



Brussels, 14.12.2016
C(2016) 8821 final

Autoriteit Consument & Markt
(ACM)
Zurichtoren – Muzenstraat 41
2511 WB Den Haag
Netherlands

For the attention of
Mr Henk Don
Vice chairman

Fax: +31 70 722 23 55

Dear Mr Don,

Subject: Commission Decision concerning Case NL/2016/1947: Wholesale local access provided at a fixed location in the Netherlands - remedies

Article 7(3) of Directive 2002/21/EC: No comments

1. PROCEDURE

On 17 November 2016, the Commission registered a notification from the Dutch national regulatory authority, Autoriteit Consument & Markt (ACM)¹, concerning the price control obligation previously imposed on KPN's Fibre-to-the-Home (FttH) product in the market for wholesale local access provided at a fixed location² in the Netherlands.

The national consultation³ ran from 21 September 2016 to 2 November 2016.

On 25 November 2016, a request for information⁴ was sent to ACM and a response was received on 30 November 2016.

¹ Under Article 7 of 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, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Corresponding to market 3a in Commission Recommendation 2014/710/EU of 9 October 2014 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 (Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

³ In accordance with Article 6 of the Framework Directive.

⁴ In accordance with Article 5(2) of the Framework Directive.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

The last full review of the market for wholesale local access provided at a fixed location in the Netherlands was notified to the Commission under case NL/2015/1794⁵. ACM proposed to designate KPN with significant market power (SMP) and imposed access, transparency, non-discrimination and price control obligations⁶. The Commission commented on the need i) to monitor developments on cable networks in the market, ii) to review related markets outside the scope of the notified draft measure, and iii) to re-consider the imposed price control obligation in the following review, in light of the Commission's 2013 Costing and non-discrimination recommendation.

The last pricing decision for FttH at the ODF⁷ was assessed by the Commission under case NL/2013/1439⁸. The Commission requested the regulator to review its costing methodology in line with the Recommendation on costing and non-discrimination⁹ not yet issued at the time.

2.2. Proposed price caps

The current draft measure implements the FttH ODF access tariff regulation as imposed by ACM in case NL/2015/1794. The present price decision would apply until its revocation or until the current regulatory obligations have been replaced in a new market analysis decision. The proposed tariffs are set on the basis of two methodologies, i.e. the discounted cash flow (DCF) model and the embedded direct costs (EDC) methodology, as specified in the full market analysis of 2015. ACM states in its response to the request for information that the DCF methodology is suitable for long term investments (e.g. NGN networks roll-out), whilst the EDC methodology is appropriate for determining short-term regulatory costs of existing networks.

A price cap applies to KPN's FttH ODF access based on the DCF model using KPN's own internal rate of return (IRR). Since 2008 ACM is maintaining the same regulatory approach to FttH in order to ensure a predictable and attractive environment for investments. At the start of each new regulatory period ACM

⁵ C(2015) 8657.

⁶ The price control obligations imposed on KPN consisted of: (i) a safeguard cap for existing LLU services (MDF access with some exceptions for MDF pair bonding) based on the previous price cap increased by the CPI (constant in real terms); (ii) cost-orientation (based on the EDC/WPC methodology) for new LLU services; (iii) a price cap on VULA based on the LLU safeguard cap and increased by the EDC of the VULA increment (applicable only in case no alternative commercial agreement is reached between KPN and access seekers); and (iv) a price cap on KPN's FttH based on a DCF model using KPN's own internal rate of return (IRR).

⁷ Optical Distribution Frame.

⁸ C(2013) 2435.

⁹ Commission Recommendation of 11.9.2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (Costing and non-discrimination Recommendation), C(2013) 5761, OJ L 251, 21.9.2013, p.13.

verifies if the ceiling of the monthly tariff for unbundled FttH access is still effective to prevent excessive pricing. ACM does so by comparing KPN's IRR with the all-risk weighted average cost of capital (WACC). KPN calculates the IRR which is then reviewed by ACM. If the IRR is lower than the all-risk WACC, then the tariff ceiling is not adjusted by ACM.

The present draft decision sets the IRR at [...]%. Since the all-risk WACC amounts to 10.04%¹⁰, ACM concludes that there is no reason for a downward adjustment of the price caps for the unbundled FttH access. ACM therefore sets the maximum tariffs by allowing an annual CPI increase¹¹ for (i) unbundled FttH ODF access lines for 8 different CAPEX-areas, (ii) collocation per Area Point of Presence (PoP) and (iii) the city-ring connection of the Area PoP with the City PoP, (iv) a one-off connection contribution per customer connection and (v) per Area PoP. ACM also defines the national price cap for 2016 (19.03 euros/month) and the discount percentage for the national tariff structure, i.e. 8.96%.

The services priced based on the EDC methodology include: patching and de-patching¹², migration, order cancellation, NT installation services¹³, extended and extended after-care services¹⁴, and patch repair services, premium service level agreements (SLA), ODF information product.¹⁵

After calculation of each service's direct costs, the surcharge of [...]% is applied for indirect costs. It is considered that the latter cannot be attributed to a specific service. Indirect costs are therefore calculated as a % surcharge added to the specific service's direct costs.

3. NO COMMENTS

The Commission has examined the notifications and the additional information provided by ACM and has no comments.¹⁶

Pursuant to Article 7(7) of the Framework Directive, ACM may adopt the draft measure and, where it does so, shall communicate it to the Commission.

¹⁰ This figure is based on three elements, i.e. the WACC applicable to the copper network after taxes (4.54%), a fibre increment (2%), and an increment for asymmetric regulatory risk (3.5%). The latter surcharge was calculated in 2009 and is applicable since then. ACM explains in the response to the request for information that while the newly proposed WACC figure includes a fibre surcharge of 2%, the WACC without this surcharge would still be superior to the IRR. WACC parameters have been defined for ACM by "The Brattle Group" in July 2015.

¹¹ The annual tariff ceilings are set through the annual CPI change of the previous year, such as defined by the Dutch Central Bureau of Statistics.

¹² I.e. operations at the ODF/telephone exchange.

¹³ NT is the modem converting optical signals into electronic ones.

¹⁴ These two types of services aim to remedy service interruption at the ODF.

¹⁵ This service includes information from KPN to alternative operators on end-user's data.

¹⁶ In accordance with Article 7(3) of the Framework Directive.

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/EC¹⁷ 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 Commission¹⁸ 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.¹⁹ You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

¹⁷ 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.

¹⁸ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

¹⁹ The Commission may inform the public of the result of its assessment before the end of this three-day period.