

European Regulators Group
Attn. ERG Secretariat
Avenue de Beaulieu 33
B-1160 Brussels

Sent by email (erg-secretariat@ec.europa.eu)

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The Hague, 25th of January 2008

Dear Sir, Madam,

The Association of Competitive Telecomoperators ('ACT'), a cooperation of bbnd N.V., BT Nederland N.V., COLT Telecom B.V., Orange Nederland Breedband B.V., Priority Telecom Netherlands B.V., Tele2 Nederland B.V. and Verizon Nederland B.V. on regulatory issues in the Netherlands, warmly welcomes the opportunity to respond to the public consultation on the draft document 'ERG Report on best practices on regulatory regimes in wholesale unbundled access and bitstream access' (ERG (07) 53rev1).

ACT supports the Best Practices document, which ACT considers to be very useful to support the process to come to effective regulation on the wholesale markets to local loop unbundling ('LLU') and wholesale broadband access ('WBA').

Below ACT gives an overview of the developments within these wholesale markets in the Netherlands and comments on the three main topics i) Quality of Service (operational), ii) Migration and Richness of Reference Offers (functional), and iii) Pricing issues (economic), which are identified within the ERG consultation document.

1. Developments on Dutch wholesale broadband markets

In its decisions on the Dutch wholesale broadband markets¹ OPTA assigned KPN as having SMP on the wholesale market for local loop unbundling. On the wholesale broadband access market KPN has only been assigned with SMP on the market for '*high quality* wholesale broadband access', but not with regard to '*low quality* wholesale broadband access'². One of the main arguments of OPTA not to assign KPN as having SMP with regard to low quality

¹ OPTA decisions on WBA and LLU d.d. 21 December 2005 (reference respectively OPTA/BO/2005/203432o and OPTA/BO/2005/203431).

² Broadband access services with a contention ratio that exceeds or is below 1:20 are respectively part of the low quality or high quality broadband access market.

WBA concerned the widespread availability of LLU as an alternative to enter the retail broadband internet access market. This is still the regulatory situation within the Netherlands today.

At the end of 2005 KPN announced its so-called 'All IP' strategy plans, which basically contain the following aspects:

- an upgrade of the KPN access network based on subloop unbundling (introduction of VDSL);
- gradual termination local loop unbundling (part of KPN's real estate, in which MDF collocation is provided, is to be sold in order to invest in subloop unbundling);
- implementation of an 'open network policy', which includes the provisioning of wholesale broadband access.

These plans have major impact on alternative operators as these operators, including ACT members, have invested heavily in LLU. Currently the ACT members are discussing the consequences, including the availability of LLU and WBA, with KPN.

KPN has confirmed that a certain number MDF collocations will remain available for the provisioning of LLU, which could lead to a limited network coverage of approximately 45-50% of the Dutch households. As a result LLU will no longer act as an alternative for WBA to enter the retail market(s), at least for the geographical part of the Netherlands where LLU is not available.

Within the coming years, maintaining the availability of LLU is of great importance to enable alternative operators to gain a fair return on their investments in LLU. But the viability of the LLU business case for the future is unclear due to the introduction of subloop unbundling by KPN and fiber initiatives.

As a result of these developments LLU cannot be regarded as a substitute for LLU to allow entrance to (parts of) the downstream retail market(s). Therefore regulation on both wholesale markets for LLU and WBA is of great importance, also in the Netherlands.

The All IP developments, as described above, in the Dutch market differ from other member states. In the Netherlands KPN clearly announced a withdrawal of LLU services whereas in other member states the incumbent is focusing on Subloop unbundling next to local loop unbundling. ACT would like to stress that is important to recognize that these developments are to be taken into account besides the 'ladder of investment' principle (which in this context means stimulation of migration of WBA to LLU services). For the avoidance of doubt, ACT supports the 'ladder of investment' principle which should stimulate infrastructure competition. However, as far as infrastructure competition becomes more difficult or even impossible on certain (parts of) the markets, this should be taken into

account by the NRA. It is of crucial importance that effective remedies on the wholesale markets are imposed to ensure effective competition on the retail market(s).

ACT requests the ERG to recognize in its Best Practices document that SMP remedies on wholesale markets should result in fair terms and conditions to stimulate effective competition on the retail market(s). The 'ladder of investment' principle remains of great importance, but should be regarded in the context of the national market circumstances. Phase out of LLU leads to the end of the principle of the ladder of investment and may call for the need of geographical differentiation in regulation.

ACT requests the ERG to recognize the need for (stricter) regulation of wholesale broadband market if the viability of investment in LLU is limited.

2. ERG Best Practices

In general ACT is very pleased with the contents of the ERG consultation document. The best practices proposed in this document should provide NRA's with actual tools and examples to identify and impose effective remedies. Below ACT provides comments on the three main topics relating to wholesale broadband offers.

