Public Decision

Our reference: 2014200067
Case number: 13.0612.53
Date:

Decision of the Board of the Netherlands Authority of Consumers & Markets within the meaning of Section 49a of the Dutch Competition Act

1 REQUESTS

1. On August 1, 2013, August 14, 2013, and September 10, 2013, respectively, the Board of the Authority of Consumers and Markets (hereafter also: ACM) received requests to declare commitments binding as referred to in Section 49a(1) of the Dutch Competition Act (hereafter: the Competition Act).

2. The requests have been filed by T-Mobile Netherlands B.V. (hereafter: T-Mobile), Vodafone Libertel B.V. (hereafter: Vodafone) and Koninklijke KPN N.V. (hereafter: KPN), respectively. Since December 2011, these companies had been the subject of an investigation into possible violations of competition regulations.

3. The draft commitment decision was announced in the Dutch Government Gazette of November 22, 2013, reference no. 33172. The draft decision was available for perusal at ACM from November 22, 2013 until January 2, 2014. No interested party approached ACM in connection with the perusal period.

2 LEGAL FRAMEWORK

4. The rules for commitment decisions are laid down in Chapter 5A of the Competition Act. On the basis of Section 49a(1), an undertaking may, before the adoption of a report or, if a report has been adopted, until the moment that a decision, as referred to in Section 62 of the Competition Act has been made, apply to ACM for a decision in which ACM declares a commitment set out in that application to be binding for the undertaking. The aim of the declaration is to prevent any action that violates Section 6(1) or Section 24(1) of the Competition Act or to stop ongoing actions that violate Section 6(1) or Section 24(1) of the Competition Act.

5. On the basis of Section 49a(2) of the Competition Act, the Netherlands Authority for Consumers & Markets may declare a commitment binding if it is of the opinion that:

A. it is ensured that the undertaking will act in accordance of Section 6(1) or Section 24(1) of the Competition Act as a result of that decision;
B. the undertaking demonstrates that that it will comply with the decision in such a manner that compliance can be verified;

C. it is more effective in a specific case, for the purpose of enforcing the law, to issue such a decision than to impose an administrative fine or an order subject to periodic penalty payments.

6. In decisions declaring commitments binding, the Netherlands Authority for Consumers & Markets decides in accordance with Section 49a(3) of the Competition Act that it will refrain from launching an investigation, from drawing up a statement of objections or from imposing an administrative fine or an order subject to periodic penalty payments. The decision shall not set out any opinion as to whether the undertaking's behavior is reconcilable with competition regulations.

7. Once ACM has issued a decision declaring commitments binding, the undertaking shall act in accordance with that decision (Section 49a(4) Competition Act). The decision shall be issued for a specific term, and ACM can renew the decision (Section 49a(5) Competition Act).

8. Under Section 49b of the Competition Act, Part 3.4 of the Dutch General Administrative Law Act (Awb) shall apply to the preparation of the commitment decision. The draft decision and the related documents have been made available for perusal, so that interested parties were able to put forward their opinions on the draft decision.

3 THE APPLICANTS

9. KPN, Vodafone and T-Mobile commercially exploit networks for mobile telecommunication in the Netherlands. One of their business activities is the sale of mobile telecommunication services — including voice, text messaging, data and content services — through their own distribution channels or through independent dealers. Henceforth, KPN, Vodafone and T-Mobile together will be indicated as mobile network operators or 'MNOs'.

4 PROCEDURE

10. During the period from December 2011 to June 2013, ACM carried out an in-depth investigation into the interactions between the MNOs, and into the ways in which they determined their price policies and their competitive positions between 2008 and 2011. In the investigation, no proof was found of any violations of the Dutch Competition Act.

11. However, ACM did find that public announcements of the MNOs about measures that could harm consumers created anti-competitive risks if it is not yet sure whether these publicly announced measures will actually be implemented, which means that the MNOs let their behavior depend on their competitors' reactions. Prompted by the conclusions of the investigation, ACM contacted the MNOs and presented them the identified anti-competitive risks. The MNOs subsequently indicated to make commitments, aimed at preventing in the future the anticompetitive risks that such announcements usually carry.

