



Fixed Telephony, Broadband and Leased Line Preliminary Draft Decisions 15 July 2008

Context and Perspective





Fixed Telephony, Broadband and Leased Line Preliminary Draft Decisions: Context and Perspective

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1 Introduction

The purpose of regulating the electronic communication markets is to ensure the achievement of sustainable, effective competition, so that end users can benefit from greater choice and lower prices. Regulation has been structured in such a manner that the Commission of the Independent Post and Telecommunications Authority of the Netherlands (referred to throughout as: the Commission) analyses various markets prospectively to answer the question as to whether *de facto* competition occurs in those markets or if any market party holds significant market power (SMP) in them. In the latter case the Commission imposes appropriate remedies on any such party in order to eliminate any actual or potential problems pertaining to competition, which are associated with its SMP position.

On 15 July 2008 the Commission published three preliminary draft market decisions.¹ They cover the landline telephony markets (the fixed telephony retail markets, the wholesale markets for call origination and for access to fixed telephone connections, referred to throughout as "fixed telephony"), the broadband markets (the markets for unbundled access and wholesale broadband access, referred to throughout as "broadband"), and the retail and wholesale leased line markets (referred to throughout as "leased lines"). To acquaint yourself with their substance you are referred to the draft decisions themselves and the summaries of them, which are appended to this document (see Appendix I). The press release issued by the Commission on 15 July has also been appended to this document (Appendix 2) for the record.

In this document² the Commission deals with a number of issues which it wishes to explain against the background of the draft market decisions that have been published, viewing them from a broader perspective and having in mind developments in the longer term. Attention is also devoted to the conclusions drawn by the Commission in its analysis of the broadcasting services market. At present that decision is still in the stage of being finalised and it will be published in preliminary draft form on 5 August 2008. Consideration is also briefly given to the most important findings of the analysis of the fixed terminating calls market, the draft of which is scheduled for publication on 25 July. Finally, attention is devoted to the subsequent procedure through which these draft decisions are eventually to be finalised.

¹ The Commission also published a draft decision covering the radio transmission market on 15 July 2008.

² This document contains a brief summary of these analyses. For the purposes of this document it has been decided to formulate them in a way which is not in itself identical to that used in the decisions themselves. Consequently, no rights may be derived from this document.

2 The consumer markets

The Commission has defined the consumer and business retail markets separately because of the different dynamics at play in them. What is typical of the consumer markets is the ongoing development of competition, innovative investments in Next Generation Networks (NGNs) and their evolution towards bundled markets in the future. In this section the Commission considers, amongst other things, the question as to where these developments will lead in the longer term and how this is reflected in the current draft market decisions.

2.1 Telephony

2.1.1 Deregulation of the consumer telephony markets

An important finding which emerged from the fixed telephony analysis is that competition is strong enough in the consumer telephony market – and is expected to remain so – to support the assumption that there is no longer any need for OPTA to protect consumers from potential problems pertaining to competition, such as a situation in which KPN, the former telephone service monopolist, would charge excessively high tariffs. Now competition has assumed this role. This means that the Commission will deregulate this market in its entirety. This represents a major step in the direction of the ultimate target situation in which sustainable, effective competition renders OPTA's intervention superfluous at the outset.

Amongst other things, the deregulation of the telephony consumer market means that KPN will be given the freedom to alter its tariffs to keep pace with its competitors' reduction of theirs, whereas it was previously not allowed to reduce them to below a lower limit stipulated by OPTA. Consumers will benefit from KPN's freedom to do so.

Naturally, this is not to say that end users will be abandoned to their fate. Matters such as obstacles to switching, transparency and number portability are and will remain of great importance in the period ahead and the Commission will therefore continue to devote unabated attention to these issues. In addition, NMa [Netherlands Competition Authority] is eminently aware of the fact that OPTA will no longer be regulating the relevant retail markets but the Competition Law [*Mededingingswet*] continues to apply.

2.1.2 Continuation WLR and CPS

The fixed telephony analysis has also revealed that the consumer telephony market can only be deregulated, if KPN's current obligations in relation to carrier selection and preselection (CPS), and wholesale line rental (WLR) continue to apply. Taken together these two forms of access enable providers to offer consumers both telephone connections and calls.

As it happens, the Commission currently anticipates that these access remedies will no longer be required for the consumer market in the next regulatory period (after 2011).

2.2 "Two is not enough"

As part of its current market analyses the Commission has again come to the conclusion that bundled retail markets still do not exist. In such a market a consumer is able to source a bundled set of services, such as telephony, Internet access and television, from a specific provider. Nevertheless, it is likely that there will be an evolution towards bundled markets in the longer term. What will play a role in this respect, is that as a result of technological convergence different networks will be capable of providing similar bundles of services.

A likely scenario for the consumer market is that, in particular, the networks of KPN and the cable companies will be capable of providing the relevant bundles. As such, a situation that could occur in which competition evolves between two infrastructures that are rolled out to the home. The Commission feels that such an outcome is not enough to represent sustainable, effective competition ("two is not enough"). Consequently, it is still important to have regulation of access, so as to enable other parties to offer sustainable, effective competition.

The imposition of access regulation represents an important principle underlying policy to the effect that sustainable competition is best achieved in a situation in which different infrastructures compete with each other. As a result, competitors do not depend on other parties' networks in terms of cost and functionality, or only to a limited extent, and they are best able to develop their own range of commercial services. For this reason the Commission will always first examine those forms of access which facilitate the ongoing development of infrastructure competition, for example, because they provide an incentive to other providers to invest in the ongoing roll-out of their own networks.

An clarification is provided below of how the policy principle of promoting infrastructure competition receives expression in the draft decisions.

2.2.1 KPN's evolution towards NGN and regulation of access

Next generation networks will increasingly play a more important role in the regulatory period ahead. For instance, in 2006 KPN announced that it would be proceeding with the large-scale modernisation of its network in the years ahead (its so-called All-IP programme). This modernisation of its network will take the form of a further introduction of fibre optic cable into the local loop (to the street cabinet - FTTC and to the home - FTTH),³ on the one hand, and the establishment of a multi-service network based on the Internet protocol.

