

BEREC Opinion

Phase II investigation

pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC

**Case NL/2012/1284 – Call termination on individual public telephone networks
provided at a fixed location in the Netherlands**

**Case NL/2012/1285 – Voice call termination on individual mobile networks in the
Netherlands**

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1 Introduction

Under Article 7 and 7a of the Framework Directive¹, and Article 3(1a) of the BEREC Regulation², one of the roles of BEREC is to deliver opinions on draft measures of national regulatory authorities (NRAs) concerning market definition, the designation of undertakings with significant market power and the imposition of remedies, and to cooperate and work together with the NRAs. Article 2(a) of the BEREC Regulation require BEREC to develop and disseminate among NRAs regulatory best practice, such as common approaches, methodologies or guidelines on the implementation of the EU regulatory framework.

On 12 January 2012, the European Commission (the Commission) registered a notification from the Dutch NRA, Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA), concerning OPTA's decision in relation to (i) the fourth review of the wholesale market for voice call termination on individual public telephone networks provided at a fixed location and (ii) the third review of the wholesale market for voice call termination on individual mobile networks in the Netherlands. The Commission initiated a Phase II investigation with a serious doubts letter³ on 13 February 2012 (the serious doubts letter). Under Article 7a(1) of the Framework Directive, this has the effect of preventing the adoption of the notified draft measures for a three month period from the date of the serious doubts letter (the standstill period).

Article 7a(3) of the Framework Directive requires BEREC, within six weeks of the start of the standstill period, to issue an opinion on the serious doubts letter, indicating whether it considers that the draft measures should be amended or withdrawn. BEREC may also provide specific proposals in relation to any such amendment or withdrawal. Article 7a(2) of the Framework Directive also requires BEREC to cooperate closely with the Commission and OPTA during the standstill period, to identify the most appropriate and effective measure in the light of the objectives laid down in Article 8 of the Framework Directive.

An Expert Working Group (the EWG) was established immediately after receipt of the serious doubts letter with the mandate to provide an independent expert opinion on the justification of the Commission's serious doubts on the case, in accordance with Article 7a(3)

¹ Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services

² Regulation (EC) 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

³https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp?FormPrincipal: idcl=FormPrincipal: id3&FormPrincipal_SUBMIT=1&id=af09c3eb-ca65-46ad-b6b7-e70190ccbfc9&javax.faces.ViewState=rO0ABXVyABNbTGphdmEubGFuZy5PYmplY3Q7km5YnxBzKWwCAAB4cAAAAAN0AAEzcHQAKy9qc3AvZXh0ZW5zaW9uL3dhaS9uYXZpZ2F0aW9uL2NvbnRhaW5lci5qc3A=

of the Framework Directive. The mandate of the EWG was to draft an opinion containing a summary of the notification and the serious doubts, the experts' analysis, clear conclusions on whether the draft regulatory measure is compatible with the EU Regulatory Framework and possible alternative proposals from BEREC.

The EWG first met on 20 February 2012 in London. OPTA also attended part of that meeting in order to explain the case to the EWG and provide further information and clarification in response to questions. Certain follow-up questions were also sent to OPTA after that meeting and OPTA responded on 28 February. A further meeting of the EWG was conducted by conference call on 7 March 2012. The EWG also spoke to representatives of the Commission by conference call on 7 March, to seek clarification on specific aspects of the serious doubts letter.

A draft opinion of the EWG was finalized on 15 March 2012 and presented to the BEREC Board of Regulators for comment. The final opinion was adopted by a majority of the BEREC Board of Regulators on 23 March 2012, and is now issued by BEREC in accordance with Article 7a(3) of the Framework Directive. BEREC's conclusions and recommendations are to be found in chapters 3 and 4 of this opinion.

2 The serious doubts raised by the Commission

Background

In May 2009, the Commission issued a recommendation in relation to fixed termination rates (FTRs) and mobile termination rates (MTRs) (the Recommendation).⁴ In the Recommendation the Commission recommends that FTRs and MTRs should be based on the costs incurred by an efficient operator, and that the evaluation of efficient costs should be based on the use of a pure BULRIC⁵ cost methodology.

