

**BEREC Opinion on  
Phase II investigation  
pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC:**

**Case NL/2012/1299**

**Wholesale broadband access (Market 5) and wholesale terminating segments of  
leased lines (Market 6) in the Netherlands**

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## 1. EXECUTIVE SUMMARY

On 21 February 2012, the Commission registered a notification by the Dutch Regulatory Authority, OPTA, concerning the third review of the market for wholesale broadband access and for wholesale terminating segments of leased lines in the Netherlands.

OPTA defines two separate wholesale markets for low-quality WBA and high-quality WBA, the latter encompassing also wholesale leased lines services.

- Low Quality Wholesale Broadband Access (LQ/WBA), which includes access based on copper coaxial cable and fibre.
- High Quality Wholesale Broadband Access and wholesale terminating segments of leased lines (HQ WBA/LL), which includes copper and fibre.

OPTA intends to apply the following obligations on KPN with regard to the market for high-quality WBA: access obligation on the copper-based network (but not on fibre); transparency and reference offer; non-discrimination. Furthermore, OPTA concludes that in the presence of obligations on access and non-discrimination there is no need to impose tariff regulation.

In this case, OPTA considers that in the market for high-quality WBA it is not necessary to impose access obligations on KPN's fibre network, despite the fact that both copper-based and fibre-based infrastructures are considered to be part of the same market.

On March 21<sup>st</sup> the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC. Commission's doubts concern compliance with Article 8 (4) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16 (4) of the Framework Directive, in particular for the non-imposition of effective access obligation on the market for high-quality Wholesale Broadband Access.

On the basis of the economic analysis set out in this Opinion, BEREC considers that the Commission's serious doubts are mostly justified. Furthermore, BEREC believes that the limitation on the scope of the access obligation creates a potential barrier to the single market.

BEREC suggests that on the forward looking basis there may be some possible constraints and market failures in the future, which should be taken into account by OPTA designing appropriate and proportionate measures.

## 2. INTRODUCTION

On 21 February 2012, the Commission registered a notification by the Dutch Regulatory Authority, *Onafhankelijke Post en Telecommunicatie Autoriteit* (OPTA), concerning the third review of the market for wholesale broadband access and for wholesale terminating segments of leased lines in the Netherlands. On 6 March 2012, a request for information (RFI) was sent to OPTA, and a response was received on 9 March 2012

The Commission initiated a phase II investigation, pursuant to Article 7a(1) of Directive 2002/21/EC as amended by Directive 2009/140/EC, with a serious doubts letter on 21 March 2012. In accordance with the BEREC rules of procedure the Expert Working Group (EWG) was established immediately after that date with the mandate to prepare an independent BEREC opinion on the justification of the Commission's serious doubts on the case.

On 28 March the EWG sent a first list of questions to OPTA. Answers were received from OPTA on 30 March, a second list was sent the 3 April and the answers received the 4 April.

The EWG met on 2 April in Brussels. During this meeting the EWG held an audition with OPTA to gather further information and clarification in response to the questions sent the week before and to additional questions. The objective of the EWG was to reach clear conclusions on whether or not the Commission's serious doubts are justified.

On 4 April EWG held a conference call with the Commission upon the latter's request. In this occasion the Commission explained in detail to the EWG the reasons behind its serious doubts. This gave the group a more complete understanding of the case.

A draft opinion was finalized on 23 April 2012 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 27 April 2012. This opinion is now issued by BEREC in accordance with Article 7a(3) of the Framework Directive.

### **3. BACKGROUND**

#### **Previous notifications**

##### *Wholesale Broadband Access*

The first review of the wholesale broadband access ("WBA") market was conducted under case NL/2005/0281. At that time OPTA concluded that two separate relevant markets existed for low-quality WBA and high-quality WBA. With regard to high quality WBA, OPTA considered that KPN had SMP; consequently OPTA imposed obligations of access, transparency and non-discrimination. However, in the market for low-quality WBA OPTA found that no undertaking had SMP. OPTA considered that the pricing constraint exercised by cable-based broadband services at the retail level had a sufficiently significant impact at the wholesale level to justify its inclusion in the WBA market. The Commission expressed concerns as to whether low quality WBA provided over cable and DSL formed part of the same market and as to OPTA's finding of effective competition in the market for low quality WBA. Finally, with regards to the characteristics of the Dutch broadband market, the Commission did not contest OPTA's findings, but asked OPTA to carefully monitor market developments.

