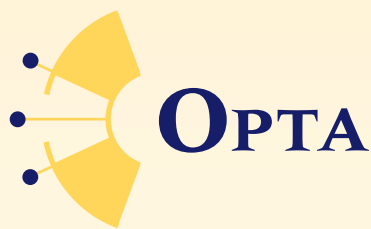


Imposing Access Obligations



INDEPENDENT POST AND TELECOMMUNICATIONS AUTHORITY

IMPOSING ACCESS OBLIGATIONS

Explanatory note

The Dutch Independent Post and Telecommunications Authority (OPTA) regulates the postal and telecommunication markets in The Netherlands. OPTA is an independent executive body that commenced its activities on 1 August 1997. OPTA's mission is to stimulate sustained competition in the telecommunications and post markets. In the event of insufficient choice OPTA protects end-users. OPTA regulates compliance with the legislation and regulations on these markets.

In terms of market conditions, market structure and regulatory framework, telecommunications and postal markets present a continuously changing landscape. In this environment, OPTA has committed itself to improving the economic reasoning on which strategic choices are made in such a way that market parties can contribute to and have a clear understanding of the development of OPTA-policies, now and in the future. In 2003 the OPTA bureau was complemented with the Economic Analysis Team (EAT) headed by the Chief Economist. EAT is responsible for developing economic reasoning and stimulating discussion on key issues within the telecommunications and postal markets. To achieve this, EAT produces two kinds of policy notes - short discussion papers. Economic Policy Notes focus on economic issues and principles. Regulatory Policy Notes focus on strategic economic issues in specific regulatory fields. To stimulate discussion EAT organises roundtables. With its products and activities the Economic Analysis Team expects to add value to the economic debate in Dutch telecoms and post.

Often, lessons can be drawn from past cases. Policy Notes will try to benefit from analysing such cases. These Notes, however, are aimed at contributing to the development of future OPTA policies and are focused on providing sound economic reasoning to that effect. For the purpose of these Notes it is not necessary to take into account other considerations, either of a factual or of a policy nature, that may have played a role in these past cases. These Notes, e.g., do not set out to identify or evaluate short term benefits service providers may offer to end consumers but primarily aim to look into long term benefits of competition between service providers. As a consequence, discussion of these cases should not be considered or construed as an attempt to revise or evaluate these cases. Furthermore, Policy Notes are not aimed at reviewing past policies or expressing future policies. They are solely intended to stimulate discussion and critical comment within as well as outside of OPTA, thus laying a basis for the development of future policies.

The analyses and conclusions expressed in Economic and Regulatory Policy Notes of the Economic Analysis Team (EAT) do not necessarily reflect the opinions of the Commission of OPTA. As such, the opinions of EAT, in whatever shape or form, do not have a legal status. Quotes from and references to these Notes can be made freely, provided that such quotes and references sufficiently express the preliminary character and purpose of the Notes.

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Abstract

Access obligations interfere with the free disposal of property rights. Under general economic principles imposing access obligations can be considered if the upstream facility is not replicable and downstream competition is not effective. Under the essential facilities doctrine access obligations can be considered if the upstream facilities are an essential facility and all competition on the downstream market would be eliminated without access. The New Regulatory Framework for Electronic Communication requires for access obligations to be imposed that there is significant market power (SMP) on the upstream market and that without access obligations, the emergence of a sustainable competitive market at the retail level would be hindered, or that this would otherwise lead to consumer harm. This RPN argues that the requirements for imposing access following general economic reasoning and the principles of the NRF means that access obligations can only be imposed if there is wholesale and (the risk of) retail SMP.

1 Introduction

In 2002 the European Commission has introduced a new regulatory framework for electronic communication (NRF). The overriding objective of this framework is to establish a harmonised framework for the regulation of electronic communications services, networks, associated facilities and services. The access obligation is central in the NRF. Imposing access (obligation to deal) is the most interfering measure in the market process the NRF allows, going even further than tariff regulation (conditions of delivery). This means the proportionality of the actions of the regulator will be heavily scrutinised in the case of access. Therefore, it is important to establish clear principles when an access obligation is called for.