On 7 July 2010, OPTA published its market analysis of the wholesale markets for call termination on individual public telephone networks provided at a fixed location (Fixed Call Termination or FCT) and for voice call termination on individual mobile networks (Mobile Call Termination or MCT) (the Original Decision).⁶

Pursuant to Article 8(2) of the Access Directive,⁷ the Original Decision imposed conditions on FCT and MCT providers designated as having significant market power on the markets for FCT and MCT. The conditions included a price control for both MTRs and FTRs, pursuant to Article 13 of the Access Directive. The price controls were based on the pure BULRIC⁸ cost standard.

A number of communications providers in the Netherlands appealed the Original Decision to the relevant national court, the Dutch Trade and Industry Tribunal (the CBb). The appeals covered a range of issues, but of particular relevance to this opinion, T-Mobile Netherland B.V., Vodafone Libertel B.V., Koninklijke KPN N.B., KPN B.V., Telfort B.V., and Lycamobile Netherlands B.V. all appealed OPTA's decision to set the price controls on the basis of the pure BULRIC cost standard.

The CBb issued its judgment on 31 August 2011.⁹ The judgment upheld the appeals in relation to the choice of cost standard, ruling that both price controls should be set by

⁴ Recommendation 2009/396/EC of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU.

⁵ Bottom-up Long Run Incremental Cost

⁶ <https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp?FormPrincipal: idcl=FormPrincipal: id3&FormPrincipal: SUBMIT=1&id=0e29eeca-82b7-4e73-9900-56db78310900&javax.faces.ViewState=rO0ABXVyABNbTGphdmEubGFuZy5PYmplY3Q7kM5YnxBzKWwCAAB4cAAAAAN0AAAEycHQAKy9qc3AvZXh0ZW5zaW9uL3dhaS9uYXZpZ2F0aW9uL2NvbnRhaW5lci5qc3A=>

⁷ Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities.

⁸ Pure Bottom-up Long Run Incremental Cost

⁹ <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR6195>.

reference to the plus BULRIC cost standard.¹⁰ In relation to MCT, the CbB was able to set revised plus BULRIC MTRs in the judgment, as these had already been calculated by OPTA and were included in the Original Decision. In relation to FCT and direct interconnection (the rates for the physical interconnection services required to terminate calls), the CbB instructed OPTA to take a new decision setting the relevant rates on the basis of plus BULRIC.

The notified draft measure

On 12 January 2012, OPTA notified the Commission of a draft decision following the CbB's judgment.¹¹

The draft decision on FCT set the plus BULRIC rate on a glide path to 0.37 eurocent per minute, reaching that level on 1 May 2012. The draft decision also presented the glide path set by the CbB for MTRs, on a glide path to reach 2.4 eurocent per minute from 1 September 2012.

OPTA has advised the EWG that MTRs based on plus BULRIC are now already in force in the Netherlands as a direct consequence of the CbB's judgment. For FCT, the rates based on pure BULRIC in the Original Decision are currently in force pending OPTA's final decision.

OPTA expressed the view to the EWG that in fact it was only notifying its draft decision in relation to FCT and was not notifying a draft decision in relation to MCT, on the basis that the MTRs were in effect set by the CbB's judgment, and that no such notification was therefore required. BEREC also notes the Commission's view that the revised MTRs should have been notified, and that in any event, the draft decision appears on its face to include the MTRs, including in the summary notification form, and at Annex B to the decision itself. BEREC does not need to reach a definitive view on this for the purpose of giving its opinion on the serious doubts expressed by the Commission, and has proceeded on the same basis as the Commission, i.e. that MTRs did form part of the notification. In any event, BEREC considers that the substantive economic considerations raised in the Commission's serious doubts letter are equally applicable to FCT and MCT.