Such modernised networks have the potential to provide end users with services more efficiently but are also capable of creating new obstacles to the development of competition. This potential danger is exacerbated by the fact that KPN will be phasing out the local exchanges – where competing market parties currently gain access to KPN's network – in the future as part of its new All-IP network.

The policy principle to the effect that the form of access regulation which contributes most to infrastructure competition, is also preferable within the context of the evolution towards an NGN. In the current draft decisions this principle receives expression in the fundamental choice which the Commission has made in favour of unbundled access to the subloop (SDF access) in the case of FTTC and unbundled access to fibre optic connections (ODF access) in the case of FTTH.

³ FTTC stands for Fibre to the Curb. FTTH stands for Fibre to the Home.

Through these forms of access, which are geared towards the further roll-out of alternative infrastructures, the Commission will be giving other parties an opportunity to opt for a sustainable business model for the Dutch market. Within this context they will be able to combine their own further roll-out with the procurement from KPN of appropriate fibre optic customer connections for potential use in the future. Research conducted by Analysys reveals that the business case for ODF access is realistic and may be compared with existing unbundled access to the copper local loop network (MDF access).

To complement the decision in favour of regulated access to fibre optic connections, the Commission has deliberately opted in favour of not imposing regulated wholesale broadband access (WBA) in those areas in which ODF access is or will become available. After all, the Commission accords priority to those forms of access which best facilitate the ongoing development of infrastructure competition and, compared with ODF access, WBA makes less of a contribution towards infrastructure competition.

With regard to unbundled access to the subloop (copper or otherwise – SDF access), the Commission has determined that this form of infrastructure access does not represent a large-scale alternative to other providers, mainly because of the economies of scale required. For this reason the Commission has decided that in relation to KPN's copper local loop network (and hence unlike its fibre optic local loop network) it will regulate wholesale broadband access (low quality WBAP), which focuses more strongly on services competition than SDF access does. As such, the wholesale regulation to which KPN is subject, will be more onerous.

The Commission is aware that there is an area of tension between the desire for KPN to invest in innovative infrastructure, on the one hand, and its acknowledgement, on the other hand, that access to this infrastructure is required for the purposes of further infrastructure competition. The Commission holds the view that it has found the right balance in its preliminary draft decisions. As far as possible, access regulation is confined to the type of access which contributes most effectively to the further development of infrastructure competition. In addition, KPN is afforded scope in its implementation of its obligation to ensure access to charge access fees which accommodates the costs it incurs and a reasonable profit.

2.2.2 Broadcasting market: resale of the cable connection

As part of its broadcasting analysis the Commission has come to the conclusion that resale of the cable connection is required to achieve competition in the broadcasting market. This remedy will be imposed on UPC and Ziggo in addition to their existing obligation to grant access. This will give those parties who wish to do so the opportunity to take over entire cable customer relationships. These parties, which will need to arrange their analogue package rights themselves, will then be able to compete with the cable operators in relation to RTV plans, for example, by offering interesting bundles of analogue RTV packages together with IP TV via DSL. The creation of such scope for other parties in the broadcasting market will give end users a choice and will bring pressure to bear on cable tariffs.

An important consideration when imposing this remedy is that the positions of power held by UPC and Ziggo in the broadcasting market in recent times have remained as strong as they were, and there is no reason to expect this to change rapidly in the regulatory period ahead. In this respect the cable companies' temporary freeze of tariffs does not represent a sustainable solution, which will result in

greater competition. While it is true that KPN's Digtenne (DVB-T) has exhibited strong growth in terms of connections, at the same time the Commission has noted that the transmission of RTV through the cable networks belonging to Ziggo and UPC are still very important for reception on any other television sets in a household (in the bedroom, kitchen and so forth). Consequently, Internet television (IPTV) via DSL and satellite find it difficult to establish a firm footing, with the result that, in spite of the expansion of other platforms, cable operators are still experiencing little in the way of pricing pressures. A failure to erode this advantage could mean that other parties would not be able to compete with the cable companies strongly enough in a totally digital broadcasting market in the future. As WLR applies in the case of telephony, the resale obligation therefore represents a transitional measure, which spans the period during which end users will still make considerable use of analogue television alongside its digital counterpart.

In addition, the potential for offering analogue RTV packages and for taking over customer relationships is required in order to establish a base for other parties as part of the future evolution towards a bundled market. Without such a base it is rather doubtful whether competitors would be able to match the retail position of, in particular, KPN and the cable companies in a bundled market.

Viewed against this background, the Commission wishes to note its expectation that a cable resale to KPN would not readily be deemed to be reasonable. After all, allowing KPN to resale the cable connection would entail a risk that its incentive to invest in its NGN would be eroded. The Commission is aware that the same line of reasoning would also need to apply inversely to a situation in which a cable company were to ask KPN if it could resale the latter's telephone connections. In this case too the Commission has therefore adopted the view for the moment, that such a request would not be reasonable.

In order to ensure that the obligation to provide access does not dampen any incentive on the part of UPC, Ziggo or any other potential entrants into the broadcasting market to proceed with investments, tariffs will apply to wholesale resale which – as in the case of WLR – will be related to the retail fees charged by Ziggo and UPC.

3 The business market

In the absence of the extensive presence of the cable companies' infrastructure, the business market experiences dynamics which differ from those of the consumer market. For instance, KPN has retained a strong position in the business telephony retail market and this is not expected to change in spite of existing access regulation. This leads one to conclude that there is a need to give actual and potential competition a significant boost in this market by means of stricter wholesale regulation. Such stricter regulation is reflected in the Commission's conclusion that the high-capacity leased line wholesale market also needs to be regulated now, as does the high-quality WBA market. As such, the Commission is extending the existing WLR remedy to cover the business market.

Stricter wholesale regulation has given the Commission cause to note that competition is and, based on this wholesale regulation, will be strong enough to deregulate the business retail telephony market, albeit not before KPN has implemented the additional wholesale remedies. In this respect the Commission will be monitoring the situation in the period ahead to ascertain whether this stricter

wholesale regulation will produce a degree of retail competition that will constitute grounds for deregulation.

As in the case of the consumer market, the deregulation of the business telephony market will entail that KPN will be given the freedom to alter its tariffs to keep pace with its competitors' reduction of theirs, whereas it was previously not allowed to reduce them to below a lower limit stipulated by OPTA. This will benefit business end users.