5 ANTICOMPETITIVE RISKS

12. The commitments relates to anticompetitive risks posed by MNOs' public announcements[1] of measures that harm consumers, and of which it is not sure whether they will actually be implemented (hereafter called **public announcements**). Section 5.1 will go into the fact that coordinated effects may occur in the mobile-telecommunications markets in the Netherlands. Section 5.2 describes from an economic point of view the way in which public announcements could influence the competitive process between companies. Sections 5.3 and 5.4 will go into two real-world cases and that, according to ACM, clearly illustrate how public announcements in the mobile telecommunications market in the Netherlands carry the risk of actual coordination of competitors' behavior. Finally, in section 5.5, it is concluded that, given the information from sections 5.1 through 5.4, public announcements do pose anticompetitive risks in the mobile telecommunications market in the Netherlands.

5.1 Possibility of coordinated effects in the mobile telecommunications market in the Netherlands

13. In the Dutch telecommunications market, coordinated effects may occur, or, in other words, the MNOs compete with one another to a lesser degree than possible, resulting in higher prices, lower quality or less choice (hereafter collectively referred to as "higher prices").

This is described in a relatively recent ACM concentration decision: *"The current market circumstances, particularly the high level of concentration, the limited competitive power of outsiders, and the relatively high level of transparency and product homogeneity, may favor the development of a <u>tacit understanding</u> between KPN, Vodafone and T-Mobile, and thus of a collective dominant position of these companies, on the potential post-paid services market for individual and small-business end-users."*[2]

14. Communications by companies that operate in markets where coordinated effects might occur need to be assessed carefully. This will be discussed in greater depth below.

5.2 Public announcements from an economic perspective

15. In October 2012, the Organization for Economic Co-operation and Development (OECD) published a document entitled *Unilateral Disclosure of Information with Anticompetitive Effects*. This document outlines what anticompetitive effects could occur when companies disclose competition-sensitive information.

16. In general, the intensity to which companies compete with each other varies. The degree of

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[1] Public announcements include communications through the media, speeches, presentations and panel discussions at conferences, including telecommunication conference, as well as interviews and answers to questions through professional media, both traditional and digital.

[2] NMa Decision in case 7177/Vodafone-BelCompany, 14 July 2011, paragraph 91.

competition depends on a number of *strategic variables*, such as price, product quality, warranty and sales channel. Price is usually the most important of these variables. For companies, it is attractive to have all competitors ask a high price, but such an outcome is not likely to result in an equilibrium. That is because it might be more profitable for an individual company to ask a slightly lower price, given the high prices that all the others are asking. This will result in a slightly lower profit margin, but also to an increase in demand, and thus, on balance, a higher profit. This phenomenon is called *cheating* in economic literature. As a result, companies compete with each other, and are not able to maintain higher prices. Rational companies know that competitors experience an incentive to *cheat,* and, anticipating such a move, ask a lower price, too. This could lead to a stable equilibrium with low prices. This argumentation can be illustrated by the *prisoner's dilemma*, refer to Table 1.

Table 1. Prisoner's dilemma between companies

		Company B	
		Low price	High price
Company A	Low price	0, 0	2, -1
	High price	-1, 2	1, 1

17. Table 1 shows the profits for companies "A" and "B" for different prices. The first number in each cell represents the profit for company "A", and the second number the profit for company "B". For the companies in this example, it is more profitable if they both set a high price compared to a situation where they both set a low price. In the first case, both companies realize a profit of 1, in the second case a profit of 0. If company "B" sets a higher price and company "A" decides to *cheat*, then company "A" will have a high profit of 2. That is higher than 1, and therefore it is rational for company "A" not to set a high price, but a low price. The essence is that the same goes for company "B", so that both companies will choose to charge the low price, even if they would both be better off with a high price.[3]

18. Because of the risk of *cheating,* it seems impossible that companies realize a better outcome for each of them without binding contracts. However, as is already known from economic theory, markets where companies are continuously in contact with each other have several possible outcomes.[4] One stable outcome, for example, could be that companies are in intense competition (in the table, the upper left cell), but another, equally stable outcome could be that companies reach a tacit understanding on a permanent price increase (in the table, the bottom right cell). A situation with high prices is stable if companies know that they will be punished for cheating with a price war, which results in lower prices and lower profits for the both of them. Such a punishment is only possible if a

[3] Charging the low price is the so-called "dominant" strategy in a "one-shot prisoner's dilemma" game. Also, if the game is played for a known, finite, number of times, charging a lower price is the 'dominant strategy'.