The conditions under which a regulatory authority can impose access are set out in article 12 of the Access and Interconnection Directive (AID). This article states that operators with SMP can be obliged to meet reasonable requests for access to, and use of, specific network elements and associated facilities “inter alia” in situations where “the denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a *sustainable* competitive market at the retail level, or would not be in the end-users’ interest”. This provision clearly links wholesale access obligations to the competitive situation in the retail market. However, it is less clear what the exact nature of the competitive problems in the retail market should be. This RPN focuses on access obligations in relation to the level of competition in the wholesale market, the retail market and the interrelation between the competitive levels in both those markets. A standard for applying wholesale access obligations is developed on the basis of general economic principles and general competition law.

1.1 Structure

Section 2 deals with general economic and competition law principles for imposing access obligations. The issue of mandated access to networks and associated facilities is particularly relevant in situations where the owner of a network has market power and is vertically integrated into the services that can be delivered over that network. This is discussed in paragraph 2.1. Paragraph 2.2 discusses a number of conditions which must be met before imposing access obligations based on general economic thinking. Paragraph 2.3 discusses conditions for imposing access based on competition law. The so called “essential facilities doctrine” deals with the question under which conditions an owner of an “essential” or “bottleneck” facility is obliged to grant access to that specific facility (against a reasonable rate) under general competition law, or to put it differently, under which conditions a denial of access to that facility can be regarded as an abuse of a dominant position as a result of which competition is significantly impeded.¹

The NRF sets out a new framework for imposing access obligations and this is discussed in section 3. The NRF advocates an approach for mandating access that differs from the essential facilities standard, but is in line with general economic theory. This approach proposes a lower threshold for mandating access than the essential facilities doctrine and is discussed in paragraph 3.1. The subsequent paragraphs develop the access framework of the NRF in more detail, focussing on those (anti-)competitive

¹ The requirement of significant impediment to competition draws is not literally referred to in article 82 itself but draws from the jurisprudence on the Hoffmann-La Roche and Michelin cases (Bishop/Walker 6.11)

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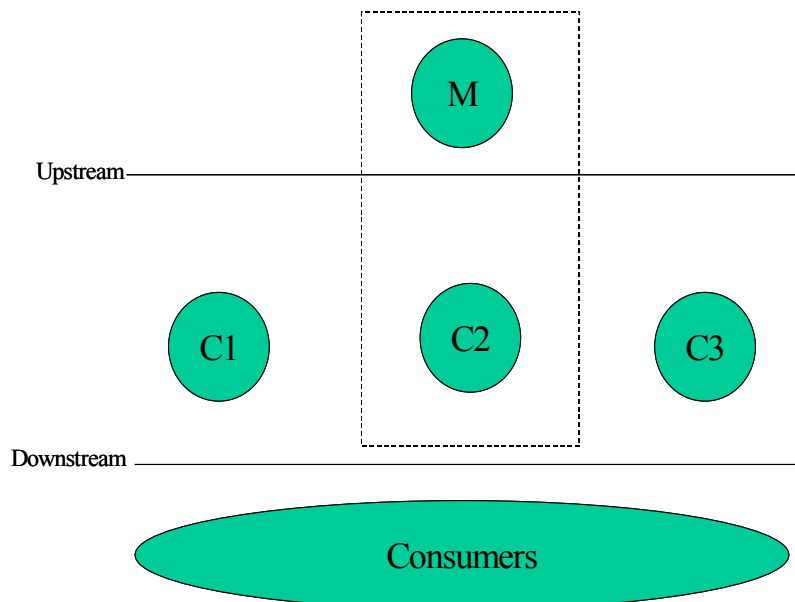
circumstances in the wholesale and retail markets that may justify access obligations. It is argued that significant market power on both the wholesale and retail market is necessary before access obligations can be imposed. Section 4 discusses some counterarguments against this conclusion that were produced during discussions in preparation of this RPN. Finally the policy implications and conclusions are presented in section 5.

2 Conditions for imposing access obligations

2.1 Vertical integration²

A firm that participates in more than one successive stage of production or distribution of goods or services is vertically integrated³. Many incumbent firms in network sectors are vertically integrated. In the Netherlands KPN and the cable companies, for example, own a fixed network and provide retail services that use fixed network inputs. In order to provide retail services, downstream competitors have to produce the network services themselves or purchase network services from the upstream fixed network owner. In utility network sectors, the upstream fixed network owner is often either the only party that can provide network inputs (due to limited replicability of networks) or it faces competition from one or at most few alternative networks. Figure 1 shows the basic reference model used in this paper. An upstream monopolist (M) with its own downstream organisation (Competitor2), competes with downstream Competitor1 and Competitor2, who depend on monopoly input supplied by M.