4 All-IP and co-regulation

Acting for the purposes of KPN's proposed phase-out of its local exchanges – where KPN's competitors currently have unbundled access to its network – as part of its All-IP plan, at the beginning of 2007 the Commission called on KPN and other market parties to work together to produce a solution for this. The Commission was to incorporate such a solution into its market analyses. KPN and the parties involved – the DSL operators – heeded this request, which resulted in memorandums of understanding being signed by KPN and the three largest DSL parties in mid-2007, and in a public offer being made by KPN. The Commission also considered the situation involving negotiations between the various parties and KPN in mid-April 2008 and the public offer made in relation to MDF migration on 21 April 2008 as input for the purposes of its analyses of wholesale unbundled and broadband access.

The Commission appreciates the efforts made by KPN and the other market parties. They have taken major steps in relation to various issues which are required for the purposes of finding a solution for the phase-out of the local exchanges, and through its public offer KPN has responded to those steps in a transparent, non-discriminatory manner. For instance, it will remain possible for competitors to obtain unbundled access in a number of places, which means that it will still be possible to reach half of Dutch households through this form of access. As such, a great deal of progress has been made towards a solution which will enable KPN to migrate to an NGN and which holds out the prospect to other parties of a realistic but sustainable business case.

At the same time the Commission notes that a memorandum of understanding has not been signed with all of the DSL parties, which compromises market support for the steps that have been taken, and no memorandum of understanding has given rise to a migration agreement with any party. The Commission has concluded from this that at present a number of essential components are still missing from the solution that is sought. This means that the Commission has found insufficient grounds to relax the proposed remedies in the wholesale markets for unbundled and broadband access.

What is stated above, does not change the fact that, based on the results which have already been achieved, the Commission still holds the view that there is no reason to prescribe conditions to KPN for the phase-out of local exchanges in the form of policy regulations. On the contrary, the Commission feels that the current public offer constitutes a sound basis for further negotiation. In this respect the Commission feels it to be important that the results which have been and are still to be achieved are anchored in a reference offer for wholesale unbundled access to be published by KPN. In view of the significant stakes involved, the Commission is considering the possibility of organising an industry group through which further discussions can be held.

5 Investment certainty

What is paramount, is that the Commission welcomes investments in innovative telecommunication networks. In this respect the Commission realises that such investments can be facilitated by means of stable, predictable regulation spanning the longer term. At the same time the Telecommunications Act [*Telecommunicatiewet*] stipulates that OPTA is required to study the markets every three years.

With regard to the issue of investment certainty, the Commission assumes that market parties understand that the decisions which it makes as part of its three-yearly market analyses, are confined by the tasks that are assigned to it in European legislation and the Telecommunications Act, and which are set out in greater detail, for example, in the form of policy rules issued by the relevant minister. In relation to the willingness of parties to invest in innovative infrastructures, the Commission specifically refers to the underlying principle that both a party holding SMP and those with an alternative infrastructure must be encouraged to continue to invest. The Commission needs to account for itself in relation to this underlying principle in every round of market analyses, and this is an important factor in terms of investment certainty.

In this connection it is also important to note that in the course of time the Commission has made clear decisions in relation to a number of issues that are relevant precisely within the context of the willingness of parties to invest and the certainty they require to do so. Its consistent implementation of the cost-orientation norm in relation to the EDC system over time is an example of this. This EDC system is based on the costs which KPN actually incurs and factors in a reasonable return based on the risks to which it is exposed. This system will also apply to regulated wholesale access to KPN's NGN. In view of the lengthy useful economic life of NGN local loop networks and the substantial investments that need to be injected into them and in the light of the importance of predictable regulation, in principle, it is not to be expected either, that the Commission will alter the manner in which it implements tariff regulation in the longer term.

In more concrete terms the Commission would like to draw attention to the access model for FTTH in relation to KPN's willingness to invest in its further roll-out. As part of this access model the Commission will suffice with the regulation of unbundled access to the fibre optic local loop and will refrain from regulating wholesale broadband access (WBA – see Section 0). The Commission envisages that with the aid of this model a market situation will evolve (in the future) in which KPN (through FTTC and FTTH), cable providers (through their coaxial networks) and alternative FTTH providers (based on ODF access) will together ensure that there is effective competition in the retail markets. Consequently, the Commission wishes to stress that the decision in favour of this access model is a lasting one: if this model actually results in the parties effectively competing with each other to serve their end users based on ODF access, in principle, regulation will remain confined to such access.

In this connection the Commission wishes to note that KPN proposes to offer its NGN (FTTC and FTTH) in the form of a so-called open wholesale model, to which other parties obtain access subject to identical terms and conditions. The aim of this open model is to achieve a higher capacity utilisation rate and greater market penetration in relation to the network together with other parties and, as such, a level of expenditure capable of competing with that of cable. In terms of certainty with regard to

regulation, the Commission wishes to point out that KPN will be partly directing the future evolution of regulation through this open model: an open model which actually produces effective competition could constitute the basis for further deregulation in the future.

6 Terminating call symmetry

At present the regulation of fixed terminating calls⁴ occurs asymmetrically: the fees which KPN's competitors may levy for this wholesale service exceed those which KPN may charge. In the past this asymmetry was prompted by the idea of 'entry assistance'.

As part of its current fixed terminating call market analysis, the Commission has come to the conclusion that this asymmetry will no longer be appropriate as of the next regulatory period (hence as of 1 January 2009), with the result that the tariff ceiling for fixed terminating call charges will need to be the same in the case of all providers as of that time.

A second important conclusion drawn from this analysis is that a non-discrimination obligation will no longer apply. Such an obligation would be unnecessarily restrictive with regard to terminating calls in the regulatory period ahead and would also restrict competition unnecessarily in the underlying retail markets.

7 Procedure

The present regulatory framework came into effect in 2004, following which the Commission conducted its initial analyses of the fixed telephony, broadband and leased line markets in 2004 and 2005. The relevant market decisions came into force on 1 January 2006. Because the Telecommunications Act stipulates that the Commission is required to study the markets again within a period of three years, the Commission commenced new research in 2007 and 2008. The new market decisions will cover the period from 1 January 2009 until 31 December 2011.