[4] This is a generally acknowledged insight in the discipline of Industrial Organization. Friedman (1971) was the first who formally demonstrated this so-called "Folk Theorem". Collusion can result in a stable equilibrium if companies know that the competitor will punish for cheating by a (temporary) price war. The essence of this result is that the "prisoner's dilemma" game is typically not "one-shot" (that means: it is played one time or a large number of times). Translated to competition: companies meet a large, unknown, number of times in the same market or in different markets.

game is repeated.[5]

19. If more stable outcomes are possible, and these outcomes influence the profit in different ways, then companies will have an interest in coordinating their behavior. One way to realize this is by communicating about the preferred strategy in the public domain beforehand. Such a form of communication is called *cheap talk* in economic literature.[6] This communication is *cheap* because talking does not cost any money, and the company has no obligation to keep up any of the promises it may have made. If a company *says* it will increase the price, it does not necessarily mean it will actually do so.

20. If companies do not know what the other party will do, there is *strategic uncertainty*. "Does my competitor see our common interest in high prices, or will he compete intensively?" This strategic uncertainty can be reduced or even be removed completely by communication (that is, by cheap talk). If company "A" indicates beforehand to choose a high price, then coordination may arise in the sense that the best alternative for company "B" is to choose a high price, too. Laboratory experiments in economics show that it is easier for players to coordinate if they are able to communicate beforehand.[7] Kühn (2001) concludes, after a literature analysis, that communication and coordination correlate strongly with higher prices.[8]

21. It is clear from the above that pubic announcements can be used as an instrument to reduce strategic uncertainty between companies, and to coordinate behavior.

5.3 Two real-world public-announcement cases

22. The study has shown that there is a general understanding within MNOs that public communications are noticed by competitors. Below, two real-world cases of public announcements in the mobile-communications market in the Netherlands will be examined in greater detail. Both cases illustrate the potential anticompetitive risks from public announcements as described in this decision.

Public announcement of a reintroduction of connection charges in the mobile-telecommunications market

23. On December 10, 2008, at a Telecom Time conference in Utrecht, the (then) director Mobile of KPN announced in a panel discussion with representatives of other MNOs that KPN would start to charge connection fees (again).[9] Telecom Time advertises itself as the largest and most important

[5] A punishment in a repeated game is actually only possible if the number of competition moments is unknown. This is because, in the case of a known number of game moments, the dominant strategy is cheating in the last game moment. Consequently, players in the second to last period will also cheat, because they foresee that everybody will intensely compete in the last round. This applies automatically for every earlier period, so punishment can only be effective in case of an unknown number of competition moments. If that is the case, it will nevertheless not realistic to assume that the number of playing moments is known, because that would mean that parties know when they will have to face each other for the last time.
[6] Whinston (2006) defines cheap talk as "speech that has no direct payoff consequences".
[7] See, for example, Cooper et al (1989) or Blume and Ortmann (2007).
[8] Kühn, K. (2001), Fighting collusion by regulating communication between firms, *Economic Policy*, 16, pp. 167-204.
[9] See, among other things: http://www.connexie.nl/actueel/1817/8216aansluitkosten-kpn-spoedig-terug-8217.html.

telecom event in the Netherlands, and as *the* platform for the entire sector.[10]

24. The public announcement of the reintroduction of connection fees by the then director Mobile of KPN had not been planned. This announcement did not mean that KPN had taken on an obligation towards its customers to reintroduce connection fees, which it was supposed to fulfil.[11]