Figure 1: vertical integration



When the upstream network owner is also active in the downstream retail market, the network owner can affect the competitive position of downstream rivals through pricing and supply conditions of upstream network services. The potential competition issue arises when undertaking M refuses to grant competitor C1 and/or C3 access to its upstream facilities and this refusal of access harms competition. The relevant question for the competition or regulatory authority is whether undertaking M should be obliged to grant undertaking C1 and/or C3 access to the facilities controlled by M.

2.2 Economic arguments for access

A central assumption, which underlies economic theory and general competition policy, is that all undertakings – including undertakings with a dominant position – freely dispose of their property rights

² See EAT (2004) EPN03: Vertical Integration: Efficiency & Foreclosure

³ Carlton, Perloff (1999), p. 377

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and therefore determine unilaterally whether they wish to provide access to their facilities, to whom, and under which conditions. This provides protection for investments in infrastructure, and therefore stimulates such investment, which in turn stimulates facilities based competition. Because a mandatory access regime interferes with this assumption, it is necessary to have a test based on economic criteria that discriminates between a denial of access that constitutes a lawful exercise of property rights and a denial of access that harms competition.

On the basis of economic theory there are a number of conditions that should be met when imposing access obligations:⁴

- i) the facility must not be replicable,
- ii) alternative facilities should not be available,
- iii) spare capacity should be available,
- iv) the downstream market is not competitive, and
- v) the owner of the facility must be active in the same market as the access seeker.

The facility must not be replicable

This requirement in essence a test whether entry barriers to a certain market exist that relate to technology and cost and demand conditions. Technology and cost en demand conditions can cause an economic constellation in which it is not efficient to replicate certain facilities. This means that it is not possible for another firm to develop or threaten to develop a similar facility that could supply the product of service at a low enough cost to supply the downstream market.

Alternative facilities should not be available

If alternatives to the facility to which access is requested exist, this shows on the one hand that the facility is already replicated and that alternatives for the access seeker exist. In that case mandating access would not be necessary to protect competition. If no alternatives for the facility exist and the facility is not replicable, one can assume that the owner of the facility is dominant on the market for services or products delivered through that facility (the upstream market).⁵

Spare capacity should be available

If no spare capacity is available at the facility in question, mandating access would not increase the level of competition at the downstream level. Units supplied by the access seeker would then simply substitute the units previously supplied by the owner of the facility. As a result of constrained capacity the access seeker will not be able to extend demand by lowering prices.⁶

The downstream market is not competitive

If competition is already effective at the downstream market, a denial of access would not harm

⁴ Bishop and Walker, p 242 ff.

⁵ The NRF requires that the relevant market be established in the appropriate way when determining whether the incumbent has SMP. Defining the relevant market requires looking at supply and demand substitute and this will reveal whether alternative facilities belong to the relevant market.

⁶ However, in a former monopoly situation capacity of the facility may partly have been an endogenous decision of the incumbent operator. In such a situation the extension of demand as a result of the entry of a new competitor might make extension of the capacity of the facility socially beneficial.

consumers and therefore mandated access is not necessary.⁷

The owner of the facility must be active in the same market as the access seeker

If the access seeker to the facility will not directly compete with the owner of the facility on the downstream market, it can be expected that the owner will not have an incentive to deny access to the facility. In this case the owner might still have an incentive to charge a monopoly price if the first three criteria mentioned above are met. In this situation access is not the problem because the owner of the facility has an incentive to supply its customers, the possible problem here is that these supplies are made at excessive prices, which may harm consumer welfare.

According to general economic thinking access obligations might be considered if the upstream facilities are not replicable and downstream competition is not effective.