¹⁰ Bottom-up Long Run Incremental Cost with a mark up for fixed and common costs

¹¹ <https://circabc.europa.eu/d/d/workspace/SpacesStore/b1e7803a-f7ba-478a-a957-63abcda69367/OPTA%20notification%20form%20draft%20market%20decision%20fixed%20and%20mobile%20voice%20terminating%2012%20januari%202012.pdf>

The Commission's serious doubts letter

On 13 February 2012, the Commission notified OPTA, pursuant to Article 7a(1) of the Framework Directive, of its serious doubts as to the compatibility of the measures contained in the draft decision (in relation to both MCT and FCT) with EU law. In particular, the Commission expressed serious doubts as to the compatibility of the draft measures with the requirements of Article 16(4) of the Framework Directive, and Article 8(4) of the Access Directive in conjunction with Article 8 of the Framework Directive. The Commission also considered that the measures contained in the draft decision may create barriers to the internal market.

Commission's serious doubts as to the compatibility of the draft measures with EU law

The Commission noted the existence of the Recommendation, which recommends that NRAs set termination rates based on a pure BULRIC cost standard in order to promote competition, ensuring that all users derive maximum benefit in terms of choice, price and quality in line with Article 8(2) of the Framework Directive. The Commission recognised that NRAs can deviate from the Recommendation but that an alternative methodology should be duly justified in light of the policy objectives and regulatory principles of the Regulatory Framework. The Commission considered that the measures contained in the draft decision do not appear to comply with these principles and objectives, and that OPTA departed from the pure BULRIC methodology without providing any economic justification to show that the plus BULRIC methodology would equally promote efficiency and sustainable competition and maximise consumer benefit in the Dutch market.

In particular, the Commission considered that the proposed plus BULRIC methodology may lead to competitive distortions between fixed and mobile operators and/or between mobile operators with asymmetric market shares and traffic flows.

Creation of barriers to the internal market

The Commission did not address this point in substantial detail, but considered that termination rates above the pure BULRIC efficient level would allow terminating operators in the relevant Member State to benefit at the expense of originating operators (and ultimately consumers) in other Member States where termination rates are set at the pure BULRIC level. The Commission noted that this was the primary purpose of the Recommendation.

The Commission also observed that MTRs set at the efficient pure BULRIC level contribute to a level playing field at EU level, by eliminating competitive distortions between fixed and mobile networks.

Commission's conclusion

The Commission considered that OPTA did not provide any economic justification as to how the measures contained in the draft decision meet the policy objectives and regulatory principles of Article 8 of the Framework Directive, in line with Article 8(4) of the Access Directive. As such, the Commission had serious doubts as to the compatibility of the draft decision with EC law. The Commission also believed that the draft measures would create barriers to the internal market. Nonetheless the Commission did not explicitly address the key legal issue that OPTA's draft notification essentially implemented a legally binding judgment from the Dutch Trade and Industry Tribunal (the CBb).

3 Assessment of the justification of serious doubts

General observations

3.1.1 The Original Decision

As set out above, in its Original Decision OPTA proposed to designate all active operators providing FCT and/or MCT as having SMP on their respective markets in the Netherlands. The main criteria considered by OPTA when reaching its conclusion on the SMP designation were: market shares (each operator had 100 per cent market share on its own network), entry barriers, countervailing buyer power and lack of potential competition. OPTA designated 35 providers of FCT and 10 providers of MCT.

OPTA proposed to maintain the previously imposed remedies (under case NL/2008/0830 on FCT and under case NL/2007/0634 on MCT) on all operators, i.e. (i) price control, (ii) network access obligations and (iii) transparency.

With respect to the price control remedy, OPTA explained that the target price caps for both FTRs and MTRs would be based on a pure BULRIC model from 2012, in line with the Recommendation. According to the Original Decision, the pure BULRIC price control methodology was chosen in order to address the identified competition problems of excessively high termination rates and possible margin squeeze. The excessively high termination rates result in an inefficient retail pricing structure, and the costs are passed on to consumers in higher retail prices. Another competition problem discussed in OPTA's Original Decision was the risk of double marginalisation which appears if fixed costs are recovered on both retail and wholesale level.¹² According to OPTA, only prices set by reference to pure BULRIC can guarantee an efficient outcome and effectively address the negative effects on the retail pricing structure identified in its analysis.