25. The public announcement by the then director Mobile of KPN was made against the backdrop of KPN's explicit communication in the public domain in July 2008 that, in reaction to the reintroduction of connection fees for iPhone subscriptions plans by T-Mobile, the company had no plans to reintroduce connection fees. KPN stated in a reaction to questions from the media: "*This was our practice a very long time ago, but nowadays we don't do that anymore. It would not be fair to introduce that practice again.*" Vodafone, too, stated in the media that it had no plans to reintroduce connection fees. T-Mobile announced later that day that the connection fees for its iPhone subscription plans would be cut by 50%.[12]

26. On December 10, 2008, at another edition of the same Telecom Time conference, a Vodafone director stated that he hoped that KPN would carry this plan through.[13] One day after KPN's public announcement at the Telecom Time conference, a Vodafone staff member made an internal analysis of the reintroduction of connection fees.[14] This analysis contained a proposal to reintroduce subscription fees, on the condition that KPN announces an introduction of connection fees for all its consumer brands: "*The Commercial Committee is kindly asked to approve the proposal to <u>reintroduce a connection fee</u> for new connections in the future <u>provided KPN will announce the introduction for all its consumer brands</u>.* " Furthermore, a proposal is made to use the same contractual terms as KPN: "*…new subscriptions and all channel at the same conditions as KPN (e.g. contract duration and online/telesales promotions....*"

27. On January 13, 2009, Vodafone decided internally to reintroduce the charging of connection fees, starting on April 1, 2009, under a number of conditions, one of which is to check the level of KPN's subscription fee.[15]

28. The file shows that the reintroduction of connection fees was also internally discussed at T-Mobile, and that one of the considerations in this discussion was that, by reintroducing connection

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[10] www.telecomtime.nl
[11] See: http://webwereld.nl/algemeen/39710-kpn-voert-aansluitkosten-mobiele-telefonie-weer-in: "A KPN spokesperson confirmed the plans, but stated that the final decision had not yet been taken." The process is not so far advanced that we are actually going to do this, but we are currently considering it," said the spokesperson to news portal Webwereld."
[12] http://webwereld.nl/mobility/38074-t-mobile-rekent-53-euro--aansluitkosten--voor-iphone
[13] See, among other things, http://www.connexie.nl/actueel/1817/8216aansluitkosten-kpn-spoedig-terug-8217.html.
[14] See document with file no. D_730603_02570, internal Vodafone memo of December 11, 2008. It must be noted that this document was dated December 9. However, its metadata show that it was produced on December 11. On December 11, the author probably erased the contents of an older memo from December 9, named 'memo business bundle', and filled it with new text without adapting the date in the header.
[15] See document with file no. D_730603_0240554, minutes of Commercial Committee meeting on January 13, 2009.

fees, Vodafone followed KPN's signal to make the market healthier:[16] *"As promised: strategy for MLT[17] is (after consultation with […] this morning):*
Yes, we want to follow at some distance for these reasons:
Securing our profit margin
KPN's signal to make the market healthier, under the following conditions:
Initially for SIM-only, provided that Telfort follows, too.
Also for one-year plans (we will do that from Q2), preferably not for two-year plans (as long as it is not necessary)".

29. KPN reintroduced a connection fee in phases. It set the first step on January 1, 2009.[18] On April 6, 2009, Vodafone introduced a connection fee, and on April 1, 2009, T-Mobile introduced connection fees for some of its plans. The connection fees that KPN, Vodafone and T-Mobile charged consumers were quite similar in terms of level, and were about EUR 25 for a new one-year plan.[19]

Public interview in telecom journal Telecom Update

30. An interview to telecom journal Telecom Update in May 2009 is a second real-world example of a public announcement as meant in this decision. In this interview, the abovementioned KPN director looked back on KPN's price strategies, and those of the sector as a whole, drawing the conclusion that other measures will be needed for the future: "The industry is a captive of its own model". He announced what measures KPN considered, such as the introduction of an inflation correction, and noted among other things that KPN would concentrate less on market share, but more on market value. He also indicated to be satisfied with a market share of 50%. He regarded the measures that he announced as setting a new course and as a revolutionary decision, as revealed by parts of the interview:

