements of KPN to close down MDF collocations have consequently led to a “frozen” market situation, causing reticence of Tiscali and other wholesale DSL operators to invest in further roll out of their networks. At the moment Tiscali is hardly able to commit to further future-proof developments of such wholesale offerings. It is clear that this situation enables KPN to optimize its own position and to squeeze other wholesale broadband suppliers from this market.

In this respect the most obvious consequences are the recent acquisitions of internet service providers Freeler, HCCnet, Cistron, Speedlinq and Demon, of which the last four parties are also wholesale partners of Tiscali. These four wholesale customers of Tiscali account for [REDACTED] of the wholesale DSL lines supplied by Tiscali.

Another noticeable consequence is the (net) growth of more than 50% of KPN's market share on the retail broadband internet market during the first quarter of 2006.

Based on the foregoing it is very clear to Tiscali that KPN is already in a position in which it is able to dominate the markets. This dominance will only increase in the event the All-IP plans in the current state as presented by KPN become reality, as parties will become dependent on wholesale offerings which will be dictated by KPN.

*Relevant information is essential for determining strategic position*

Another important aspect concerns the (lack of) available information for market parties with regard to All-IP to be able to determine their own market position and discuss the future development of the KPN access network on a rational basis.

As mentioned above, All-IP is an initiative of KPN which has not been consulted with other market parties that are dependent on the access to KPN's network. KPN should at least have seriously discussed with and consulted market parties on the future of the KPN network. Instead KPN bluntly announced the closing down of MDF services.

To be able to seriously discuss the future use of KPN's access network it is first of all essential that market parties have access to all relevant information on a non-discrimination principle. This at least concerns information on which basis Tiscali is able to evaluate its current business model and to consider its long term plans (e.g. detailed information on KPN's future planned network architecture, tariffs and cost structures). Only then market parties will be able to start a serious discussion with KPN on the future use of KPN's access network.

Currently KPN is requesting market parties for operational input with regard to for example the facilities for SLU collocation. It is obvious that Tiscali is not able to provide such information as it has not even been able to determine its long term strategic position in this respect.

Tiscali has strong concerns about the ongoing processes (e.g. the Industry Group Subloop Unbundling), in which KPN will take the position that they have consulted the market on all relevant aspects regarding SLU. Tiscali is pleased that OPTA has taken the initiative on chairing the IG SLU instead of having this discussion within FIST, however, the relation between the IG SLU and the All IP consultation is not clear at this moment. According to Tiscali discussing the offer for SLU with KPN is premature as parties have not even been able to determine their positions. At all times OPTA should prevent that Tiscali (and other market parties) is forced into choosing to either invest heavily in SLU or enter into a wholesale relationship which has adverse consequences for Tiscali's current competitive position.

Another relevant aspect is that KPN apparently has been able to define its All IP strategy on sufficient information in the past year(s). Decisions such as roll out to subloop are not taken overnight taking into account the substantial investments needed for such development. Market parties are still not able to even prepare let alone make such decisions due to the lack of the aforementioned information. This means that KPN is way ahead as opposed to market parties in this process. This will also reflect on future developments for example with regard to new services.

Again, market parties should be able to determine their position and discuss the future of the access network on a rational basis in which access to relevant information is essential. Tiscali requests OPTA to confirm that no definite decisions within All-IP can be taken before this process has taken place.

Besides this, Tiscali is of the opinion that OPTA should enforce and safeguard access to information on a non-discriminatory basis and take into account the time leap of KPN in this process. The authority of OPTA on the market for local loop unbundling (market 11) should form sufficient legal ground thereto.

#### *Maintaining current access obligations (ULL) is essential*

As stated above the business model of Tiscali is merely dependent on MDF access. Within the current regulatory framework MDF access is regulated. It is not likely that the imposed remedies will change drastically at the end of 2008 as it is not likely that the access network will be duplicated during the current regulatory period and therefore sufficient network competition will be safeguarded.

To correct the current market situation in which alternative market parties are reticent to invest in network expansion, OPTA should emphasize that despite the All-IP plans the current obligations of KPN will remain in place now and after the current regulation period to assure that investments of these market parties will be safeguarded.

Despite the lobby of KPN that regulation of telecommunication markets should be decreased, Tiscali is of the opinion that an active role of OPTA is now more essential than ever. In the event KPN is allowed to execute its All-IP plans as currently presented by KPN, Tiscali strongly fears that all the market achievements of the past 5-7 years (including the important role of OPTA in that respect) will be damaged severely, if not eliminated. Especially the end user will be confronted with negative impact due to the lack of sustainable and fair competition (e.g. price increases).

#### **Reaction on issue paper**

Below Tiscali will reflect its reaction on the issue paper with regard to the most important issues at this point in time. This reaction will refer also to the introduction as stated above.

##### *Question 1*

In the issue paper OPTA does not refer to multiple play developments. Due to large economies of scale KPN is able to bundle services (i.e. internet, telephony both fixed and mobile, and television) and squeeze other market parties from the relevant market(s). Especially in the light of All IP it is of great importance that access to KPN's network safeguards multiple play options.

In the event KPN is able to implement its presented version of the All IP plans, KPN will be able to offer such bundled retail services from the subloop which cannot be matched by alternative market parties. Therefore, fair competition should be the main principle, which means that market parties are and will remain at least able to match the retail offers of KPN based on fair wholesale offerings in all respects.

Furthermore, in the issue paper OPTA does hardly refer to need for information, while this is an essential aspect. Tiscali refers to its statements above regarding the essential need for information.

#### *Question 2*

Tiscali is very much surprised by OPTA's statement that the All IP plans of KPN are to be seen as a positive development. The investments of KPN could lead to a wider range of services and lower prices, which could consequently have a positive impact on the Dutch economy and competition according to OPTA.