The rest of the procedure will be as follows. The market decisions for fixed telephony, broadband and leased lines have now been published in preliminary draft form.⁵ As stated in our letter of 11 July 2008 (OPTA/MA/2008/201534), the Commission will be organising an information meeting on Thursday, 17 July, in which it will explain the findings set out in its analyses. The formal consultations about the fixed telephony, broadband and leased line draft decisions will then commence on 29 July. The legally stipulated period during which market parties and other stakeholders can submit their thoughts on the draft decisions to the Commission will end on 8 September 2008. Before then the Commission will be holding a hearing on Tuesday, 2 September, when parties will be afforded an opportunity to present

⁴ Fixed terminating calls refer to the service which the providers of fixed telephone networks provide to route a call to a number that is connected to their network. This service is purchased by other telephone service providers, that frequently also need to provide terminating calls to numbers connected to their network. As such, it is a service which providers procure from each other.

⁵ In publishing these preliminary draft decisions – which gives market parties two additional weeks during which to familiarise themselves with the proposed market decisions – the Commission has made allowances for the fact that consultations about them will coincide with the holiday period, and that different market decisions have been presented for consultation simultaneously.

their views in person (as well). The relevant invitation will be communicated separately on the OPTA website later in July.

After receiving notice of these views the Commission will decide what changes should be made to the draft decisions. It is anticipated that this will be followed at the end of October 2008 by a period of four weeks during which formal notice will be given of the draft decisions at the European level, after which they may in principle be finalised before the end of the year.

This year the Commission will be conducting other analyses in addition to those concerning fixed telephony, broadband and leased lines. There will be analyses of the markets for fixed terminating calls, transit, and broadcasting and radio transmission services.⁶ The following table contains a comprehensive overview of the schedule of national consultations concerning all of the draft decisions:

Analysis	Preliminary Consultations	Consultations re Draft Decisions
Fixed telephony	15 July until 29 July	29 July to 8 September
Fixed terminating calls	25 July until 15 August	15 August to 25 September
Transit	n.a.	15 August to 25 September
Broadband: unbundled access	15 July until 29 July	29 July to 8 September
Broadband: wholesale access	15 July until 29 July	29 July to 8 September
Leased lines	15 July until 29 July	29 July to 8 September
Broadcasting transmission services	5 until 19 August	19 August to 29 September
Radio transmission services	n.a.	15 July to 25 August

⁶ This year the mobile terminating calls market will not be analysed. The reason for this is that the current regulatory period for this market will only expire in mid-2010.

Appendix 1 - Summaries of the Fixed Telephony, Broadband and Leased Line Draft Decisions

1. Fixed telephony

1.1 Introduction

1. Under the terms of Chapter 6a of the Telecommunications Act *Telecommunicatiewet* (referred to throughout as "Tw") the Commission of the Dutch Independent Post and Telecommunications Authority (referred to throughout as the "Commission") is required to analyse specific relevant markets in the electronic communications sector in order to determine whether there is effective competition on these markets or whether any market party holds significant market power (referred to throughout as SMP) in them based on a forward looking analysis covering the period until the end of 2011. The Commission may impose appropriate remedies on any market party which holds SMP.

2. The decision concerns the relevant retail and wholesale markets for fixed telephony with the exception of those for terminating calls to landlines and transit calls.

3. The decision makes it mandatory for KPN to provide wholesale services for originating calls (including CS and CPS) and access to traditional telephone connections. This will afford other providers the opportunity to offer telephone services to end users. The remedies involving KPN's retail services are to be revoked.

1.2 Key aspects of the decision

Wholesale markets for the supply of originating calls and the granting of access to telephone connections

4. The Commission has defined the following relevant fixed telephony wholesale markets:

- the residential wholesale market or alternatively the wholesale market for the supply of originating calls and granting of access to telephone connections for the purposes of the fixed telephony residential retail market; and
- the business wholesale market or alternatively the wholesale market for the supply of originating calls and granting of access to telephone connections for the purposes of the fixed telephony business retail market.

5. These relevant markets cover all of the Netherlands and are confined to it.

6. KPN's share of the residential wholesale market amounted to 70% to 80% in the fourth quarter of 2007. Its share of the business wholesale market amounted to 75% to 85% in the same period. Based on an analysis of dominance, the Commission has concluded that KPN holds SMP in the residential and business wholesale markets. As a result, it is possible for the following anti-competitive practices to occur in the residential and business wholesale markets:

- competition constraints pertaining to access, such as the denial of access, the strategic use of information, the improper use of information in relation to competitors, delaying tactics, inequitable terms and conditions, quality-related discrimination, strategic product design and bundling/tying;
- competition constraints pertaining to pricing, such as price discrimination, excessive tariffs and margin squeeze.

7. Since infrastructure competition has not matured sufficiently to operate in an appropriately disciplined manner, the Commission is also promoting services competition. Consequently, the priority objective of regulation specific to telephony is to promote services competition in so far as it retains the potential for infrastructure competition to develop.

8. In order to prevent the occurrence of the anti-competitive practices which had been observed and having in mind the purpose of the regulation, the Commission is imposing the following obligations on KPN in the residential and business wholesale markets for fixed telephony:

- an obligation to grant access for originating calls and the resale of telephone connections (wholesale line rental or WLR);
- an obligation to provide CS and CPS – KPN must grant access to its network to other telephone service providers for this purpose;
- an obligation to ensure transparency – KPN must ensure that proper notice is given in the form of a reference offer of the tariffs and any other terms and conditions which it offers to its wholesale customers;
- an obligation to ensure non-discrimination – KPN must present a reference offer to all of its wholesale customers;
- tariff regulation – cost-oriented wholesale price caps for CS, CPS and originating calls services and retail-minus tariff regulation together with a maximum annual increase in the fees for WLR services;
- an obligation of accounting separation.

9. The most important changes in this decision compared with the 2005 market analysis decisions pertaining to fixed telephony wholesale markets are as follows:

- markets have been defined differently – originating calls and access to telephone connections now constitute part of a single market and the Commission has now defined a residential and business wholesale market;
- the WLR obligation has been extended to include all telephone connections, even those in the business wholesale market;
- the introduction of a maximum annual increase in the tariffs charged for WLR services.