2.3 Access and general competition law: the essential facilities doctrine

Under general competition law, the issue of access to facilities is commonly approached on the basis of the “essential facilities doctrine”. The essential facilities doctrine has been applied in a number of cases under European competition law. These cases deal with access problems in different sectors such as sea port facilities, distribution of newspapers and television programming information⁸. Although the European Commission has published a guidance notice on the application of article 82 of the EU treaty (the prohibition on abuse of market power) to access agreements in the telecommunications sector⁹, it has so far never applied the essential facilities doctrine to cases in this sector in a formal decision.

Based on the current state of competition case law, the following of cumulative criteria have to be fulfilled in order to be able to mandate access.¹⁰

- i) The owner of the facility must enjoy a dominant position on the upstream market,
- ii) The facility to which access is demanded must be indispensable to carrying out the activity of the party who demands access, because there is no actual or potential substitute for this facility,
- iii) The refusal is incapable of being objectively justified.
- iv) The refusal of access must be likely to eliminate all competition in the market where the party requesting access is active (or intends to become active),

The requirements in the case law on essential facilities are partly similar to the criteria described in the previous paragraphs and partly more demanding. The first and the second criterion are essentially similar. The criterion on objective justification resembles the spare capacity criterion in the sense that when no spare capacity exists, it would not be reasonable to mandate access because either it would have no effect (see above) or it would constitute an obligation to invest which may be contrary to the basic

⁷ Bishop and Walker (2002) p 244: “if competition is already effective downstream, there is no consumer harm arising from the refusal to supply and so no reason to mandate access”.

⁸ For instance: Case IV/34.689 – Sea Containers/Stena Sealink, Official Journal, 1994, L 15, page 8, ECJ, Magill – Radio Telefio Eirann (RTE) v. Commission [1995] ECR 743, ECJ, Oscar Bronner v. Mediaprint Zeitungs- und Zietschriftenverlag, [1998] ECR I-7791.

⁹ Notice on the application of the competition rules to access agreements in the telecommunications sector, Official Journal, 1998, C 265, page 2.

¹⁰ Andreas Bartosch, p. 131.

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principle of property rights. The fourth criterion - the requirement that the denial of access must be likely to eliminate all existing or potential competition on the market where the party requesting access is active or intends to become active (in figure 1 the downstream market) - introduces a threshold for imposing access obligations which lies higher than the threshold that would be necessary from an economic perspective. The fifth criterion mentioned in paragraph 2.2 (the owner of the facility must be active in the same market as the access seeker) is not explicitly mentioned in case law but follows from the market situations in which the essential facilities doctrine has been applied.

According to the essential facilities doctrine access obligations might be considered if the upstream facilities are essential and downstream competition would be eliminated without access.

3 Access and the regulatory framework for electronic communication

3.1 The NRF and the essential facilities doctrine

Although the NRF is based on the principles and approaches of general competition law, the essential facilities doctrine only plays a minor role under the NRF. According to the European Commission, the essential facilities case law of the European Courts is not directly applicable to imposing access obligations under the regulatory framework.¹¹

The regulatory framework for electronic communication contains a threshold for mandating access which is lower than the threshold developed under the essential facilities doctrine. The reason for this lower threshold for mandating access in the electronic communications services can be explained by the reason for having ex-ante regulation in the first place: introducing competition in a formerly monopolised industry. The qualification whether a facility is essential is based on an assessment of entry barriers relating to technology and cost and demand conditions. The existence of an essential facility is in general not the result of anti competitive behaviour and it is not anti-competitive in itself. With general competition law the prohibition on abuse of market power comes into play only when the facility is used for the purpose of leveraging.¹² The mere *possession* of essential facilities or the existence of barriers to entry that are due to technology, cost and demand conditions in the industry, are not regarded as anti-competitive per-se.

In the electronic communications sector, which the NRF must to complete the transition from a monopolised structure to a competitive structure, the networks of incumbent operators were construed to be essential facilities and alleged to provide an instrument to monopolise the provision of telecommunication services (the natural monopoly argument).¹³ The network structure, as it developed in the monopoly period, is not necessarily driven by efficiency motives alone. Thus, the essential character of a facility may not only be the result of exogenous factors such as technology and demand conditions but also of historic monopoly motives. By placing the existing network structure under competitive pressure through the removal of entry barriers, the industry can move to a situation where technology and cost en demand conditions determine the market structure.