In the second round of review of the WBA market (NL/2008/0827) OPTA maintained the definition of two separate relevant markets for low-quality WBA and high-quality WBA. Similarly to the first round of review, in the market for low-quality WBA OPTA considered, after analysing direct and indirect constraints, that cable should be included in the market definition on the basis of indirect constraints. However, unlike in the first review, this time OPTA concluded that KPN had SMP also in the low-quality WBA market. This conclusion

was predominantly based on the increased market share in the retail broadband market ([...]), the acquisition of a significant LLU operator (Tiscali), as well as credible plans/announcements of the roll-out and migration towards a fibre-based All-IP network.

In the market for low-quality WBA, OPTA imposed obligations of access, transparency and non-discrimination; these obligations were, however, limited to copper-based products. With regard to the regulation of fibre, OPTA proposed to mandate unbundled access to fibre (ODF access) in Market 4, and concluded that it would not be appropriate to mandate fibre access in the low quality WBA market at this stage. In the high-quality WBA market OPTA maintained the remedies already in place, and supplemented them by granting access to fibre-based WBA products.

The Commission commented on the inclusion of cable-based WBA in Market 5, on the lack of regulation of fibre in the low-quality WBA, the need to closely monitor the effectiveness of fibre unbundling (on Market 4, upstream from WBA), and, depending on the success of its implementation, the need to mandate WBA over all fibre networks.

### *Wholesale terminating segments of leased lines*

The first review of this market was conducted in case NL/2005/0282. At that time, OPTA concluded that KPN should be designated as an SMP operator on the following three wholesale markets: wholesale terminating segments of leased lines of a capacity lower than 2Mbit/s, wholesale terminating segments of leased lines of 2Mbit/s capacity, and wholesale terminating segments of leased lines of a capacity higher than 2Mbit/s. Consequently OPTA imposed on KPN a number of regulatory obligations. The Commission provided comments on the related retail markets (minimum set of leased lines), but not on the wholesale markets.

The second review of this market was conducted in case NL/2008/0823. OPTA defined two wholesale markets for terminating segments of leased lines: low capacity (i.e. below and equal to 20 Mbit/s) and high capacity (above 20 Mbit/s). The main argument for the distinction between the two markets was that the higher capacity bandwidth would require fibre infrastructure, whereas the copper network could serve the lower-capacity market. The fibre network did not have the coverage of the copper network, resulting in higher cost and low substitutability.

OPTA determined that KPN had SMP in both wholesale markets and imposed obligations including access, transparency, non-discrimination, price control and accounting separation. The access remedy was mandated at the local, metro and regional level, with the latter only imposed if metro level access was not possible. The Commission commented that the adopted measure should make clear that access on regional level was imposed to remedy the lack of competition in the wholesale markets for terminating segments of leased lines, and that it did not intend to regulate trunk segments of leased lines. Unlike in 2005, OPTA did not regulate any of the related retail markets.

OPTA's regulatory decisions from 2008 concerning high-quality WBA and wholesale leased lines have been appealed by KPN. The decision for wholesale leased lines was annulled by the Dutch appellate tribunal in April 2010, the one for high capacity WBA in May 2011.

## **Current notification and the Commission's serious doubts**

OPTA defines two separate wholesale markets for low-quality WBA and high-quality WBA, the latter encompassing also wholesale leased lines services.

- Low Quality Wholesale Broadband Access (LQ/WBA), which includes access based on copper coaxial cable and fibre.
- High Quality Wholesale Broadband Access and wholesale terminating segments of leased lines (HQ WBA/LL), which includes copper and fibre.