10. These remedies will enable other providers to provide all end users with both calls and traditional telephone connections. The obligations involved will apply alongside other wholesale duties, such as ULL and WBA. Thanks to these remedies providers will be able to offer VoB telephone services in combination with broadband Internet access. The overall range of wholesale remedies will ensure that a third group of providers will be able to offer a competitive range of services in the retail markets in addition to KPN and the cable companies. In the business market it will make it possible for parties other than KPN to provide a competitive range of services.

Retail markets for fixed telephony

11. The Commission has defined the following relevant markets:

- a residential retail market for fixed telephony – this market consists of residential services or call and connection services focusing on two or fewer (simultaneous) calls; and
- a business retail market for fixed telephony – this market consists of business services or call and connection services focusing on more than two simultaneous calls.

12. These relevant markets cover all of the Netherlands and are confined to it.

13. Based on a dominance analysis, the Commission has drawn the conclusion that the residential retail market is truly competitive given the presence of the wholesale remedies for CS, CPS, originating calls and WLR, which are to be imposed by this decision, as well as the ULL obligations and the inferior quality WBA duties stipulated in other market analysis decisions. Thanks to these remedies there are enough alternative providers of fixed telephone and voice over broadband (VoB) services. Following this regulatory decision KPN's market share is expected to decline from 70% to 80% in 2007 to 50% to 60% in 2011.

14. A preliminary analysis reveals that, thanks to competition, in the regulatory period ahead consumers will have enough alternatives available to ensure that they are able to procure quality services in the residential retail market at an affordable price. The Commission therefore sees no further grounds to retain existing remedies or impose new ones in the retail market. For this reason the existing retail remedies will be revoked.

15. Based on a dominance analysis, the Commission has drawn the conclusion that the business retail market is not truly competitive despite the presence of the wholesale remedies for CS, CPS, originating calls and WLR, which are imposed by this decision, as well as the ULL obligations and the superior quality WBA and leased line duties stipulated in other market analysis decisions. Thanks to these remedies there are enough alternative providers of fixed telephone and voice over broadband (VoB) services. Following this stricter regulatory move KPN's market share is expected to decline from 70% to 80% in 2007 to 65% to 75% in 2011.

16. On the basis of a number of developments the Commission is of the opinion that the overall range of wholesale remedies will nevertheless be adequate to ensure *de facto* competition in the long run, albeit beyond the regulatory period, and to protect end users' interests. The Commission will therefore revoke the existing retail remedies, although not before KPN has actually implemented its WLR, superior quality WBA and leased line obligations.

17. Consequently, the most important change in this decision compared with the 2005 market analysis decisions pertaining to fixed telephony retail markets is to be found in the phased revocation of all retail remedies, namely, tariff regulation (upper and lower limits), the duties of transparency and non-discrimination, and *ex ante* tariff assessments (traffic light model).

2. Unbundled access at the wholesale level

2.1 Introduction

1. Under the terms of Chapter 6a of the Telecommunications Act *Telecommunicatiewet* (referred to throughout as "Tw") the Commission of the Dutch Independent Post and Telecommunications Authority (referred to throughout as the "Commission") is required to analyse specific relevant markets in the electronic communications sector in order to determine whether there is effective competition on these markets or whether any market party holds significant market power (referred to throughout as SMP) in them based on a forward looking analysis covering the period until the end of 2011. The Commission may impose appropriate remedies on any market party which holds SMP.

2. The decision concerns the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location. (referred to throughout as the market for unbundled access at the wholesale level).

3. This decision makes it mandatory for KPN to grant unbundled access (fully or shared unbundled) at the level of the main distribution frame (MDF access), the sub-network (SDF access) and the optical distribution frame (ODF access). This will make it possible for providers to offer various retail services to end users.

2.2 Main points of the decision

4. What plays an important role in this market analysis is the fact that at the end of 2005 KPN announced that it intended to migrate its network to a so-called *Next Generation Network* in the years

ahead. KPN refers to this operation as All-IP. Through All-IP KPN will be replacing its current network, which consists (in part) of separate networks for telephone services (mobile or fixed), leased lines, data communication and Internet services with a single integrated broadband IP network.

5. Amongst other things, All-IP involves the replacement of part of the current copper local loop network with fibre optic cable. Bringing fibre optic cable closer to end users will make it possible to provide them with higher speeds through the remaining part of the copper local loop network. In order to facilitate this KPN is also relocating the operational equipment which is used to supply broadband access to other providers via the local loop at MDF locations to street cabinets. Ultimately the MDF locations will be phased out and current providers will have to be migrated appropriately. As it happens, KPN has indicated that it may proceed directly with the provision of services based on fibre to the home in a number of areas. This means that fibre optic cable will be rolled out to end users' homes, which will make it possible to achieve even greater speeds.

6. The relevant product market for unbundled access at the wholesale level consists of both fibre optic and KPN's local loop networks. The relevant geographical market is national and consequently covers all of the Netherlands.

7. Only KPN is active in the market for unbundled access via the copper local loop. At present providers are procuring hardly any unbundled access via existing fibre optic local loop networks. Based on a SMP analysis, the Commission has concluded that KPN holds SMP in the market for unbundled access at the wholesale level. As a result of KPN's dominant position in this market it is possible for the following anti-competitive practices to occur:

- competition constraints pertaining to access, such as the denial of access, the strategic use of information, the unfair use of information in relation to competitors, delaying tactics, inequitable terms and conditions, quality discrimination, strategic product design and bundling or tying;
- competition constraints pertaining to pricing, such as price discrimination, margin squeeze and excessive pricing.

8. The Commission is of the opinion that a situation of sustainable competition can best be achieved by according priority to measures which promote infrastructure competition where possible when deciding on remedies. This means that the Commission has a preference for access services which as far as possible provide market parties with an incentive to invest in their own infrastructure.