3.1.2 Substantive analysis in the Dutch judgment

We summarise below BEREC's understanding of the CbB's reasoning for ordering OPTA to apply termination rates and direct interconnection rates based on a plus BULRIC methodology.

¹² 4.8.3.5 of the court's ruling.

The CBb does not appear to dispute OPTA's economic reasoning regarding the choice of the pure BULRIC methodology to set MTRs. However, the court decided that OPTA should have investigated whether a less burdensome measure was also appropriate. According to the CBb, Dutch national law does not oblige OPTA to adopt precisely the measure which maximises consumer benefits regardless of the consequences for the regulated operators. In this regard, the CBb stated that it is necessary to assess the proportionality of the measure.

The CBb's assessment of the appropriateness of the price control measure was based on its compatibility with the concept of cost-orientation. According to the CBb's interpretation of the Dutch national law, namely Art. 6a.7(2) of the Telecommunicatiewet (Telecommunications Act), OPTA should not have used a cost methodology which was *more onerous* for the regulated operators than an alternative cost methodology which determines cost-oriented rates.¹³

Although OPTA argued that plus BULRIC would not remedy the inefficient retail pricing structure created by termination rates above the pure BULRIC level, the CBb stated that these harmful effects arise on the retail market which is considered effectively competitive and not on the wholesale market regulated under the pure BULRIC methodology. In addition, the CBb noted that an inefficient pricing structure on the retail market is not recognised as a competition problem in the ERG Common Position on Appropriate Remedies.¹⁴ According to the court, these circumstances do not support the choice of the pure BULRIC methodology as an appropriate price control measure under Dutch national law.¹⁵ In OPTA's view, it was central to the case that while rates above pure BULRIC may have given rise to 'negative effects' on the retail market, this is not a recognised "competition problem", and the CBb did not consider that pure BULRIC was *necessary* to remedy the identified competition problem of excessive pricing that could be adequately remedied through plus BULRIC termination rates.

The CBb decided that its conclusions are not affected by the Recommendation. According to the court, the obligation of national regulatory authorities to take into utmost account the recommendations of the Commission does not affect the obligation of OPTA to deviate from the non-binding Recommendation if the latter would lead them to act in violation of the national law.

¹³ 4.8.3.4.

¹⁴ http://erg.eu.int/doc/meeting/erg_06_33_remedies_common_position_june_06.pdf

¹⁵ 4.8.3.4

Based on the above reasoning, the CBb decided that the decision to impose MTRs based on pure BULRIC was not appropriate, and therefore, in conflict with Article 6a.2(1) of the Dutch Telecommunications Act.¹⁶ The same conclusion was reached regarding the appropriateness of using the pure BULRIC methodology to set FTRs, and the CBb annulled OPTA's decision in this part as well.¹⁷

The court went on to discuss whether the information presented by the parties was sufficient for the court to resolve the matter itself and issue a ruling which obliges OPTA to use the plus BULRIC methodology. The court decided that plus BULRIC is in principle an appropriate measure under the Telecommunications Act and discussed in detail whether this methodology meets the impact assessment test. The court's ruling contains a detailed discussion of the evidence presented by the parties in relation to the plus BULRIC model, and the costs which should be included in that model.¹⁸

The conclusion of the CBb was that plus BULRIC is indeed an effective measure and should be imposed to regulate termination and direct interconnection rates.

The CBb itself set the price cap for MTRs at 0.056 €/min as of 7 July 2010, 0.042 €/min as of 1 January 2011, 0.027 €/min as of 1 September 2011, and 0.024 €/min as of 1 September 2012 on the basis of the plus BULRIC methodology and OPTA's own calculations. The CBb ordered OPTA to take a new decision to set direct interconnection rates on the basis of the same costing methodology.¹⁹

The CBb ordered OPTA to take a new decision to set FTRs as well as the rates for direct interconnection. Since one of the contested issues by the operators was the cost of VoIP licences, the court advised OPTA to reconsider the level of costs used in the model. The CBb directed OPTA to set FTRs and rates for direct interconnection with fixed networks under a plus BULRIC methodology.