The above definition applies on a national level. The distinguishing factors between the two markets are the quality parameters (SLAs, customer service, fault repairs guarantees) and contention (overbooking) ratio. All products with a contention ratio of a lower quality than 1:20 fall into the low-quality WBA.

In the market for high-quality WBA the relevant products include WBA via copper and optical fibre, but exclude WBA over coaxial cable. This is justified by the lack of appropriate quality parameters (lack of possibility to guarantee a certain contention ratio due to technical network characteristics), and SLAs. Contrary to the distinction between Market 5 and Market 6 in the Recommendation, OPTA includes wholesale terminating segments of leased lines in the high-quality WBA market.

With regard to high-quality WBA OPTA concludes that KPN's market share has decreased, albeit very modestly. Based on the scenarios for future market development OPTA considers that KPN's market share will further decrease, but still will be over 50%. Furthermore, the growth of the market for high-quality WBA is mainly driven by the development of fibre-based networks, on which KPN is also the leading market player. The relatively high and stable market shares, coupled with other indicators (vertical integration, economies of scale and scope, lack of countervailing buyer power, switching costs, geographical fragmentation of alternative fibre networks) point towards the conclusion that KPN will have SMP during period of the next review.

OPTA intends to apply the following obligations on KPN with regard to the market for high-quality WBA:

- access obligation on the copper-based network (but not on fibre);
- transparency and reference offer;
- non-discrimination.

Furthermore, OPTA concludes that in the presence of obligations on access and non-discrimination there is no need to impose tariff regulation.

In this case, OPTA considers that in the market for high-quality WBA it is not necessary to impose access obligations on KPN's fibre network, despite the fact that both copper-based and fibre-based infrastructures are considered to be part of the same market. OPTA considers that currently copper-based high-quality WBA still represents a significant part of the market, and even in the case of refusal to give access to the fibre-based high-quality WBA, alternative operators could still compete with KPN on the basis of regulated copper access, access to fibre of other operators but also on the basis of their own fibre infrastructure. Furthermore, OPTA considers that the upgraded copper-based infrastructure,

offering symmetric data transfers above 20 Mbps, is a substitute to fibre-based connections. OPTA also considers that on the basis of its information, in absence of regulation KPN would still continue to offer high-quality WBA over fibre.

The Commission has serious doubts as to whether a realistic alternative to KPN's fibre infrastructure exists on the market for high-quality WBA in the Netherlands. Despite some evidence of the existence of fibre-based networks owned by other operators, the Commission questions that such fibre connections, supplied by other operators, represent a sufficient alternative to KPN's fibre network. According to OPTA the roll out of fibre, which constitutes a building block for high-quality WBA (it can be assumed that a high proportion of such high-quality WBA over fibre corresponds to Fibre to the Office (FtO), subject of the related analysis of Market 4), is not ubiquitous, but is developed "on-demand" only in order to connect individual retail consumer or a group of individual consumers (demand bundling). Therefore, even by combining the elements of fibre networks of various alternative operators, it would not be possible to reach all final consumers, bypassing KPN's network. The Commission considers, at this stage, that the limitation of the access obligation only to the copper network would not be appropriate to address the competition problems identified in the market for high-quality WBA.

The Commission notes that OPTA has concluded that on the market for high quality WBA both copper and fibre networks are part of one single market, on which KPN has significant market power. The Commission considers, at this stage, that a barrier to the development of the internal market would arise with the failure to impose access remedies on infrastructure that constitutes an important and growing part of the single product market, which is characterised by the presence of an SMP undertaking. Without regulation of the fibre element of the high-quality WBA offer, KPN will be able to limit the expansion of alternative providers of high-quality broadband access at the retail level by withholding access to a necessary input. This would have an impact on the ability of such alternative operators to offer to their retail (business) customers pan-European connectivity and other cross-border services. At this stage the Commission argues that the notified regulatory measure would create a barrier to the single market.