A central goal of the NRF is the promotion of competition in the provision of electronic communications networks, electronic communications services and associated facilities and services *inter alia* by preventing dominance abuse, but also by for example encouraging efficient investment .¹⁴ The key aim of a regulatory policy is to induce a certain sector to move to a higher state of static and/or dynamic efficiency, if necessary. Therefore, the existence of barriers to entry that are due to technology, cost and demand conditions becomes a relevant factor in regulatory policies which aim at introducing competition in formerly monopolised industries, and may not be taken for granted as in general competition law or competition case law.

¹¹ Commission Guidelines on market definition and SMP assessment, Official Journal 2002 C 165, page 6, paras 81-82

¹² Daniel F. Spulber, p. 492

¹³ *Ididem*, p. 493

¹⁴ Article 8, Framework directive

Therefore it appears reasonable that the NRF should contain a lower threshold for imposing access than the general competition case law currently prescribes, but which is still consistent with general economic theory. As already mentioned this is recognised in the NRF. The next section discusses the relevant provisions in directives and Commission guidelines that specify when access obligations are relevant in the communications sector.

The lessons for granting access from the essential facilities doctrine are not applicable to the communications sector. The NRF has a lower threshold for mandating access.

3.2 Conditions for imposing access obligations under the NRF

The conditions under which a regulatory authority can impose access are laid down in article 12 of the Access and Interconnection Directive (AID). This article states that operators with SMP can be obliged to meet reasonable requests for access to, and use of, specific network elements and associated facilities “inter alia” in situations where “the denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a *sustainable* competitive market at the retail level, or would not be in the end-users’ interest”. It follows that the purpose of an access obligation under the NRF must be the promotion of a sustainable competitive market at the retail level or the promotion of the end users interest.

The SMP guidelines state explicitly that the relevant test in the market analysis is not whether a certain facility can be considered “essential” or “indispensable” with the meaning of existing competition case law, but whether a given facility affords its owner significant market power. This may be the case when, despite the existence of alternative competing networks¹⁵, the size or the importance of the network affords him the possibility to behave independently from other network operators (for example, due to significant economies of scale and scope).¹⁶

Article 8 of the Access and Interconnection directive provides that the obligations covered in articles 9 to 13 of the Access directive (including access obligations) can only be imposed on undertakings with SMP. From the fact that the European Commission has made a clear distinction between the regulation of wholesale and retail markets one can conclude that the imposition of an access obligation under NRF requires SMP on a defined wholesale (upstream) market.

Principle 1: The imposition of access obligations requires a finding of significant market power in the wholesale (upstream) market

Although the NRF does not explicitly state that the imposition of access obligations requires a finding of SMP on the downstream market, the NRF explicitly links retail markets and wholesale markets, as well as (competition problems in) retail markets and remedies at wholesale level:

- The relevant Commission Recommendation states that the starting point for the definition and identification of markets is an analysis of retail markets;¹⁷
- According to article 17 Universal Service Directive problems found in retail markets are by

¹⁵ Figure 1 is not applicable anymore

¹⁶ Commission Guidelines on market definition and SMP assessment, OJ 2002 C165/6, at paras 81-82.

¹⁷ Commission Recommendation on relevant product and service markets within the electronic communications sector, OJ 2003, L114/5, at para 7.

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preference addressed by means of wholesale remedies;

- Article 12 of the Access Directive states that access obligations are imposed (at wholesale level) in order to promote sustainable competition in retail markets and/or in the interest of end-users.

The general competitive standard under the new regulatory framework NRF is *effective* competition. Obligations can only be introduced where competition is not effective. According to article 16 Framework Directive and paragraphs 19 and 107 of the Guidelines on market definition and SMP a determination of the absence of effective competition by definition equals the existence of SMP. Article 12 of the AID, however, refers to *sustainable* competition at the retail level.

Sustainable competition is not identical to effective competition. In the context of an industry that is subject to asymmetric regulation of undertaking with market power, sustainable competition can be defined as effective competition which stays effective (sustains) if asymmetric regulation were to be removed.¹⁸ In this sense effective competition based on facilities or infrastructure would be sustainable competition, whereas competition based entirely on asymmetric regulation would not be sustainable. When imposing access obligations it is therefore necessary to balance facilities based and services based competition.