"*His strategic plan for 2009 is to concentrate less on market share, but more on market value. 'KPN has a market share of around 50%,' he reveals, 'and we are happy with that. In the past few years, operators have focused too heavily on increasing their market shares by continually raising the SAC/SRC and by reducing prices. Actually, we all have tried to buy ourselves a larger market share. However, all competitors are walking the same path, so we don't make any progress at the end of the day. The industry is a captive of its own model.' How could this deadlock be resolved, according to the executive? […] answers: 'Based on this observation, we are following a new strategy. We will carefully start lowering the SAC/SRC and raising prices this year. It is really a paradigm shift.' That*

[16] Document with file no. D73060260030, internal T-Mobile email from February 9, 2009.
[17] MLT stand for Management Level Team. This is a management meeting at T-Mobile, attended by both sales managers and marketing managers.
[18] See document with file no. A7306_0133_7306_01_20111221104943953_13, document on communication about reintroduction of connection fees for mobile plans.
[19] http://tweakers.net/nieuws/59477/ook-vodafone-en-t-mobile-berekenen-weer-aansluitkosten.html and http://www.bellen.com/nieuws/ook-aansluitkosten-bij-vodafone-en-t-mobile.aspx

means a new way of thinking, a revolutionary decision. The executive is very conscious of this change: 'We have clearly set a new course'.

[…]

'If we will be punished by the markets and our market share will be immensely under pressure, then we will have to make other plans. We will indeed have to stand the test of criticism by consumers and competitors. We are also considering other measures, such as passing on the inflation to consumers every year. Many industries act like that. In the gas, energy and water markets, consumers fully accept this practice.'"

31. Furthermore, in the same interview, the former KPN director looked back at the reintroduction of connection fee charging. In that context, he said that T-Mobile and Vodafone have by now taken the same steps. He continued by saying that KPN's competitors, too, should feel the need to change course: " '*KPN works in an open and very competitive market. All actors know their own strategy and their own prisoner's dilemma. All parties are, independently from each other, working on their own solution to keep their business healthy.' Although operators are not allowed to work together – the NMa was one of the parties who objected to this – they copy some of each other's measures. 'Take, for example, the reintroduction of connection fees. In the end, consumers pay for the costs of switching operators, because circulating these costs is not efficient. I see that T-Mobile and Vodafone have now taken the same step.' KPN's competitors face the same challenges and should also feel the need to change course, according to the KPN executive."*

32. The dossier reveals that some extracts from the interview had been highlighted by a T-Mobile employee and had then been forwarded to the top management of the organization that is responsible for the mobile business.[20] Another internal T-Mobile email shows that KPN's strategy presented the company with a dilemma, given its growth ambitions.[21]

"[…] indicates that KPN is satisfied with the current market share of around 50%. It wants to slowly reduce the commissions, and will take action when that market share will be under pressure. They said the same in 2006, but then they talked about "a phased reduction of the commissions" ─ in other words: we will start, and if the competition will follow, we will push our plan through. […] indicates that the competition should also feel the pressure to adopt another practice. He saw this confirmed by the reintroduction of connection costs by all operators.

To summarize: KPN wants to maintain its market shares, but also to improve its profit margin by aiming for value and reducing its commissions. A dilemma for T-Mobile given the growth ambition."

[20] Document with file no.D73060232305, internal T-Mobile email dated May 20, 2009.
[21] Document with file no.D73060231415, internal T-Mobile email dated May 26, 2009.

5.4 Anticompetitive risks

33. This sub-section will explain, taking into account, among other factors, the economic theory on public announcements and the awareness among MNOs that these announcements could be noticed by competitors, how such announcements can carry anticompetitive risks.

Reintroduction of connection fees

34. As described above, in December 2008, market leader KPN announced that it would charge connection fees again. KPN was able to abandon this idea at a later moment. The announcement, made in the presence of representatives of other MNOs, informed competitors about KPN's intentions on how it would behave in the market. This could lead to coordination, and, as a consequence, consumer interests could be harmed. It is clearly more beneficial to the MNOs if each of them starts to charge connection fees again, but for an individual MNO it could be risky to start, suddenly and unilaterally, charging connection fees again. MNOs always face a certain degree of uncertainty about their competitors' preferences and decisions. If a competitor decides not to follow, this could lead to customers moving to this competitor in such great numbers that the reintroduction of connection costs will be loss-making.[22]

35. A public announcement of – in this case – the intention to reintroduce the charging of connection fees changes this playing field. By announcing the reintroduction of connection fees without actually implementing this decision at the same moment, KPN was able to create expectations among competitors.