### **3. ASSESSMENT OF THE SERIOUS DOUBTS**

On March 21<sup>st</sup> the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC. Commission's doubts concern compliance with Article 8 (4) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16 (4) of the Framework Directive, in particular:

#### **"Non-imposition of effective access obligation on the market for high-quality Wholesale Broadband Access"**

These doubts are justified by 3 charges analysed in the sections hereafter.

#### **On the reference to NGA Recommendation**

*Concerns of the Commission*

The Commission points out that remedies imposed on Market 5 should follow the Recommendation on regulated access to Next Generation Access Networks (“NGA Recommendation”). In particular pursuant to paragraph 31 and 37 of the NGA Recommendation where SMP is found on Market 5, wholesale broadband access remedies should be maintained or amended, unless there is effective access to the unbundled fibre loop of the SMP operator's network and that such access is likely to result in effective competition on the downstream level.

According to the Commission an alternative approach must be appropriate in light of the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive. Referring to OPTA’s justification, the Commission notes that the different treatment of copper and fibre access within the boundaries of the same product market would result in unjustified discrimination between operators seeking access on copper and those seeking access on fibre, resulting in a distortion of competition contrary to the objectives of Article 8(2) of the Framework Directive.

#### *BEREC Opinion*

According to Article 288 of the Treaty on the Functioning of the European Union (TFEU) recommendations and opinions shall have no binding force. Pursuant to Article 19 (2) of the Framework Directive NRA can choose not to follow a recommendation. Thus the assessment of the compatibility with EU law cannot be based only on non-compliance with the NGA Recommendation. However, according to Article 19 of the Framework Directive, NRAs should take the utmost account of the Commission’s recommendations. When a NRA does not follow a recommendation, it has to inform the Commission and give the reasons for its position.

BEREC does not share the position that different treatment of copper and fibre access proposed by OPTA is unjustified and discriminatory as such. As evidence provided by OPTA shows, the coverage of KPN’s copper and fibre network is significantly different. Also there are different market shares of the copper-based WBA access, as well as the competitive market pressure in case of both kinds of infrastructures. These objective market factors can lead to various appropriate specific regulatory obligations, which are based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC.

#### **On the serious doubts about the existence of a realistic alternative to KPN’s fibre infrastructure**

##### *Commission’s concerns*

Despite some evidence of the existence of fibre-based networks owned by other operators, the Commission questions that such fibre connections, supplied by other operators, represent a sufficient alternative to KPN’s fibre network.

According to OPTA the roll out of fibre, which constitutes a building block for high-quality WBA (it can be assumed that a high proportion of such high-quality WBA over fibre corresponds to Fibre to the Office (FttO), subject of the related analysis of Market 4) is not ubiquitous, but is developed “on-demand” only in order to connect individual retail consumer or a group of individual consumers (demand bundling). Therefore, even by combining the



elements of fibre networks of various alternative operators, it would not be possible to reach all final consumers, bypassing KPN's network.

#### *OPTA's views*

In the OPTA's answer to the first BEREC EWG list of questions, OPTA replies that in order to get the right perspective of the coverage figures, it needs to be pointed out that even KPN's fibre network (FttO) has no national coverage in terms of connected companies. The number of connected locations is a small fraction of all the locations in the vicinity of the network. KPN and other companies have to roll out their network to connect new customers, based on individual demand and on demand bundling. So, also KPN is not able to reach all final customers without rolling out its network.

Access to KPN's fibre based HQWBA/LL platform would give access only to those locations that are already connected, and in most cases already have a retail contract with KPN. Thus, to reach all customers each provider (including KPN) would need to either combine various networks, or to roll out the network himself.

Following from paragraph 571 of OPTA's draft decision, the network coverage is expressed in terms of connectivity of undertaking with more than five employees. Furthermore, in paragraph 579, OPTA further explains that alternative providers with their optical fibre networks have a coverage comparable to the optical fibre network of KPN. There are undertaking locations with more than five employees, where KPN is the only provider at less than 250 meters (19 per cent). At 15 per cent of the undertaking locations with more than five employees there is one or more alternative optical fibre providers, at less than 250 meters and KPN is not present. At approximately 38 per cent of the locations, besides KPN, there is minimum one alternative optical fibre provider present at less than 250 meters while in about 28 per cent of these locations, no single provider is present within 250 meters.