The European Regulator's Group (ERG) common position on remedies has clarified that in those cases where replication is possible, priority is given to promoting facilities based competition. Only where replication is not feasible over the timeframe of the review and over the foreseeable future services competition may be promoted in order to protect consumer welfare (protecting the interests of end users) and/or in order to provide a stepping stone to facilities based competition (based on the "ladder of investment" concept).¹⁹ In both cases, the reference point for imposing access obligation is the competitive state of the retail market, in the absence of regulation.

The distinction between sustainable competition and effective competition is particularly relevant when imposing obligations, because most of the relevant markets under the NRF are currently regulated. For instance wholesale access obligations may provide for effective (but not sustainable) competition at the retail level. If these access obligations were to be lifted, effective competition at the retail level may disappear instantly as a result of direct denial of access or is likely to disappear as a result of leveraging of SMP from the wholesale to the retail level. Therefore the relevant test for the state of competition at the retail level should be whether competition at the retail level will be effective (i.e. there is no SMP) in the absence of regulation.

Following this line of reasoning, access obligations can only be imposed if, in the absence of regulation, an SMP position at the retail market will be present or is likely to arise. This is also in line with general economic thinking as discussed in paragraph 2.2.

Principle 2: The imposition of access obligations requires a present position of *significant market power in the downstream market or an SMP position that is likely to arise, in the absence of regulation*

¹⁸ See for instance Commission Decision, C(2004)527 final, 20 February 2004, recital 27: " However, a key principle for market analyses is to assess whether effective competition is or is not entirely or primarily a result of regulation in place, and whether the status of competition in the defined market is likely to be different in the absence of such regulation."

¹⁹ See EPN 01: Economic Considerations on balancing infrastructure and services based competition, for a more detailed analyses.

From the above, one can conclude that access obligations are only imposed in the event there is a SMP position on the upstream (wholesale) *and* competition is not sustainable at the related downstream (retail) market. In a situation where competition is sustainable at the retail level it is difficult to justify access obligations on the wholesale market²⁰.

3.3 Burden of proof

Currently most of the markets that are analysed under the new framework are regulated through existing SMP obligations. As a consequence the situation in the absence of regulation will be a hypothetical one. In these situations it will not be possible for an NRA to actually prove the existence of SMP. In order to overcome this problem, it would be sufficient to conclude that a NRA has reason to believe that an SMP position at the retail market would be present or would be likely to arise in the absence of regulation.

Proposed general rule:

The imposition of access obligations requires, in addition to SMP on the wholesale market, (reason to believe) that a SMP position on the retail market would be present or would be likely to arise in the absence of regulation.

Box 1: broadband and the proposed general rule

Broadband market

The following example shows the different consequences for regulation of broadband with and without the proposed approach.^{21 22}

Relevant markets

In its Recommendation on relevant product and service markets the European Commission defines no broadband retail markets and the following broadband wholesale markets:

Wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services;

Broadband wholesale access market. This market covers 'bit-stream access' that permits the transmission of broadband data in both directions and other wholesale access provided over other infrastructures, if and when they offer facilities equivalent to bit-stream access.

Under the proposed approach for access obligations

²⁰ The addition "inter alia" in article 12 of AID appears to suggest that access obligations could also be imposed in other cases. However, the NRF does not offer any suggestions when this would be appropriate. Considering the serious nature of access obligations, we currently do not see instances where it might be appropriate (proportional) to impose such measures if the retail markets concerned are already subject to sustainable competition. As will be explained further in the following paragraph, this is to say, in the absence of the (threat) of SMP in the retail markets concerned.

²¹ It should be noted that this example deals with the vertical relationship between retail broadband internet access, wholesale broadband access and ULL. In reality the competitive situation on other markets such as fixed telephony and leased lines may also be relevant for the regulation of ULL and or broadband access. These factors are not considered in this example.

²² See also RPN 02: Infrastructure and services-based competition in the broadband access market

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The retail market should be analysed first. The retail broadband market in the Netherlands has developed quickly in recent years. The number of users has increased sharply, price/speed ratio's have improved dramatically. At the moment the competition between retailers is strong. Not one firm seems to have SMP at the moment. As a second step it should be assessed whether: there is a danger of leveraging of SMP from the wholesale market to the relevant retail market such that retail SMP might arise; there are access obligations in place which provide for effective competition at retail level.