9. In order to prevent the occurrence of the anti-competitive practices which have been observed and having in mind the purpose of the regulation, the Commission is imposing the following obligations on KPN in the market for unbundled access at the wholesale level:

- An obligation to accede to reasonable requests for unbundled access (fully or shared unbundled) – and related facilities – to KPN's copper local loop network (MDF and SDF access) and its fibre optic local loop network (ODF network), or alternatively to KPN's local loop network;

- an obligation to ensure non-discrimination – the duty to grant unbundled access to its local loop network and related facilities and services in identical circumstances and subject to the same terms and conditions. This duty entails that KPN will ensure supply to external customers in identical circumstances subject to the same terms and conditions governing supply to itself;
- an obligation to ensure transparency – any reference offer will have to be broken down in accordance with the different forms of access to KPN's local loop network and must appropriately disclose the rates and any other terms and conditions which KPN employs for its wholesale customers;
- an obligation to submit to tariff regulation – KPN will be required to apply cost-oriented pricing, in respect of which a long-term wholesale price cap has been set, so as to offer as much certainty as possible for investments;
- an obligation for accounting separation - KPN will be required to keep separate accounts, as part of which income and expenditure pertaining to unbundled access at the wholesale level must be reported separately.

10. The most important changes in this decision compared with the 2005 market analysis decisions pertaining to unbundled access at the wholesale level are as follows:

- a more extensive market has been defined – unbundled access via copper (MDF and SDF access) constitutes part of the same relevant market as unbundled access via fibre optic cable (ODF access);
- because of KPN's proposed phase-out of MDF access the Commission will be imposing conditions on KPN, which the latter will need to comply with during the phase-out, if it wishes to proceed with the denial of access that has already been granted to facilities in the relevant locations. The purpose of the terms and conditions governing migration is to ensure that this migration to one of the other forms of access (SDF, ODF and wholesale broadband access) can occur in a manner which accommodates the interests of both KPN and MDF access customers.

Broadband Internet access retail market

11. The relevant market for broadband Internet access includes broadband Internet access services via DSL, cable and fibre optic networks. The relevant geographical market is national. The most important change compared with the 2005 broadband Internet access retail analysis is that broadband Internet access through fibre optic local loop networks is also deemed to constitute part of the relevant product market.

12. Based on a SMP analysis, the Commission has concluded that in the absence of wholesale regulation there is a risk of KPN holding SMP in the broadband Internet access retail market. In the absence of wholesale access competition will occur between vertically integrated providers (KPN, and regional cable operators and local fibre optic operators).

3. Wholesale broadband access

3.1 Introduction

1. Under the terms of Chapter 6a of the Telecommunications Act *Telecommunicatiewet* (referred to throughout as "Tw") the Commission of the Dutch Independent Post and Telecommunications Authority (referred to throughout as the "Commission") is required to analyse specific relevant markets in the electronic communications sector in order to determine whether there is effective competition on these markets or whether any market party holds significant market power (referred to throughout as SMP) in them based on a forward looking analysis covering the period until the end of 2011. The Commission may impose appropriate remedies on any market party which holds SMP.

2. The decision concerns the market for wholesale broadband access (referred to throughout as "WBA"). The Commission defines WBA as a wholesale service which consists in the supply to wholesale customers of flexible or variable transmission capacity (bandwidth) in excess of 128 kbit/s downstream from the place where procurement occurs to the relevant end user's location.

3. The Commission has concluded that the WBA market consists of two separate relevant markets, namely, the market for low quality WBA and the market for high quality WBA.

4. The decision makes it mandatory for KPN to supply high and low quality WBA and related facilities based on access to copper. This will enable WBA customers to supply electronic communication services to their end users.

3.2 Main points of the decision

5. What plays an important role in this market analysis is the fact that at the end of 2005 KPN announced that it intended to migrate its network to a so-called *Next Generation Network* in the years ahead. KPN refers to this operation as All-IP. Through All-IP KPN will be replacing its current network, which consists (in part) of separate networks for telephone services (mobile or fixed), leased lines, data communication and Internet services, with a single integrated broadband IP network.

6. Amongst other things, All-IP involves the replacement of part of the current copper local loop network with fibre optic cable. Bringing fibre optic cable closer to end users will make it possible to provide them with higher speeds through the remaining part of the copper local loop network. In order to facilitate this KPN is also relocating the operational equipment which is used to supply broadband access to other providers via the local loop at MDF locations to street cabinets. Ultimately the MDF locations will be phased out and current providers will have to be migrated appropriately. As it happens, KPN has indicated that it may proceed directly with the provision of services based on fibre to the home in a number of areas. This means that fibre optic cable will be rolled out to end users' homes, which will make it possible to achieve even greater speeds.

7. The relevant WBA product market consists of access to copper (based on MDF and SDF access) and to fibre optic cable (based on ODF access). The WBA market comprises two separate relevant markets. One is a market for low quality WBA and the other for high quality WBA. The feature distinguishing these two markets from each other is the contention rate. Those products which have a

contention rate of 1:1 to 1:20 constitute part of the relevant market for high quality WBA and those with a contention rate of less than 1:20 constitute part of the relevant market for low quality WBA. The relevant geographical market for both high and low quality WBA is national and consequently covers all of the Netherlands.

8. Based on a SMP analysis the Commission has concluded that KPN holds SMP in the high and low quality WBA markets.

9. As a result of KPN's dominant position in the low quality WBA market it is possible for the following anti-competitive practices to occur:

- competition constraints pertaining to access, such as the denial of supply or access, the strategic use of information, delaying tactics, inequitable terms and conditions, quality-related discrimination, strategic product design and bundling or tying;
- competition constraints pertaining to pricing, such as price discrimination and margin squeeze..

As a result of KPN's dominant position in the high quality WBA market it is possible for the following anti-competitive practices to occur:

- competition constraints pertaining to access, such as the denial of supply or access, the strategic use of information, delaying tactics, inequitable terms and conditions, quality-related discrimination, strategic product design, bundling or tying and margin squeeze,
- competition constraints pertaining to pricing, such as price discrimination, margin squeeze and excessively pricing..

10. The Commission is of the opinion that a situation of sustainable competition can best be achieved by according priority to measures which promote infrastructure competition where possible when deciding on remedies. This means that the Commission has a preference for access services which as far as possible provide market parties with an incentive to invest in their own infrastructure.