¹⁶ 4.8.3.7.

¹⁷ 4.8.3.8.-4.8.3.9.

¹⁸ 4.8.3.15.-4.8.3.30.

¹⁹ Section 5 of the CBb judgment

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

3.2.1 Concerns of the Commission

In its serious doubts letter, the Commission considers that OPTA departs from the pure BULRIC methodology without providing any economic justification showing that the proposed plus BULRIC methodology would equally promote efficiency and sustainable competition and maximise consumer benefits, in accordance with Recital 20 of the Access Directive. The Commission doubts that the proposed plus BULRIC methodology would allow the achievement of those objectives, as it may lead to competitive distortions between fixed and mobile operators and/or between mobile operators with asymmetric market shares and traffic flows. In the present case, the Commission considers that OPTA has not shown that the proposed plus BULRIC methodology would equally allow achieving these regulatory objectives.

3.2.2 BEREC opinion

OPTA has stated that it considers that there is no requirement for it to provide an *economic* justification for its draft notification, and that the existence of the binding CbB's judgment is sufficient, under Article 19 of the Framework Directive. According to Article 19 of the Framework Directive, NRAs should take the utmost account of the Commission's recommendations, including, in relation to MTRs and FTRs, the Recommendation. When a NRA does not follow a recommendation, it has to inform the Commission and give the reasons for its position. The draft measures notified by OPTA depart from the Recommendation and OPTA justifies this departure on the basis of the legally binding nature of the CbB's judgment.

BEREC notes that recommendations made under Article 19 of the Framework Directive are not legally binding and that an NRA has some leeway to deviate from them. However, BEREC notes that although the serious doubts letter refers to the Recommendation, the Commission's serious doubts relate specifically to the compatibility of the draft measures with Article 8(4) of the Access Directive (and Recital 20 to the Access Directive) and Articles 8 and 16(4) of the Framework Directive. Even if Article 19 of the Framework Directive does not explicitly ask for economic reasons, NRAs have to take into account these provisions of the Regulatory Framework. As such, the draft measures should be based on the nature of the problem identified, proportionate and justified in the light of the objectives of the

Regulatory Framework (Article 8(4) of the Access Directive) and also be appropriate (Article 16(4) of the Framework Directive). Moreover, the method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximize consumer benefits (Recital 20 to the Access Directive). BEREC notes that the requirements set out under these provisions are predominantly economic in nature. BEREC's substantive views on the general economic merits of pure BULRIC and plus BULRIC in the Dutch market are set out below.

Compared to pure BULRIC, a plus BULRIC method includes not only the avoidable costs of termination but also a contribution to the costs that are common to termination and other services. BEREC considers that, in the case of termination services, a pure BULRIC approach is generally the most appropriate for the following reasons:

- According to recital 20 of the Access Directive, the method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximize consumer benefits. Termination markets are an instance of two-way access²⁰ where both interconnecting operators are presumed to benefit from the arrangement but, as these operators are also in competition with each other for subscribers, termination rates can have important strategic and competitive implications.²¹ A pure BULRIC approach takes into account this specific characteristic of the termination markets, as it takes into account that the common costs can be recovered from services other than termination.²² The notified measures do not justify why plus BULRIC should be more appropriate to the circumstances of the termination markets in the Dutch market.
- There is an objective reason to recover common costs on retail markets rather than on the wholesale termination markets. By taking into account pure incremental costs when determining termination rates operators are being encouraged to recover their common costs on retail markets (on which there is a price constraint) and not on a monopolistic market (on which there is a risk of excessive prices). Moreover, operators have a disincentive to lower their off-net call prices because by so doing they generate more outbound traffic which attracts outpayments to rivals. If

²⁰ This is distinct from a situation of one-way access such as in local loop unbundling markets.

²¹ Explanatory note accompanying the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU.