Currently the Netherlands has an ULL provision and the effect of this obligation of retail competitions should be analysed. Without this ULL obligation leveraging of market power could be come an issue considering the importance of the regulated wholesale input for most broadband providers. Assume that it is concluded that an ULL obligation should be maintained to prevent a SMP position in the retail market from arising. It is then necessary to investigate if additional access measures, for example bit-stream, are needed to maintain effective competition on the retail market.

Without the proposed approach for imposing access regulation

The regulator might simply take the two wholesale markets identified by the Commission and determine possible SMP. Access obligations could be imposed depending on the outcome of this analysis. However, this approach does not identify the retail market failures the remedies need to address, and the decision will be more easily challenged in court.

4 Objections to the necessity of retail SMP for access obligation

To test the general rule that “the imposition of access obligations requires a SMP position on the wholesale *and* (the reason to believe) that, in the absence of regulation, an SMP position on the retail market would be present or would be likely to arise”, objections to this rule are analysed. When preparing this regulatory policy paper three main objections were raised:

- SMP at retail level would not be necessary in all cases because wholesale market power could, even when retail competition is effective, have direct negative effects on end users;
- The ERG common position would require a broader approach;
- Promoting competition at wholesale level would be an objective in its own right under the NRF.

4.1 Other obligations

The proposed approach in fact does not require the presence of SMP or the likelihood that SMP will arise in retail markets as a prerequisite for imposing wholesale obligations *in general*, it only deals with imposing access obligations. In those cases where the retail market in itself is effectively competitive, but where an SMP position at wholesale level is nevertheless directly detrimental to end users, the latter can be a sufficient reason for imposing other wholesale remedies than access obligations. This applies for example to imposing price controls based on article 13 Access Directive in those cases where in spite of the existence of effective competition in retail markets, excessive wholesale rates which are not affected by the degree of retail competition are passed on to end-users (an example may be call termination on mobile networks). This is reflected in the wording of article 13 Access Directive.²³

4.2 ERG common position on remedies

The ERG common position charts the main potential competition problems that are relevant for four basic market constellations (vertical and horizontal leveraging, single market dominance, and termination). The imposition of access obligations is extensively dealt with under the market constellation vertical leveraging.²⁴ The main competition problem arising in this market constellation is a denial of access that causes foreclosure of the (potentially competitive) retail market. Although the ERG common position does not state explicitly under which conditions access obligations should be imposed, the text assumes implicitly that access obligations can only be imposed in situations where a potential denial of access leads to foreclosure of the retail market.²⁵ Therefore, the proposed approach is in line with the ERG common position.

4.3 Alternative approach: promoting competition at wholesale level

An alternative approach to imposing access obligations could be restricted to a determination of SMP at wholesale level. This test would be more easily met, reducing the burden of proof for regulatory intervention and potentially increasing its scope. The disadvantages of this approach are that it is not in line with current economic thinking on access issues and it is systematically inconsistent with the

²³ “A national regulatory authority may, [.....] impose obligations relating to cost recovery and price controls, [.....] in situation where a market analysis indicates that a lack of effective competition means that the operator might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users. [.....]”

²⁴ ERG Common Position on the approach to appropriate remedies in the new regulatory framework, 2004.

²⁵ It should be noted that the document does not give a formal threshold for foreclosure. It does not take position whether the retail market should be foreclosed completely, as in the essential facilities doctrine, or that a lesser form of foreclosure, as in “hindering the emergence of a competitive retail market” would suffice.

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approach under general competition law. Furthermore, it does not provide a framework for making consistent choices on access issues which makes decisions of NRAs vulnerable for appeal, and makes intervention more difficult to justify given the absence of a direct link to consumer welfare. There are no clear limits to promoting competition at wholesale level: in principle there are always further levels at which competition could be promoted.

Moreover access obligations generally do not directly contribute to the emergence of effective competition at the level at which the access obligation is imposed: imposing ULL for instance does not in any way promote the emergence of an effectively competitive market for ULL even in the long term, it only provides for ULL under conditions that simulate competition. To promote competition at wholesale level other measures that promote entry at wholesale level might be more appropriate, such as making available more spectrum resources (such as WLL and WiFi), stimulating the roll-out of new access networks (such as optic fibre and/or coaxial networks, or WLL), and removing planning constraints. Even in this case however it is not clear that there would be significant entry at wholesale level: it is also possible that self-provision and vertical integration would prevail.