36. As remarked in section 26, a Vodafone director stated in an interview with a journalist, in reaction to KPN's public announcement, that he hoped that KPN this time would really push through its plan to reintroduce connection fees. One day after KPN's public announcement, an analysis of the reintroduction of connection fees was made within Vodafone. When T-Mobile prepared its position on the reintroduction of connection fees, it took KPN's signal "to make the market healthier" into account (see section 28).

Public interview on upcoming strategy changes in telecom journal Telecom Time

37. The then director Mobile of KPN said in the interview that the company had no growth ambitions and thus no intentions to follow an aggressive pricing strategy. In addition, he said that KPN had planned to implement cost reductions, such as a lower SAC/SRC and price increases to compensate for inflation. After this interview, KPN was still able to abandon its plans. Section 32

[22] See also *OECD* (2012), p. 43*: "A firm might announce that it will increase its price to a certain level at a specific date in the future, but then revert to the current price if other firms do not follow suit with similar announcements of price changes. This way, firms might arrive at a commonly agreed price without incurring the risk of losing market shares or triggering price wars during the period of adjustment to the new prices."*

makes clear that at least T-Mobile had also perceived this information in such a way. Just like in the connection fee case, it is more advantageous for the MNOs if each of them increases its prices. On the other hand, it could be risky for an individual MNO to implement price increases and cost reductions in a sudden and unilateral manner. If a competitor decides not to follow, this could lead to customers moving to this competitor in such great numbers that charging higher prices will result in lower profits.

38. The public announcements by market leader KPN, as meant in this decision, could change the status quo. An important element in this context is the remark that KPN is satisfied with its current market share of 50% and had the intention to aim for market value, but that its strategy had to withstand the test of criticism of the competitors. This remark about the market share indicates that KPN, if the competitors will follow, will thereupon actually push the price increases through.

39. The two previous real-world cases show that public announcements in the mobile telecommunications market in the Netherlands can carry anticompetitive risks.

5.4.1. Public announcements and possible efficiencies

40. Market transparency is a necessary condition of the perfect-competition model.[23] In that light, communication can also have positive effects. These benefits can be obtained in three ways:[24]

1. the communication carries information that is important to consumers;
2. the communication is of importance to investors;
3. the communication involves an exchange of information between companies about the market, which improves efficiency.

41. In this case, it is not clear in what way consumers benefit from public announcements as meant in this decision.[25] After all, consumers do not know whether the announced actions will actually be carried out. In that case, they will not be able to base their purchase decisions on this information in a rational way. If public announcements are made in professional telecom journals or at conferences instead of in consumer-oriented media, such as advertisements in daily newspapers or company websites, the impression is created that these announcements are not meant for consumers.

42. The requests for a commitment decision do not relate to specific meetings, expert meetings, analyst calls[26], and the like, that address investors, potential investors and analysts. ACM realizes that MNOs should be able to inform investors, potential investors and analysts about their cooperate strategy. In the specific meetings, the substance of the information, the way the information was presented and the location where the information was presented were clearly targeted at investors.

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[23] *OECD Policy roundtables, Unilateral Disclosure of Information with Anticompetitive Effects,* p. 11.
[24] Kühn, K. (2001), “Fighting collusion by regulating communication between firms”, *Economic Policy,*16, pp. 167-204.
[25] See also the definition in section 12: it is not yet sure whether the change will actually be implemented.
[26] An analyst is someone who studies and analyses specific companies or sectors. An analyst makes recommendations regarding companies and sectors to clients from, for example, investments banks or asset managers. The decision to buy a certain share or not is one of the decisions such a person could advise about.

Information that is provided in that manner is therefore not likely to lead to coordination than information that is presented in, for example, telecom expert meetings and professional telecom media. During these types of meetings however, MNOs must obviously also act within the limits of Section 6 of the Competition Act.