11. Because an adequate level of infrastructure competition (based on unbundled access) will not occur during the regulatory period ahead partly due to the phase-out of MDF access, the Commission will also be promoting services competition (based on WBA) in so far as it retains the potential for infrastructure competition to develop. Viewed in this light, the Commission deems it appropriate to impose a remedy on KPN in relation to WBA services which are provided through the copper local loop network. The Commission does not deem it appropriate to introduce WBA remedies for services which are provided through fibre optic local loop networks. As such, the Commission is seeking to encourage the development of infrastructure competition based on ODF access, while also creating scope for the roll-out of fibre optic networks.

12. In order to prevent the occurrence of the anti-competitive practices which have been observed and having in mind the purpose of the regulation, the Commission is imposing the following obligations on KPN in the WBA markets (i.e. the low and high quality WBA markets):

- an obligation to accede to reasonable requests for the supply of high and low quality WBA and related facilities through the copper local loop network (based on MDF and SDF access);
- an obligation to ensure non-discrimination – the duty to provide high and low quality WBA and related services and facilities in the same circumstances subject to identical terms and conditions. This duty entails that KPN will ensure supply to external customers in identical circumstances subject to the same terms and conditions governing supply to itself;
- an obligation to ensure transparency – any reference offer will have to be broken down in accordance with the different forms of WBA access via copper and must appropriately disclose the rates and any other terms and conditions which KPN employs for its wholesale customers;
- an obligation to submit to tariff regulation – KPN will be required to apply cost-oriented pricing, in respect of which a long-term wholesale price cap has been set, so as to offer as much certainty as possible for investments;
- an obligation for accounting separation– KPN will be required to keep separate accounts, as part of which income and expenditure pertaining to originating calls must be reported separately.

13. The most important changes in this decision compared with the 2005 market analysis decision pertaining to wholesale broadband access are as follows:

- a more extensive market has been defined – WBA via copper, coaxial and fibre optic local loop networks constitute part of the same relevant market;
- KPN holds SMP in the low quality WBA market;
- KPN is subject to tariff regulation in the high quality WBA market;
- in so far as WBA over copper is to be phased out completely in specific areas that are covered during the regulatory period ahead, the Commission is imposing conditions on KPN in relating to the revocation of WBA access over copper, which has already been granted.

Retail market for broadband Internet access

14. The relevant market for broadband Internet access includes broadband Internet access services via DSL, cable and fibre optic networks. The relevant geographical market is national. The most important change compared with the 2005 broadband Internet access retail analysis is that broadband Internet access through fibre optic local loop networks is also deemed to constitute part of the relevant product market.

15. Based on a dominance analysis, the Commission has concluded that while regulation occurs in the unbundled wholesale access market in the absence of regulation of the WBA market, there is a risk that KPN will hold SMP in the retail market for broadband Internet access.

4. Leased lines

4.1 Introduction

1. Under the terms of Chapter 6a of the Telecommunications Act *Telecommunicatiewet* (referred to throughout as "Tw") the Commission of the Dutch Independent Post and Telecommunications Authority (referred to throughout as the "Commission") is required to analyse specific relevant markets in the electronic communications sector in order to determine whether there is effective competition on these markets or whether any market party holds significant market power (referred to throughout as SMP) in them based on a forward looking analysis covering the period until the end of 2011. The Commission may impose appropriate remedies on any market party which holds SMP.

2. The decision concerns the relevant retail markets for low and high capacity leased lines and data communication services, and the relevant wholesale market for low and high capacity leased lines and trunk connections.

3. Business end users use leased lines and data communication services to establish company networks for voice and data services between their various internal operational centres, and between their network and the public telecommunications network. Based on research conducted by Dialogic and replies received from market parties to questionnaires, the Commission has noted that business end users increasingly perceive leased lines and data communication services as similar services.

4. The Commission has observed a growing trend (approximately 10% per annum) towards the replacement of traditional leased lines with data communication services. There is another trend which has had a major impact on our market analysis in the form of the ever expanding roll-out of fibre optic networks, which are suitable for high capacity leased lines and data communication services.

5. The decision renders it mandatory for KPN to supply wholesale line rental. This will provide alternative providers with the opportunity to offer business end users retail leased lines and data communication services. The remedy involving KPN's retail services (low capacity) is to be revoked.

4.2 Main points of the decision

Definition of wholesale markets for the purposes of retail line rental and data communication services.

6. The Commission has defined the following three relevant wholesale line rental markets:

- a wholesale market for low capacity leased lines;
- a wholesale market for high capacity leased lines; and
- a wholesale trunk market for the purposes of local and regional interconnection.

High quality bitstream represents another important wholesale market for the purposes of the retail market for low capacity leased lines and data communication services. This market has been defined as part of the wholesale broadband analysis (WBA).

7. These relevant markets cover all of the Netherlands and are confined to it.

Dominance analysis of the wholesale markets

8. The wholesale trunk market has been found to be competitive. KPN's network has already been replicated multiple times. Consequently, it no longer has a position of power.

9. KPN's share of the wholesale market for low capacity leased lines amounted to 70% to 80% in the fourth quarter of 2007. Its share of the wholesale market for high capacity leased lines amounted to 60% to 70% in the same period. Based on a dominance analysis the Commission has concluded that KPM holds SMP in both wholesale markets. As a result, it is possible for the following anti-competitive practices to occur in the retail markets:

- competition constraints pertaining to access, such as the denial of access, the strategic use of information, the improper use of information in relation to competitors, delaying tactics, inequitable terms and conditions, quality-related discrimination, strategic product design and bundling or tying;
- competition constraints pertaining to pricing, such as price discrimination, excessive tariffs and margin squeeze.

10. Because infrastructure competition has not matured sufficiently to operate in an appropriately disciplined manner, the Commission is also promoting services competition. Consequently, the priority objective of regulation specific to leased lines is to promote services competition in so far as it retains the potential for infrastructure competition to develop.

Obligations in the wholesale markets

11. In order to prevent the occurrence of the anti-competitive practices which have been observed and having in mind the purpose of the regulation, the Commission is imposing the following obligations on KPN in the wholesale markets for low and high capacity leased lines:

- an obligation to grant access;
- an obligation to ensure transparency – KPN must ensure that proper notice is given in the form of a reference offer setting out the tariffs which it offers to its wholesale customers and the terms and conditions subject to which it does so;

- an obligation to ensure non-discrimination – KPN must present a reference offer to all of its wholesale customers;
- tariff regulation – cost-oriented tariffs;
- an obligation for accounting separation.