2.1. Quality of Service (operational) – Best practices 1-4

ACT is of the opinion that quality of service ('QoS') is a preconditional aspect of effective regulation. In the event e.g. provisioning or fault management processes are not organized sufficiently, this will affect alternative suppliers as this will directly lead to a degraded performance on the retail market(s) in most events. Often 'the devil is in the detail'.

The current regulation and practices in the Netherlands with regards to QoS can be improved drastically both for LLU and WBA services. LLU QoS that is essential to be improved includes delivery of New Line Services (NLS) and information services. For WBA there are no effective SLA's that can be enforced via penalties.

The service levels ('SL's') and key performance indicators ('KPI's'), as mentioned under best practices 2 (a-d) and 4 (a, b) should certainly contribute to QoS. ACT supports these SL's and KPI's as a minimum set, but would like the ERG to add and/or stress the following comments in with regard to these Best practices:

- *QoS of Information Systems:* ACT is of the opinion that the minimum set of timers and KPI's, as mentioned in the consultation document (best practice 2), should also include the performance of information systems. Alternative suppliers are often dependent on the SMP player's information systems with regard to the validation of orders (e.g. orders can only be validated in the event the alternative supplier has

verified the end user data within the SMP player's information systems). Failure of these systems prohibits alternative suppliers to supply new and maintain existing retail customers. Incumbents do not necessarily use these systems themselves for prequalification and placing orders. The lack of performance then creates market distortion.

- *Sufficient SL/KPI levels:* Depending on the market situation in a Member State the specific levels of the set of timers should be determined accordingly. At this point in time the Dutch retail broadband markets are largely characterized by transfers of end users from one supplier to another supplier. Poor QoS on the upstream wholesale market will prevent end users from transferring to another supplier. Therefore a high level of all SL's/KPI's is essential to be able to compete effectively under such market circumstances (especially with the SMP operator's retail offers).

More attention is needed with respect to the position of operators that focus on business markets. It is of great importance that these operators are able to deliver homogenous national and transnational services at a quality level that meets the requirements of business customers. Therefore these suppliers require specific suitable SL's and KPI's on which enable them to compete on the national and pan-European business markets/segments. This applies to all SL's and KPI's, including strict service levels on the pre-order process (e.g. validation of end user data, issuing committed delivery date and price offer within 2 working days after ordering).

From an end user perspective it is clear that transfers (both within LLU, voice services and WBA) should be safeguarded at a high level of QoS to prevent end users from being temporarily disconnected from a broadband connection. This issue has also been raised by the Dutch Ministry of Economic Affairs. For smooth transfers inhibited access to necessary information systems is crucial as well as clear agreements on the synchronization of transfer processes.

- *Compensation:* ACT supports the ERG's view that all SLA's and KPI indices/timers should be subject to compensation payments by the SMP player (best practice 3). The current KPN Reference Offers LLU and WBA provide insufficient incentives to comply with the SL's/KPI's offered. Remedies should include sufficient incentives to ensure QoS.
- *Transparency:* the set of timers/indices should be transparent and enable transparent reports by the SMP player, which should eventually result in an improvement QoS. The KPN Reference Offer LLU contains a complex system of timers/indices, which can blur the discussion on the actual QoS. Only a transparent and coherent system of SL's and KPI's will contribute to improvement of QoS which is required to be

able to provide a user friendly service and enable end users transfer to another supplier. NRA's should therefore ensure transparency regarding all timers/indices.

- *SL's and KPI's should be up-to-date.* ACT recommends the ERG to add that SL's/KPI's are to be revised periodically (every 2-3 years) to meet with newly developed standards and circumstances.

Furthermore ACT would like to the ERG stress that the SL's and KPI's, mentioned by the ERG, should be regarded as a *minimal* set. Depending on the market situation in a member state, additional SL's and/or KPI's might be crucial for improvement of QoS of LLU and WBA services. It should be avoided that this minimal set of timers presented by the ERG will be regarded a maximum set by incumbents.

Improvement of SLA is urgently required in the Netherlands. ACT recommends the ERG to stress that SL's and KPI's, as mentioned in Best practices 1-4, should be transparent, up-to-date, set at a sufficient level and enforced by implementing incentives. Furthermore ACT recommends the ERG to recognize with regard to all SL's/KPI's that suitable parameters are set for suppliers that operate on business markets.

ACT also requests the ERG to add SL's and KPI's with regard to information systems.

2.2. Migration and Richness of RO (functional) – Best practices 5-9

ACT fully supports the principle that reference offers regarding wholesale broadband access services must allow alternative suppliers to offer new and innovating services. However, not only a rich enough reference offer for LLU can ensure widespread adoption of broadband services. The ERG should also stress that this principle is applicable to WBA offers. Alternative suppliers should be able to develop their own services on top of the WBA service (e.g. technical necessity for V-LAN transparency with regard to ethernet based WBA services, also alternative suppliers should in general be enabled to innovate and develop tailor-made solutions, which is even more important for business users).