43. To conclude, a public announcement as such could promote efficiency if, for example, information is provided about future demand. However, it is difficult to understand how information about possible future prices provides information about upcoming trends in demand. For this reason alone, it is not plausible that this efficiency benefit will follow from public announcements as meant in this decision.

44. The above considerations show that public announcements in the mobile-telecommunications market in the phase before the moment of finalizing the internal decision-making process are not expected to bring many efficiency benefits. The announcements do not provide valuable information to consumers or information about future trends in demand that is of general use.

5.5 Conclusion anticompetitive risks of public announcements

45. Public announcements as meant in this decision create a risk of actual coordination of market behavior in the mobile-telecommunications market, which, because of its specific characteristics, already creates the possibility of coordinated effects. The investigation shows that MNOs are aware that the announcements in question are noticed by competitors. Against this backdrop, they can create expectations among competitors and reduce strategic uncertainty. Public announcements as meant in this decision can also harm consumer interests through higher prices or a lower service quality. Few efficiency benefits are to be expected. For this reason, they pose a risk to effective competition in the mobile-telecommunications market.

6 THE COMMITMENTS

46. During the process towards this commitment decision, the MNOs have displayed an awareness of the fact that public announcements about possible future market behavior could carry anticompetitive risks. Therefore, the MNOs have made the commitments below, which aim to prevent the anticompetitive risks that these remarks may create in the future.

47. Each of the MNOs promises individually that their senior management[27] will not make any

[27] Senior management means the following specific positions:
i. For KPN: Members of the Management Board, members of the Management Team KPN Netherlands (NL Exco) and members of the Management Team Consumer Market (Mobile). This includes the individuals who have formerly held the position of Director Marketing or Director Sales for the brands KPN, Hi and Telfort
ii. For T-Mobile: members of the Board of Directors and members of the Consumer Management Team
iii. For Vodafone: members of the General Management Team (GMT) and the Consumer Management Team (CBU): Head of Postpaid Marketing, Head of Prepaid Marketing, Head of Market Insights, Head of Commercial Online/Indirect Sales, Head of Discount Management.

oral or written announcements in the public domain[28] about future prices and other commercial conditions for mobile-communication services in the Dutch market that would leave consumers worse off, before the internal decision-making about such future prices and commercial conditions has been finalized and laid down in writing, whereby each of the MNO's individual behavior become dependent on their competitors' reactions.

48. Moreover, the MNOs promise that they will set up a compliance program in which it is stated that their Senior Management will refrain from making announcements as described in the previous section. As part of that program, MNOs will ensure that, through specific training in this field, awareness about the behavior described above is raised among senior management. Within three months after this commitment decision's date, the MNOs will send a copy of their compliance program to ACM.

7 ASSESSMENT

49. In this chapter, it is established that the commitments by the MNOs as described above comply with the requirements laid down in Section 49a(2) of the Competition Act. To this end, it will be assessed first whether it has been ensured that, as a result of this decision, the MNOs will act in accordance with Section 6(1) of the Competition Act. Next, it will be assessed whether it is plausible that the MNOs will actually comply with the decision in such a manner that this compliance can be verified, and whether taking this decision is effective from a law-enforcement point of view.

50. Under Section 49a(2), sub (a), of the Competition Act, the Netherlands Authority for Consumers & Markets is authorized to issue a commitment decision in a concrete case, if, in its opinion, it is ensured that the companies involved will act in accordance with Section 6(1) of the Competition Act as a result of such a decision. For ACM to issue such a decision, it is not required that, nor is it implied that the companies involved have committed a violation of Section 6 of the Competition Act. After all, a commitment decision does not establish any violation of competition regulations. In this particular case, it means that it must be plausible that the companies involved, as a consequence of the commitment decision, will refrain from making announcements that carry the anticompetitive risks that have been described in chapter 5.