²² In particular, wholesale termination rates directly affect the marginal cost of off-net calls. As the demand elasticity for off-net calls is likely to be higher than the demand elasticity for bundles of calls in retail price plans, from a static efficiency point of view it is probably best to recover the common costs from the latter.

termination rates decrease, the cost of terminating calls decreases for each operator and retail price competition increases as operators have stronger incentives to reduce their call charges. Lower termination rates would increase competition in call charges, so pure BULRIC delivering lower termination rates should be preferred in general to plus BULRIC. Pure BULRIC is therefore generally more appropriate to promote competition and to ensure that users derive maximum benefit in term of price. The notified measures do not justify why plus BULRIC would be a more appropriate cost standard in light of these objectives in the Dutch market.

- The pure BULRIC method is also more appropriate to reduce competitive distortions between fixed and mobile operators. MTRs generally include part of the mobile access costs that are therefore recovered from fixed callers. On the other hand, all fixed access costs are recovered through retail charges. Fixed operators are also generally constrained to some extent in their ability to offer flat rates for mobile call services as part of their flat-rate packages, due to MTRs being significantly higher than FTRs. Compared to plus BULRIC, pure BULRIC generally reduces the asymmetry in absolute levels between FTRs and MTRs. Therefore the pure LRIC methodology in general better meets the objectives of Article 8(2) of the Framework Directive, according to which NRAs should promote competition by ensuring that there is no distortion or restriction of competition in the electronic communication sector. The notified measures do not justify why plus BULRIC would be a more appropriate means of reducing the competitive distortions between fixed and mobile operators in the Dutch market.

As a result, a pure BULRIC methodology in general better satisfies the objectives of the Regulatory Framework. OPTA proposes however to apply a plus BULRIC methodology in the Dutch market without providing an appropriate economic justification. BEREC therefore considers that the Commission's serious doubts, as narrowly expressed in its letter to OPTA of 13 February 2012 (i.e. without explicitly addressing the legally binding nature of the CbB's judgment for OPTA), are justified.

Creation of Barriers to the Internal Market

3.3.1 Concerns of the Commission

The Commission is concerned that higher termination prices set by the OPTA on the basis of plus BULRIC may create barriers to the internal market as the terminating operators in the

Netherlands will be able, on the basis of the calling party pays principle, to benefit from this (higher) rate at the expense of the operators, and ultimately the consumers, in the Member State from which the call originates where termination rates are set using the pure BULRIC methodology. Hence, continues the Commission, the considerable difference in absolute terms derived from a price cap based on a methodology which would not ensure a cost-efficient level (at least in part) would be incurred at the expense of the operators, and eventually consumers, in the Member States from where the fixed/mobile calls originate.

3.3.2 BEREC opinion

To test this line of argument advanced by the Commission, BEREC first assessed whether the caps on termination rates set by NRAs (and by OPTA in particular) are reflected in the termination payments from foreign operators for calls originating from other Member States of the EU and if so, to what extent. Secondly, BEREC tried to estimate whether wholesale termination prices would be passed into the retail prices charged by the foreign operators to their retail customers and finally assessed whether this behaviour itself would create barriers to the internal market.

To find out to what extent (if at all) termination prices charged by operators for calls originating abroad are influenced by regulated termination prices set by NRAs, BEREC used results of a survey conducted in January 2012 by Belgian regulator BIPT (Belgian Institute for Postal services and Telecommunications). This survey shows that most EU countries apply the same termination rates for both national and international calls (originating in other EU Member States). This practice is followed also by operators in the Netherlands. Thus, the Commission's argument seems to be correct in that operators from other EU Member States will be forced to pay higher termination prices to Dutch operators under the regime of prices set using the plus BULRIC model.

The Commission then assumes that higher termination prices will eventually increase retail prices in those Member States from where the calls originate. BEREC agrees with the Commission, as in general terms higher wholesale costs will translate into higher retail prices in competitive retail markets in other Member States. It is, however, worth mentioning that the rates in OPTA's decision will apply equally to both Dutch consumers and consumers from other Member States, contrary to the situation in a parallel running phase II investigation (Danish Business Authority, Case DK/2012/1283), where the Commission finds the creation of barriers to the internal market in a discriminatory regulation of the NRA, because *"only Danish operators will be able to benefit from the regulated SMS termination*

tariff, whereas a higher commercial tariff is likely to be charged to foreign operators". This, according to the Commission, poses a restriction to the free movement of services, and therefore a barrier to the internal market. However, this is not the case for OPTA's draft measures as the regulated wholesale termination charges will be applied to both national and cross-border calls.

