

Notification regarding OPTA's policy on mobile termination tariffs

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Introduction

1. By letter of 4 December 2003, KPN Mobile, Orange, T-Mobile, Telfort and Vodafone collectively and Tele2 separately (hereinafter: the mobile providers) informed both the Director General of the Competition Authority (hereinafter: the d-g Nma) and the Commission of the Independent Post and Telecommunications Authority (hereinafter: the Commission) of their intention to reduce the tariffs for terminating traffic on a mobile network, known as mobile terminating access (hereinafter: MTA). This notification explains the Commission's view on the reduction proposed.

The mobile providers' proposal

2. The mobile providers have proposed to reduce the MTA tariffs in three phases, namely as of 1 January 2004, 1 December 2004 and finally as of 1 December 2005. This proposal stands until 1 December 2006. This agreement commits the mobile providers to applying a flat rate tariff structure for terminating traffic on their mobile networks which has originated from other networks, meaning they would no longer make a distinction in set-up and conveyance tariffs and in peak and off-peak tariffs for calls to mobile numbers. The following table outlines the implementing steps to be taken by the mobile providers.

	1 st step 1 January 2004	2 nd step 1 December 2004	3 rd step 1 December 2005
KPN Mobile, Vodafone	€ 0.155	€ 0.130	€ 0.110
Orange, Telfort, T-Mobile, Tele2	€ 0.175	€ 0.147	€ 0.124

3. The mobile providers would modify their MTA tariffs voluntarily in accordance with the reduction proposed if the d-g Nma finds reason to suspend his analysis of the level of the MTA tariffs under Section 24 of the Competition Act and if the Commission agrees upon applying the tariffs proposed by the mobile providers whilst determining reasonability in dispute settlements regarding MTA.

Considerations

4. The Commission has taken the following into consideration in determining its viewpoint.

With regard to the existing market situation

5. Since 1999, the Commission has taken the view that, from the perspective of the user and in promoting sustainable competition in the telecommunications market, the MTA tariffs which mobile providers charge to other (fixed and mobile) providers in the Netherlands, are too high. For this reason the Commission's past decisions were aimed at bringing down the MTA tariffs.

6. In 2002, the Commission issued its Policy Rules regarding the Regulation of Mobile Terminating Tariffs (hereinafter: the policy rules) stipulating the procedure of settling disputes between providers involving MTA tariffs. In the policy rules the Commission indicated the temporary nature of these directives for settling disputes. In disputes about the reasonability of the MTA tariffs, decisions would be made in accordance with the policy rules until the Commission has made a decision by using its authorities within the new European regulatory framework, according to which a suitable and proportionate remedy would be implemented to solve the high MTA tariff issue. The Commission expects the new European regulatory framework to be implemented in the Dutch Telecommunications Act in the first half of 2004.

7. During the second half of 2002, the Commission made decisions in compliance with its policy rules in a large number of disputes between market parties about the reasonability of the MTA tariffs. Some providers lodged objections against these decisions. In the first MTA dispute, between KPN Mobile and

Telfort, the Commission rendered a decision in line with these objections. The Rotterdam District Court has meanwhile determined that the Commission is not authorised to assess the reasonability of the MTA tariffs in this dispute if the parties are interconnected to each other by means of indirect interconnection. The Commission in turn has appealed the Court's decision with the Dutch Trade and Industry Appeals Tribunal (hereinafter: the CBb). The CBb will not be expected to have made a decision on this before the first quarter of 2004.

8. The Rotterdam District Court has suspended some of the Commission's decisions in the MTA disputes by way of transitional measures. In anticipation of the CBb's decision, the Commission has deferred its decisions on the objections against the decisions at first instance in the remaining MTA disputes. The reason for this was to avoid redefining the reasonability of the MTA tariffs in the process in the case of indirect interconnection on the one hand and direct interconnection on the other hand, or to avoid having to make a decision on the reasonability of the tariffs in widely varying periods of time creating and increasing unequal competitive market positions.

9. If the CBb finds reason to believe that the Commission is authorised and the MTA tariffs stipulated in its policy rules are in fact reasonable, the Commission does not expect to make a decision on the objections against the MTA decisions before the second half of 2004. It must be taken into account that the decisions made by the Commission have not resulted in any evident reduction in the MTA tariffs to date.

10. With regard to dealing with the MTA issue using its authorities within the new European regulatory framework, the Commission notes that, to date, this framework has not yet been implemented in the Dutch Telecommunications Act. The Commission expects the new Telecommunications Act to be amended during the first half of 2004. If this is the case, the Commission does not expect to have concluded its market analysis before 2005 or to have made a decision regarding the enforcement of any suitable and proportionate remedies that can bring the MTA tariffs to a level which is more approximate to the competitive level.