51. ACM believes that this is the case. The MNOs have explicitly promised that the companies' Senior Management will not make any announcements in public about future prices and other commercial conditions for mobile communication services in the Dutch market as a result of which consumers would be worse off, whereby each of the MNO's individual behavior become dependent on their competitors' reactions. To that end, they will honor the commitments that have been listed in section 46 and further. The MNOs' Senior Management of all people are the ones who are in a

[28] Announcements in the public domain are announcements in the media, speeches, presentations and panel discussions during telecom conferences or other conferences, as well as interviews and answering questions for professional media, both digital media or printed media. Announcements made at specific meetings, expert meetings, analyst calls, and the like, which are targeted at investors, potential investors and analysts, are not considered to have been made in the public domain.

position to make announcements during speeches or panel discussions at conferences, or in interviews for the print media that could carry anticompetitive risks. Considering their positions within the companies, it is not plausible that other representatives of the MNOs give speeches at conferences and interviews, let alone making announcements about intended market behavior that has not even been decided on internally yet. Nevertheless, if ACM were to discover that other individuals than Senior Management made such announcements, ACM could decide to launch an investigation into such practices under Section 6 of the Competition Act.

52. The commitments directly concern announcements that are made by the MNOs in the public domain about intended market behavior that harms consumers and that has not been finally decided on within the companies. With these commitments to ACM, certainty is created about the fact that measures that are announced by one of the MNOs will actually be implemented. The risk that announcements in the public domain will be made to jointly bring about higher prices is thus effectively eliminated.

53. Under Section 49a(2), sub (b), of the Competition Act, the Netherlands Authority for Consumers & Markets is authorized to issue a commitment decision in a concrete case, if, in its opinion, the company makes a plausible case that it will comply with the decision in such a manner that compliance can be verified. In this case, ACM believes that the MNOs have sufficiently demonstrated this, taking into account the promised measures as listed in sections 46 and further. After all, the MNOs have promised that their commitments will be implemented in a compliance program. Copies of the compliance programs will be sent to ACM.

54. Moreover, it should be noted that the commitments concern announcements in the public domain. Anything that happens in the public domain is transparent and can be monitored by ACM. At any time, ACM has the power to look into the underlying decision-making, following an observation of communication in the public domain.

55. Under Section 49a(2), sub (c), of the Competition Act, the Netherlands Authority for Consumers & Markets is authorized to issue a commitment decision in a concrete case, if such is effective for the purpose of enforcing the Competition Act. Such is the case here. This commitment decision directly prevents anticompetitive risks in connection with public announcements that could lead to coordination at the expense of consumers. In that context, it is important to note that all MNOs filed the requests to declare the commitments binding. The commitment decision thus realizes, swiftly and effectively, the complete elimination of the anticompetitive risks that have been identified in chapter 5.

56. In addition, the issuance of a commitment decision is effective in this case, because spillover effects to other sectors where public announcements may be made can be realized sooner, as the companies in those sectors are able to learn about the related anticompetitive risks as mentioned in this decision earlier.

57. Based on the above, ACM considers it plausible that the companies involved will act in accordance with Section 6(1) of the Competition Act. In addition, the companies involved have, in ACM's opinion, demonstrated that they will comply with the decision in such a manner that compliance can be verified. Finally, ACM considers a commitment decision effective in this case.

8 DECLARING THE COMMITMENTS BINDING

58. Having regard to Section 49a(2), (3) and (5) respectively, the Netherlands Authority for Consumers & Markets announces that it declares the commitments as mentioned in sections 46 through 48 binding for KPN, Vodafone and T-Mobile.

59. The Netherlands Authority for Consumers & Markets also decides not to continue the competition-law investigation into possible violations of Section 6(1) of the Dutch Competition Act and Article 101(1) of the Treaty on the Functioning of the European Union in the mobile-telecommunications sector, which was launched in December 2011. The above does not affect the administrative powers to enforce compliance with these commitments.

60. This decision will be in force for a period of three years from the day of its publication.

Date:

Netherlands Authority or Consumers and Markets,

on its behalf,

C.A. Fonteijn
Chairman of the Board

Anyone whose interest is directly affected by this decision can file an appeal against this decision with the District Court of Rotterdam, Administrative Law Section, P.O. Box 20951, 3007 BM, Rotterdam, the Netherlands. An appeal must be filed within six weeks from the day after the day the decision has been made available for perusal under Section 3:44, paragraph 1, sub a of the Dutch General Administrative Law Act.