#### *OPTA's analysis*

In paragraph 581, OPTA states that the importance of network coverage lies in the fact that the underlying retail market for business network services is characterized by buyers with several establishments which must be developed (multi-site). A provider, who cannot develop an individual location, often lose the whole contract. Based on only MDF access purchase, other parties can therefore be active to a limited extent on the market, because the chance that a location may fall outside their own coverage area, is high.

KPN has advantages over competitors due to its nationwide copper network and the largest optical fibre network when connecting multi-site undertakings, because KPN can connect all undertaking locations on copper and the largest number of undertaking locations on optical fibre (paragraph 582).

If KPN would restrict the access or would increase the price of HQ WBA/WLL products over fibre networks OPTA expects that some alternative operators will choose to buy wholesale fibre access from an alternative operator (e.g. Eurofibre, BT or Ziggo). E.g. Vodafone has a commercial wholesale agreement with Eurofibre for delivering dark fibre access. Alternative operators together have a comparable network coverage of FttO to KPN.

#### *OPTA's conclusion*

In paragraph 587, OPTA concludes that KPN benefits from its network coverage, because it has both a copper network with nationwide coverage and the largest fibre network. OPTA concludes that the criterion “control over infrastructure, that is not easily replicated”, contributes to a possible SMP position of KPN on the HQWBA/LL market.

#### *BEREC's assessment*

BEREC shares the Commission's serious doubts on the existence of a sufficient alternative to KPN's fibre network.

Although OPTA provided enough evidence on the fact that competitors' coverage are overall and on average similar to KPN's, BEREC shares the Commission's view that even by combining the elements of fibre networks of various alternative operators, it would not be possible to reach all final consumers, bypassing KPN's network.

BEREC believes that the consequent necessary third-party access to KPN and other operator's network (or several other operators' networks) imply a competitive disadvantage (in terms of efficiency and costs) for the alternative operators.

Given the combination of networks needed to reach final consumers (multi-site nature of the demand), BEREC would like to point out at the potential risk of having gaps in terms of network coverage whenever a problem to interconnect arises, illustrating the very asymmetric situation of alternative operators compared to that of KPN.

As stated by OPTA in paragraph 583, BEREC notes that *"competitors can purchase individual connections on optical fibre, where they together have a network coverage comparable to KPN, from various providers on the HQWBA/LL market to subsequently offer a total solution to intermediaries or end users. In spite of this, this is often regarded by these parties as cumbersome and often the preference for purchase goes to one wholesale provider (KPN) which is competitive pressure. Thus competitors also have in practice interconnection agreements with several parties and do also buy wholesale optical fibre services from other parties"*.

BEREC agrees that this results in a certain competitive pressure on KPN, however it is not clear whether the respective end-user profile (e.g. ARPU) is showing proportional countervailing power. Furthermore, if KPN expands its fibre network, the proportions (19% vs 15%) may shift in favour of KPN and their current willingness to offer HQ WBA/WLL products to alternative operators may change.

However it does not give any access guarantee for alternative operators in the regions, where KPN will deploy new fibre networks. In case KPN would start with rapid development of fibre networks in the areas where alternative operators are not present and at the same time change its access policy to the FttO by restricting the access for alternative operators, it would significantly harm the competition on the market. Compared to each alternative operator KPN has significantly more financial and labour resources and is therefore capable for the abovementioned behaviour.

In conclusion, according to BEREC, the different coverage of alternative operators constitutes a potential high barrier to expansion. Furthermore, BEREC considers that the alternative infrastructure provided by the alternative operators altogether do not represent an effective constraint on KPN's competitive advantage.

## **Non substitutability of upgraded copper networks and fibre-based infrastructure on a forward looking basis**

### *Commission's concerns*

The Commission questions that on a forward looking basis all access seekers would consider that the copper infrastructure is substitutable to fibre connections.