11. The Commission states that, if future decisions in MTA disputes should result in bringing down the MTA tariffs, this will not necessarily lead to lower user tariffs prior to that date. In this respect, the Commission considers the user tariffs for calls to mobile numbers to still be based on the high MTA tariffs. It therefore infers that the user is ultimately paying for the inefficient costs accompanied with the high MTA tariffs. In the interest of the user the cost of calls to mobile numbers must therefore be reduced as soon as possible.

12. Providers who are dependent on the purchase of call termination from mobile providers in setting up calls to mobile numbers, are currently confronted with an inefficient cost level for their services due to these high MTA tariffs. They would also benefit from an MTA tariff reduction without any delay.

13. Furthermore, the Commission believes that both the telecommunications market and the market parties would benefit from rapidly solving the MTA tariff issue. In this respect the uncertainties in the market can negatively affect competitiveness. The Commission has received remarks from the market that some market parties have partially suspended their payment for the MTA services. Moreover, the uncertainties about the level of the MTA tariffs can also influence some providers' means to finance their businesses.

14. In this respect, the legal procedures regarding the existing MTA decisions will continue through 2004 and possibly into 2005, resulting in both the market parties and the Commission carrying the accompanying administrative burden once the new regulatory framework has been implemented in the Telecommunications Act. Furthermore, the Commission prefers immediate clarity on the MTA tariffs to prolonged uncertainty. Even if the outcome of the legal procedures would enable the Commission to enforce tariff reductions, this would not lead to users retroactively paying lower tariffs for calls to mobile numbers. The Commission believes that the resources required for concluding the current legal procedures should be applied for implementing the new framework. Most importantly, a solution must be

found for the MTA issue under the current Telecommunications Act, which the Commission finds to be feasible in the interest of both the users and the market parties.

With regard to the NMa and OPTA's acceptance of the mobile providers' proposal.

15. The Commission states that the tariff reduction procedure, as agreed upon by the mobile providers, does not stand in the way of the authorities assigned to the Commission in the new framework. In that respect, the policy rules also assume a gradual transition from the current MTA tariff level to a more reasonable level. Shock effects arisen from sudden tariff reductions in the entire market do not promote sustainable competition and should therefore be avoided as much as possible.

16. The Commission also establishes the fact that, although various legal procedures have delayed the reduction process with two years, the pace at which the tariff reductions are taking place is in accordance with the time frame stipulated in the policy rules.

17. The fact that the MTA tariffs are reduced at a later moment than determined in the policy rules, would lead to the expiration of implementation dates. In that respect, the Commission considers that, if it would be feasible and reasonable to lower the MTA tariffs retroactively in dispute settlements, any MTA tariff reduction retroactive to a date in the past would not automatically result in lowering the user tariffs for calls to mobile numbers retroactively as well. The Commission has also ascertained that the providers, having incurred the high MTA tariff as purchase costs for calls to mobile numbers, have charged these costs to the user. Therefore, in the disputes to be yet settled, the Commission will decide, if necessary, that the tariffs as charged by the mobile providers prior to 1 January 2004, do not have to be retroactively reduced to that date.

18. Moreover, the Commission believes that, as already communicated to the mobile providers, after implementation of the new European regulatory framework for the telecommunications sector, the Commission is committed to analyse the relevant market for the termination of traffic on mobile networks and, if this analysis results in the conclusion that there is no effective competition in the market, the Commission is committed to take suitable and proportionate regulatory measures. This regulation may lead to a further reduction on or after 1 December 2005. In European view this regulation could mean adopting a transitional phase to Long Run Incremental Costs (LRIC). This transition phase will follow the last step in the tariff reduction process.

With regard to general competition law

19. The Commission also notes that the d-g Nma sees no reason to continue conducting its analysis from the perspective of regulation under the Competition Act and in anticipation of MTA tariff regulation based on ex ante regulation under the new Telecommunications Act.

The Commission's view

20. On the basis of the considerations outlined in this notification, the Commission is ascertained that the MTA tariff reduction as proposed by the mobile providers, is in accordance with the interest of the users and promotes sustainable competition in the telecommunications market. The Commission will apply its modified policy in disputes in virtue of Section 6.3 of the current Telecommunications Act. If a dispute is lodged, the Commission will apply the reduction process as proposed by the mobile providers and accepted by the NMa and OPTA to use as a framework. In the Commission's opinion this is the most feasible measure at the moment.

Sincerely,

THE COMMISSION OF THE INDEPENDENT POST AND TELECOMMUNICATIONS AUTHORITY,
on behalf of the Commission,

H.C. Bakker, secretary