Tiscali is of the opinion that this statement is premature as OPTA is only yet consulting market parties by means of this issue paper. There are a lot of relevant aspects applicable to All IP, e.g. closing MDF access, which could have a very negative impact on competition and limit the freedom of choice for end users. OPTA should investigate the impact of All IP in much further detail, also based on the outcome of this consultation, before releasing such a statement.

As stated above, cost reduction is one of the main drivers for KPN for the implementation of All IP. In fact All IP will lead to a partial replacement of copper lines with fiber within the access network. This may, however, never lead to the consequence that KPN will be allowed to pass on possible costs increases due to All IP. In other words, this KPN initiative may not lead to tariff increases for unbundling of the local loop.

#### *Question 3,4*

Tiscali agrees that in first instance it is KPN's responsibility to assure fulfillment of its obligations coming forth from the market analysis decisions. However, it is OPTA's task and authority to safeguard and assure development of sustainable competition in the Dutch telecommunication markets. It must be understood very clearly that it is not in the interest of KPN to safeguard fair competition in these markets.

In respect of the foregoing and with reference to the difficulties in the past with regard to introduction of local loop unbundling (see also presentation "lessons learned" Versatel during the meeting at OPTA on 7<sup>th</sup> of June 2006) Tiscali is of the opinion that OPTA should be pro-actively involved in this process. OPTA should assure the interests of market parties and needs to prevent that the execution of the All IP plans is dictated by KPN. To simply enforce current remedies/obligations imposed on KPN is not enough as the All IP plans as presented by KPN have serious impact on these obligations. The market should never become in a situation in which there is "no way back" due to investments made by KPN.

#### *Question 5, 6*

Tiscali agrees that the currently imposed obligations on KPN should remain despite the All IP plans. However, Tiscali is of the opinion that KPN should be assigned as SMP and regulated on the market for wholesale broadband access and that sufficient remedies should be imposed on KPN with regard to the market for local loop unbundling (see also appeal at CBB against OPTA decision against markets 11 and 12). Especially OPTA should have sufficient remedies to assure a level playing field on these markets, including prevention of (price)squeezes related to the retail markets on an ex ante basis.

At this point in time the central question should not be how a transition to KPN's All IP plans should be executed. The most important question is how competition can be safeguarded, both on infrastructure and services. Structural separation of infrastructure and services is an important aspect which needs to be investigated in further detail. Such infrastructure should however facilitate market developments such multiple play services.

#### *Question 7*

See also reaction under question 5/6. With regard to the currently convergence of markets, especially access to multiple play facilities (possibly as part of the infrastructure) and also content becomes more and more important. Due to economies of scale of KPN and cable operators are able to create a position which possibly could not be matched by alternative operators such as Tiscali. OPTA should closely monitor these developments and take this into account in the All IP process.

*Question 11, 12*

There should be left no doubt that KPN is obliged to offer MDF access. This should be the starting point.

KPN should not be allowed to withdraw MDF access and close down MDF collocations without consent of market parties. As stated above, the central question is how competition and the interests of market parties can be safeguarded both on infrastructure and services now and in the future. This question should be dealt with first before withdrawal or closing down MDF collocations should even be brought onto the table. Again, in this respect access to all relevant information is essential.

*Question 12-17*

Tiscali agrees with the principles set forth by OPTA.

In addition Tiscali wants to address that in the All IP discussion also the consequences of the convergence of markets and vertical integration of the incumbent should be taken into account. Alternative market parties should at all time have equal access to facilities and/or network additions that enable the incumbent to make better use of its infrastructure (e.g. caching and Video on Demand servers).

Again, these principle conditions are applicable in the discussion how to safeguard the interests of market parties and competition. MDF access should remain as long as market parties deem necessary to make use of such access.

*Question 18-21*

The "open wholesale model" according to KPN will lead to a market situation in which only KPN will be able to profit from certain economies of scale, especially outside the current regulatory domain (e.g. on-net mass services, content services).

Also conditions with regard to the use of network capacity could lead to economies of scale for large suppliers as KPN, but to adverse consequences for smaller alternative operators. In this respect Tiscali refers to the situation within the DSL agency agreement (ADSL van KPN) in which market parties are squeezed by the tariff(structure) of the network transport service (so-called FIA service) and which has been the reason for Tiscali to stop making use of this offer.

WBA could eventually be a potential sustainable concept in the event of a structural separation between infrastructure and services and whereby an agreed and detailed roadmap regarding developments of the infrastructure and infrastructure facilities is available.



*Question 22-28*

According to Tiscali SLU seems only a theoretical concept for safeguarding competition in the future. The estimated investments necessary for roll out to the subloop on a national level or at least a substantial part of the Dutch households are immense and can possibly only be made by KPN.

However, also with regard to SLU Tiscali fails the information to seriously consider any SLU or SLU based offer. A regulated offer regarding the transport of data from the streetcabinet to interconnection points is a pre-condition (OPTA refers to this as "backhaul"). It is economically not feasible for alternative market parties to duplicate such infrastructure (see also current structural competition problems with regard to ULL).

*Question 29-35*

For these questions Tiscali refers to the above.

Tiscali stresses that it is not up to KPN to decide whether and when MDF access will be withdrawn. Market parties who invested in the roll out of networks should be in the position to decide whether and when they consider MDF access not longer as an insufficient form of access, which principle should be made clear by OPTA. The possible sale of buildings in which MDF access is offered, does not change any of this.

Tiscali considers this OPTA consultation as a starting point for a serious discussion on the future use of the KPN access network which will have safeguard sustainable competition.

Yours sincerely,  
Tiscali B.V.

Edwin Bogert  
Legal Counsel