It is possible that access obligations contribute indirectly to competition at wholesale level in so far as they result in promoting the network roll-out of operators that may decide to provide third party access themselves. For example, operators may choose to purchase ULL from the incumbent to supplement their own network roll-out and to offer bitstream access to third parties. Wholesale access obligations may also help operators climb a 'ladder of investment' where they increasingly rely on own infrastructure, and thereby promote facilities based competition as well as possibly the provision of third party access. However, this requires access obligations to respect investment incentives and to allow the commercial provision of access to third parties to remain a profitable proposition.

Finally, it is in any event unlikely that there will be a convincing case for providing access in order to promote competition at wholesale level where a case for providing access given a lack of sustainable competition at retail level does not exist. The ultimate goal is always to create sustainable competition at the retail level.

5 Policy implications and conclusions

Proposed general rule:

The imposition of access obligations requires a SMP position on the wholesale *and* (the reason to believe) that a SMP position on the retail market would be present or would be likely to arise in the absence of regulation.

This RPN proposes to impose access regulation only if, in addition to SMP on the wholesale market, there is (a risk of) SMP on the retail market. The (potential) lack of effective competition on the retail market leads to foreclosure of competition and/or harms consumers. The choice for the general rule when applying an access obligation makes it easier and more transparent to consistently impose access obligations when called for and to argue their proportionality. Effective competition in the absence of regulation can be used as a dividing line between 'not enough' and 'sufficient' competition, and therefore as the difference between imposing or not imposing access obligations. Without such a criterion there might always be reason for imposing access obligation because competition could be improved. Furthermore, the lack of such a criterion offers no clear basis for limiting regulation. Both from an economic perspective and from the point of view of legitimacy, it is desirable that each regulatory intervention is based on the consumer interest.

Apart from its consistency with economic principles the proposed approach has two main practical advantages:

- It will make it easier to justify regulatory intervention as there is clear link to consumer welfare, and it provides a clear framework for taking decisions to provide access, promoting consistency. Both aspects will help regulatory decisions stand up in court.
- It provides not only a clear rationale for intervention but thereby also clear limits to the scope for intervention. Both in economic terms and for reasons of legitimacy it is in any event desirable to frame the reasoning for any regulatory intervention in the market process in terms of the consumer interest in the retail market. Where this is no longer possible regulation should end.

Applying the general rule does mean that the regulator restricts itself in comparison with a situation where only the existence of wholesale SMP is regarded sufficient for imposing access obligations. The rule does not prevent the regulator from imposing non-access obligations if SMP on a wholesale market harms consumers in spite of effective competition on the retail market. An example are excessive prices for termination of fixed or mobile voice traffic. The general rule is also in line with market analysis methodology: start with defining relevant markets and competition problems on the retail level before deriving wholesale markets and finding solutions for these problems. Overall this leads to a clear, consistent and economically sound approach.

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Economic Analysis Team

The **Dutch Independent Post and Telecommunications Authority (OPTA)** regulates the postal and telecommunication markets in The Netherlands. OPTA is an independent executive body that commenced its activities on 1 August 1997. OPTA's mission is to stimulate sustained competition in the telecommunications and post markets. In the event of insufficient choice OPTA protects end-users. OPTA regulates compliance with the legislation and regulations on these markets.

OPTA has committed itself to improving the economic reasoning on which strategic choices are made so that market parties have a clear understanding of what to expect from OPTA now and in the future. In 2003 the OPTA bureau was complemented with the **Economic Analysis Team (EAT)** headed by the Chief Economist. EAT is responsible for developing economic reasoning and stimulating discussion on key issues within the telecommunications and postal markets. To achieve this, EAT produces two kinds of policy notes – short discussion papers. *Economic Policy Notes* focus on economic issues and principles. *Regulatory Policy Notes* focus on strategic economic issues in specific regulatory fields.

With its products and activities the Economic Analysis Team expects to add value to the economic debate in Dutch telecoms and post. For further information visit www.opta.nl from where you can download EAT publications.

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