The Commission notes that, according to OPTA, fibre-based connections are increasingly important in the market for high-quality WBA. According to OPTA's notification it appears that in 2011 the majority of the newly concluded contracts contain at least one fibre circuit. Moreover, a significant part of the new contracts are exclusively realized over fibre connections.

### *OPTA's views*

OPTA considers that even in the absence of access to fibre networks, alternative operators could compete with KPN on the basis of regulated access to the copper infrastructure. In other words, OPTA considers that the (upgraded) copper networks are a substitute for fibre-based infrastructure. In its response to a request for information, OPTA stated that a price increase in fibre would reduce the rate of customers switching from copper to fibre, but did not suggest that customers that had already migrated to fibre would switch back to copper.

### *BEREC's assessment*

BEREC shares the Commission's serious doubts on the existence of a sufficient substitutability between KPN's copper and fibre network.

The substitutability of upgraded copper is highly questionable, both at the retail and wholesale level:

- Usage of fibre allows to increase easily the speed of the service provided to end users; the present offers from KPN are limited at 20 Mbps, thus fibre provides a competitive advantage for the operator that can offer more flexible service (upgrade of the speed in function of end-users' requirements).
- Price increase can occur on existing connection because VPN services are contracted with determined duration and would need new negotiation or bidding at the end. Therefore it is very difficult to explain to an end-user the downgrade from a modern fibre service to a more classical copper service. This would be a source of dispute with end-user.
- The coverage of copper 10 and 20 Mbps is lower than fibre coverage (respectively 52% and 28% of business location) and these services are not generally available as alternative.
- In respect of the Digital Agenda<sup>1</sup> and taking into account the broadband development tendencies whereby the service providers are providing ever-growing broadband connections to households, it is not reasonable to assume, that the demands of FttO

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<sup>1</sup> set targets for 2020 of broadband access for all at speeds of at least 30 Mbps, with at least 50% of households subscribing to speeds above 100Mbps. The European Commission has proposed to spend almost €9.2 billion from 2014 to 2020 on pan-European projects to give EU citizens and businesses access to high-speed broadband networks and the services that run on them.

users will stay at an unchanged level. The targets of the Digital Agenda for Europe refer to very high speed networks that provide download speeds of at least 30 Mbps, and upload speeds are especially important for business customers and are not reachable by present KPN's copper services.

The above mentioned arguments show that there is rather asymmetric substitution (at retail and wholesale levels) between fibre and copper than symmetric (only fibre access is fully substitute for the copper, but not vice versa).

In the light of the rapid development of fibre networks and increasing demand for speed growth BEREC is not convinced that for a significant amount of HQ WBA/WLL products the alternative operators would be able to fall back on KPN's copper based offer in case of a restriction of fibre access.

### **Possibility of competition and the creation of barriers to the internal market**

#### *Concerns of the Commission*

OPTA assesses the SMP status of KPN on the High Quality WBA on both copper and fibre. OPTA lists a set of risks deriving from this condition (recital 702 of notification):

- Refusal of delivery or access
- Discriminatory use or withholding of information
- Unfair use of information with regard to competitors
- Delay tactics
- Unreasonable requirements
- Quality discrimination
- Strategic product design
- Unrequested bundling
- Price discrimination
- Predatory pricing
- Margin squeeze

Despite the opinion of OPTA that the existing merchant market for fibre access WBA is sufficient to solve market's risks, Commission estimates that the risks are insufficiently taken into account and that KPN will be able to limit the expansion of alternative providers of high-quality broadband access at the retail level by withholding access to a necessary input. This would have an impact on the ability of such alternative operators to offer pan-European connectivity and other cross-border services to their retail (business) customers.