12. The most important changes in this decision compared with the 2005 market analysis decisions pertaining to wholesale line rental markets are as follows:

- markets have been defined differently – in defining them a distinction has now only been drawn between services with a capacity (symmetrical or otherwise) equal to or less than 20 Mbit/s and those with a larger capacity, in respect of which data communication services with such capacity constitute part of the relevant markets. As part of the new decision MDF backhaul connections are treated as part of the trunk market and no longer as part of the market for terminating connections (high capacity);
- tougher wholesale obligations for high capacity connections will be imposed and the MDF backhaul remedies will be revoked.

13. The wholesale obligations mentioned in point 11 will enable other providers to provide leased lines and data communication services to all business end users. These obligations will come on top of other duties, such as ULL and WBT, in the wholesale market for low capacity leased lines. Based on these obligations providers of leased lines and data communication services will be able to offer a comprehensive range of business services.

Retail markets for leased lines and data communication services

14. The Commission has defined the following relevant markets:

- a retail market for low capacity leased lines – this market comprises both leased lines and data communication services with a capacity (symmetrical or otherwise) of 20 Mbit/s or less; and
- a retail market for high capacity leased lines of 20 Mbit/s or more. This market also comprises both leased lines and data communication services.

15. The above-mentioned relevant markets cover all of the Netherlands and are confined to it.

16. The Commission is of the opinion that effective competition does not exist in the retail market for low capacity leased lines while wholesale regulation occurs, although the decline in KPN's market share and the neutralisation of other dominance criteria as a result of wholesale regulation indicate that effective competition could be achieved in the longer term.

17. With regard to the retail market for high capacity leased lines, the Commission is of the opinion that the wholesale remedies are adequate for the purposes of achieving the stated objectives. Consequently, the Commission does not see any grounds for imposing remedies on the retail market.

18. The most important change compared with the 2005 market analysis decision on leased lines is that the latter and data communication services are deemed to constitute parts of the same relevant market and as a result the defined markets coincide more closely with the perception of business end users. What is also an important difference is that only wholesale regulation is imposed as part of the new draft decision.

19. The regulation of wholesale markets will ensure that business end users will benefit in the form of a more pluriform range of leased lines and data communication services in terms of both price and quality.

Appendix 2 – OPTA Press Release of 15th July 2008

OPTA: Less regulation for telephony market, broadcast market open

Today the Commission of OPTA, the Independent Post and Telecommunications Authority of the Netherlands, is presenting its new preliminary draft decisions for the markets for fixed telephony, broadband internet access and leased lines. In them OPTA sets out the measures, which it feels are required to promote innovation, investments and competition in consumers' interests during the regulatory period ahead. Partly thanks to the remedies which OPTA has imposed on KPN in the telephony market to date and the fact that cable telephone services are gaining ground, it is possible to dispense with KPN's obligations in the consumer market. From now on KPN is exempt from retail obligations, such as those governing minimum and maximum tariffs, and it is allowed to compete freely. However, OPTA has had to impose stricter obligations on KPN in the wholesale telephone market in order to achieve this relaxation. In addition, OPTA has imposed a duty on cable service providers to resell cable connections, otherwise the regulatory authority foresees insufficient competition in the broadcasting markets. In this way consumers will be able to choose from whom they wish to obtain their analogue television bundle in the same way that they are already able to choose between various telephone service providers using KPN's network.

Benefits for business users

OPTA notes that there is not enough dynamics in the business segment. Further intervention is required to ensure that business users benefit as much from competition as private consumers. In view of the fact that business customers have too few alternatives to choose from, KPN's current duty to sell telephone subscriptions to other telephone service providers has been extended, so as to ensure that alternative parties are able to offer a competing range of services not only to consumers but also to business customers.

Access to cable networks

While KPN's dominance in its home market of telephony has been partly eroded, the cable companies remain dominant in the broadcasting market. Casema, @Home and Multikabel have merged to establish the cable company, Ziggo. Digitenne, IP TV and satellite do not appear to bring enough pressure to bear on cable tariffs and have failed to produce a greater choice of analogue cable subscriptions. The cable companies' temporary tariff freeze is not a sustainable solution which will produce greater competition. It is for this reason that OPTA has imposed a resale of the cable subscription, so as to ensure that alternative providers are able to compete on the cable network. This will give consumers a choice of providers from whom they can buy an analogue cable bundle.

Access to KPN's network

At present KPN's competitors have access to its network through the local exchange. Thanks to this access the Netherlands is leading the way in broadband Internet access (price and bandwidth). As a result of KPN's plans (ALL-IP) to switch to fiber optic cable and VDSL, a rather advanced innovation

which OPTA applauds, these local exchanges will be abolished. KPN's competitors will need to be provided with alternative access. This access can exist either more up in the copper network through regulated wholesale broadband access, or on the fiber network in the optic exchanges. The tariffs for both forms of access include a reasonable return on KPN's investments. This will have the effect of encouraging efficient investment and innovation in networks on the part of both KPN and other parties.

Sustainable competition

Thanks to convergence different networks can provide the same services. OPTA expects fiercer competition in relation to bundled products. In a bundle, consumers opt for a single provider of Internet, telephony and television services. In order to ensure that we are not left with only two dominant networks from which consumers can select a bundle – KPN or a cable company – OPTA holds the view that it is necessary for alternative providers to be able to compete. To facilitate access to the networks of both KPN and a cable service provider OPTA is encouraging other parties to invest. If KPN and the cable companies are to have an incentive to remain innovative and to continue to invest in their own networks, reselling each other's subscriptions does not seem a reasonable option. By promoting efficient investments in the electronic communications sector OPTA is encouraging sustainable competition and it will be possible to reduce its market regulation further.

Where to now?

The preliminary draft decisions which are being presented today mark the onset of a process of national consultation. OPTA invites market parties, interest groups and others to present their views. Our fellow European regulators will also respond and the European commission will need to consent to these decisions. OPTA anticipates that these decisions will come into effect at the end of this year. The preliminary draft decision on broadcasting is still being completed and will be published August 5th.



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