4 Conclusions and Recommendations

On the basis of the economic analysis set out in section 3 above, BEREC considers that the Commission's serious doubts, as narrowly expressed in its letter to OPTA of 13 February 2012, are justified. In particular, BEREC considers that OPTA has not offered any economic reasoning to demonstrate that a measure based on plus BULRIC is as appropriate for the Dutch market as a measure based on pure BULRIC taking account of the specificities of the termination markets, and, in particular, the need to promote efficiency and sustainable competition and maximise consumer benefits set out in Recital 20 to the Access Directive. In light of the Regulatory Framework and in the absence of any specific economic reasoning from OPTA, BEREC considers that a measure based on pure BULRIC would likely better satisfy these objectives in the Dutch market.²³ BEREC also agrees with the Commission that plus BULRIC termination rates in the Netherlands may create a barrier to the single market.

As to whether BEREC considers that the draft measures should be amended or withdrawn, OPTA has explained to BEREC that it is acting in accordance with the CBb judgment, which is legally binding on OPTA under Dutch law. OPTA considers that it is not able to engage in a substantive economic assessment when it is simply required to implement a legally binding judgment, and that its notified draft measures are therefore justified. Moreover, OPTA points out that the revised MTRs based on plus BULRIC are already in effect in the Netherlands, as a direct consequence of the CBb's judgment, so no further act of OPTA is required to adopt these measures. BEREC also notes that, given that OPTA's Original Decision included economic analysis supporting its choice of pure BULRIC, and the CBb's judgment did not overturn OPTA's underlying economic analysis, any further economic assessment by OPTA at this stage would be likely to support the views of BEREC and the Commission that pure BULRIC would be the better cost methodology in the Dutch market.

BEREC notes that Article 8(4) of the Access Directive requires that "*Obligations imposed in accordance with this Article shall be based on the nature of the problem identified*". BEREC also notes that the relevant Dutch implementing legislation appears to impose an additional requirement that the problem identified should be "on the relevant market"²⁴ and that this

²³ Although BEREC considers that a measure based on pure BULRIC would better satisfy the objectives of the Regulatory Framework in this case, it does not discount the possibility that the specific circumstances of a particular Member State might potentially provide an economic justification for a different conclusion in another case.

²⁴ 4.8.3.1 of the CBb judgment

appears to have been a relevant factor in the CbB judgment.²⁵ BEREC also notes that the CbB appears to have been of the view that pure BULRIC could not be justified by reference to an inefficient retail pricing structure, as this is not a competition problem explicitly listed in the ERG Common Position on Appropriate Remedies.

In these circumstances, in particular the legally binding nature of CbB's judgment, BEREC does not consider that it is appropriate at this stage for it to make specific proposals as to how OPTA should proceed. Under Article 7a(5) of the Framework Directive, if OPTA decides to maintain the draft measures as set out in the Notification, the Commission may either issue a recommendation requiring OPTA to amend or withdraw the draft measures within one month following the end of the three month 'standstill' period under article 7a(1), or take a decision to lift its reservations. In the meantime, BEREC intends to cooperate closely with OPTA and the Commission, in accordance with Articles 7a(2) and 7a(4) of the Framework Directive to identify the most appropriate and effective way forward. BEREC notes that similar cases are likely to arise in the future in other Member States, and that an effective resolution to this case that reduces the likelihood of similar cases arising in the future would therefore be welcomed.

²⁵ BEREC's understanding of the implementation of the Regulatory Framework into Dutch national law is based on its reading of the CbB judgment and the views expressed by OPTA. It is clearly not for BEREC to express an opinion on the implementation issue in this Opinion.