#### *OPTA's views*

In OPTA market analysis of the unbundled access to the business fibre loop (ODF-access (FttO), case NL/2012/1298) OPTA concluded that KPN has no SMP, because KPN is not able to act independently from competitors with their own business fibre infrastructure (meaning there is infrastructure based competition). This competition between different operators with their own fibre infrastructure results (via internal supply of ODF-access FttO) in competition between fibre operators on the HQWBA/LL market. On the HQWBA/LL market several operators (including KPN) are commercially offering wholesale Ethernet access products to external suppliers. The combination of infrastructure based competition on the

ODF-access (FttO) market and the regulation of copper access from KPN on the HQWBA/LL results in effective competition on the HQWBA/LL market and the downstream markets.

In such a situation an additional remedy on fibre access is neither necessary nor proportional. OPTA thinks that the non-regulation of fibre access on the HQWBA/LL market is compliant with the Recommendation, because the Recommendation foresees that a bitstream remedy can be removed (or not imposed) in a situation where such access is not necessary for effective competition on the downstream level. Which is the case for the Netherlands as far as fibre-based HQWBA/LL is concerned.

Furthermore, KPN competitors claim to OPTA that KPN offers lower wholesale access prices (for Ethernet-based services) than competitors such as Eurofibre, Ziggo, BT and UPC. Eurofibre (the main wholesale competitor) explicitly claims that access is not an issue, because KPN is providing access. In such circumstances, OPTA estimates that ex-ante regulation is not proportionate.

#### *BEREC assessment of OPTA's economic reasoning*

BEREC shares the Commission's serious doubts on creation of barrier to the internal market, but only with regard to a potential risk on a forward looking basis.

High Quality WBA is used to provide on the downstream market VPN services and broadband Internet access for business users. As a consequence, two main parameters of the service are the coverage areas and also the accessibility of the market with a given coverage taking into account that the coverage must serve all sites - requesting fibre - of a given retail customer must be taken into account too. In this perspective tables 20 & 21 gives interesting data to evaluate the capacity to compete of the different players on wholesale markets. Table 20 gives the coverage in function of a maximum distance between end-user location and network and table 21 the percentage of multi-site customers that can be connected in function of this coverage taking into account that all sites of the customer requesting fibre access are reachable by the operator alone. Taking the highest distance from the network, the competitors of KPN can only reach 36% of 2 sites projects, less than 10% for more sites and no project with more than 10 sites, compared with a practically full coverage of KPN (demonstrated by the fact of KPN very limited purchase of wholesale products by its competitors).

BEREC concludes that KPN has a high structural advantage on its competitors. Presently KPN does not use it to constrain competition and thus there is no barrier to internal market but there is no guarantee of the permanence of this situation, which can change more quickly than competitors can react.

#### 4. CONCLUSIONS

On the basis of the economic analysis set out in section 3 above, BEREC considers that the Commission's serious doubts regarding the draft decision of the Dutch regulator on the High Quality WBA fibre access - as expressed in the EC's letter to OPTA of 21 March 2012 – are mostly justified.

BEREC is of the opinion that the aim of regulation, an NRA imposes, should be forward looking and it should prevent possible constraints and market failures in the future.

Even if currently there are no competition problems as claimed by the market players and there is no evidence of a change of policy by KPN on this market as claimed by OPTA, it exists a risk of such a change, because KPN is the only provider on this market and never a buyer. It can thus change the strategy without notice, because there is no countervailing buyer power from wholesale customers. Two cases are possible:

- The intention to climb the value chain with replacement by IP offer leaving less differentiation and added value to its competitors (that is yet the case at level 2 with merchant unbundling offer less attractive than HQWBA) and by decreasing attractiveness of present HQWBA offer
- Leaving the market to put higher entry barrier to retail VPN markets to his competitors

Therefore BEREC believes that the limitation on the scope of the access obligation create a potential barrier to the single market.

The following measures may be taken into account in order to address the above possible market problems:

- Access obligation on the fibre-based network: obligation to answer to any reasonable request
- Non-discrimination of delivery (taking into account that it means “under similar circumstances” and thus that differentiation on base of an objective situation – e.g. a dense business area with larger scale effect or size of the project – stays possible)
- Transparency obligation

In the light of the Commission's serious doubts and the argumentation above, BEREC would recommend to amend the draft measure so as to not exclude fibre access from the scope of the access obligation.