ACT recommends the ERG to add to the introduction of paragraph 2 of its best practices document that richness of a reference offer is also extremely important for WBA services (and should not only be focused on LLU).

As mentioned above, the Dutch retail broadband access market(s) are largely characterized by switching end users. Therefore it is important that NRA's not only ensure migration processes, but also eliminate any obstacle for end users to switch to another supplier. If this is not taken into account an SMP player will be able to create a 'lock-in' of end users and

prevent them from switching to alternative operators. Such obstacles can for example be found in tariff structures of LLU/WBA services (e.g. disconnection fees can prevent an end user from switching to another supplier) or (malfunctioning) operational processes.

Therefore ACT fully supports best practice 6 which should ensure synchronization of line and number portability processes. By all means it should be prevented that an end user is disconnected from his telephony or broadband access service for a longer period of time. In the Netherlands these processes are not synchronized yet, which could also lead to a 'lock-in' of end users as the lack of synchronization of these processes could prevent end users from switching to another supplier.

ACT recommends the ERG to add to the category 'assurance of efficient and convenient switching processes' a best practice to prevent a lock-in of end users.

With regard to best practice 5 (Bulk migration) ACT request the ERG not to only focus on migration from WBA to LLU (in conformity with the 'ladder of investment'), but from any wholesale broadband service to any competing wholesale alternative, for instance FttH or subloop unbundling. As mentioned in paragraph 1 national market circumstances should be regarded by the NRA in composing remedies. Not being able to climb the ladder of investment is such a crucial circumstance.

Currently process for bulk migration processes are not supported by KPN for alternative operators. ACT is of the opinion that both the Reference Offer LLU and WBA should contain bulk migration processes to any competing wholesale alternative.

ACT recommends the ERG to state in best practice 5 that bulk migration and migration should be enabled from any wholesale broadband service to any competing wholesale alternative like FttH and subloop unbundling.

ACT agrees on the rationale of the ERG with regard to best practice 8 (Collocation of equipments), that innovative services should be launched without undue delay and without any technical restrictions. As mentioned in paragraph 1, KPN aims to phase out LLU services at a certain number of MDF collocations. For a number of remaining MDF collocations alternative operators will have to move to another type of collocation (or even collocation premises). Such transition should not result in new technical or economical constraints for alternative suppliers, which is to be closely monitored by the NRA.

With regard to best practice 8 (Collocation of equipments) ACT would like the ERG to add that also new types of collocation facilities should not contain any technological or economical restrictions. Continuity of these essential facilities, also during transition periods, should be safeguarded by the NRA.

2.3. Pricing issues (economic) – Best practices 10-12

ACT agrees to the principle that prices of wholesale broadband offers should create incentives for alternative suppliers to climb the ladder of investment. Prices should be set by taking into account i) the economic space between LLU and WBA and ii) the SMP player's retail offers (Best practice 10).

As explained in paragraph 1, the current developments on the Dutch wholesale broadband markets do require a national approach. Therefore ACT would like to stress the importance of the national circumstances, mentioned by the ERG in Best practice 11, while setting the economic space between LLU and WBA. These circumstances are

- Market situation including DSL penetration and competition level;
- Level of unbundling and its extension prospect;
- The existence of alternative infrastructure.

Sufficient economic space between LLU and WBA pricing should be safeguarded, but the importance to prevent pricesqueeze with SMP retail offers increases especially in the event LLU is no longer economically viable or technically available. An efficient pricesqueeze test should be introduced by which the NRA is able to monitor competition opportunities for alternative suppliers.

ACT recommends the ERG to stress in best practice 11 the importance of preventing pricesqueeze with the SMP retail offers and to add that NRA's should implement adequate pricesqueeze tests.

In Best practice 12 the ERG introduces the following scheme to monitor the economic space between LLU and WBA pricing:

WBA minimum price=LLU price + efficient operator incremental costs of providing WBA.

To contribute to prevention of pricequeeze ACT is of the opinion that also a pricing ceiling should be set. Such price could be set against the following scheme:

WBA maximum price= LLU price + efficient operator incremental costs of providing WBA + reasonable return.

ACT recommends the ERG to add to Best practice 12 a maximum WBA pricing scheme to help protect alternative suppliers from pricesqueeze on the retailmarket.

Again, ACT appreciates the opportunity to contribute to the draft ERG Best practices with regard to wholesale unbundled access and bitstream access and is looking forward to receiving the final report.

Should you have any queries, please do not hesitate to contact me.

Yours sincerely,



F.P. Sickinghe
Chairman ACT