

BEREC Opinion on

Phase II investigation
pursuant to Article 7 of Directive 2002/21/EC
as amended by Directive 2009/140/EC:

Case NL/2012/1298
Market Analysis on Unbundled Access to Corporate Fibre-Optic
Network (ODF Access FTTO) – submarket to market 4 in the
Netherlands

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1 EXECUTIVE SUMMARY

On 21 February 2012, OPTA notified the Commission a draft decision concerning the market for unbundled access to fibre-to-the-office (FttO) networks (ODF–FttO access).

That market has been identified by OPTA as a relevant separate product market with a national geographic extension, and in particular a submarket of market 4 of the Recommendation. OPTA justified its market definition on the basis of a lack of substitutability i) between unbundled copper network access and FttO-ODF network access (because of higher average deployment cost) and ii) between FttH-ODF and FttO-ODF network access (because of a lack of geographic overlap of the two networks). OPTA further concluded that no operator has SMP in that specific submarket. In this regard, OPTA considered that KPN has some advantages compared to its competitors, but these advantages do not allow it to act largely independently from them.

On 21 March 2012, the Commission expressed its serious doubts to OPTA, considering that the notified draft measure would represent a barrier to the internal market. The Commission's concerns about OPTA's market definition related to the lack of sufficient evidence supporting the finding of a separate submarket for FttO-ODF access: particularly, the lack of evidence concerning higher cost and risk of FttO roll-out on one side and the partial overlap between FttH and FttO areas on the other. Regarding the SMP analysis, the Commission seriously doubted OPTA's interpretations about: market share dynamics; uncertainty in the growth of the market; the importance of KPN network coverage and KPN vertical integration – and its implications on SMP findings.

In accordance with the BEREC "Procedures for Article 7 and 7a Phase II", an expert working group (EWG) was established with the mandate to provide an independent expert opinion on the Commission's serious doubts.

Having reviewed OPTA's reasoning against Commission's concerns, BEREC's opinion is as follows:

(a) BEREC believes that OPTA provided enough evidences regarding the lack of substitutability between unbundled copper network access and FttH-ODF network access on one side and FttO-ODF network access on the other. Therefore, BEREC reckons that the Commission's serious doubts relating to the market definition may be not justified.

- i. On the cost and risk of FttO, BEREC appreciates the assumptions plausible and the argumentations correctly developed. Therefore, BEREC is not supporting the Commission's serious doubt.
- ii. On the partial overlap between FttH and FttO areas, BEREC generally agrees with the Commission argument. Nevertheless, BEREC considers the quantification of such argument as negligible and therefore BEREC believes that it should not affect OPTA conclusion.

Finally, about the market definition, BEREC would like to emphasise that its opinion applies to the specific market conditions in the Netherlands and no general conclusion could be therefore inferred.

(b) On the effectiveness of KPN competitive advantage, BEREC records some uncertainty concerning future growth projections and the presence of certain level of infrastructure-based competition in the market. Nevertheless, BEREC agrees with the Commission's serious doubts and therefore shares Commission's view in favour of designating KPN as SMP operator.

2 INTRODUCTION

2.1 Legal Basis and Development of the Procedure

According to article 7(3) of the Framework Directive¹ (FD), where a National Regulatory Authority (NRA) intends to adopt a regulatory decision defining or analysing a relevant market (under article 15 and 16 FD), the draft measure has to be made accessible to the Commission, BEREC and other NRAs.

On 21 February 2012, the European Commission (Commission) registered a notification from the Dutch Regulatory Authority - *Onafhankelijke Post en Telecommunicatie Autoriteit* (OPTA) - concerning the market for unbundled access to fibre-to-the-office (FttO) networks (ODF-FttO access), a submarket of the wholesale market for (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location.

Article 7(4) FD provides that if the NRA's draft measure deals with the definition of a relevant market different from those defined in the Recommendation or the designation of an undertaking with significant market power, the Commission can inform the NRA concerned and BEREC about its serious doubts as to the compatibility of that measure with Community law ("the serious doubts letter").

The serious doubts letter has the effect of preventing the adoption of the notified draft measures for two months. Within that period the Commission may take a decision requiring the NRA to withdraw its draft measure and/or take a decision to lift its serious doubts.

On 6 March 2012, the Commission sent to OPTA a letter requiring further information and clarifications about the notified draft measure. OPTA responded to the request by the deadline indicated. After OPTA's response, on 21 March 2012, the Commission expressed its serious doubts to OPTA, considering that the notified draft measure would represent a barrier to the internal market.

Under Articles 7 FD and Article 3.1 (a) of the BEREC Regulation², BEREC has the task to deliver an opinion on draft measures of NRAs concerning market definition and the designation of undertakings with SMP, and to cooperate and work together with the NRAs. Before issuing its decision, the Commission has to take utmost account of the BEREC opinion, which is elaborated following the "Procedures for Article 7 and 7a Phase II".³

¹ Directive 2002/21/EC of the European Parliament and of the council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) as amended by Directive 2009/140/EC and Regulation 544/2009.

² Regulation (EC) No 1211/2009 of 25 November 2009, establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

³ BoR (10) 61 Rev1- Procedure for the elaboration of the BEREC Opinion in article 7 and 7a Phase II.

In order to draft BEREC opinion, an Expert Working Group composed of NRAs and Office representatives (BEREC EWG) was established immediately after receipt of the serious doubts letter.

The BEREC EWG first met on 30 March 2012 in Riga. Part of that meeting was devoted to two separate telephone conferences: firstly with OPTA's and secondly with the Commission's officials. In the two conference calls OPTA and the Commission provided further information and clarification in response to questions from the BEREC EWG. Furthermore, on 12 April OPTA answered a few additional questions through an email exchange.

A draft opinion of the BEREC EWG was finalized on 17 April 2012 and presented to the BEREC Board of Regulators for comments. As a result, a second draft has been completed on the 23 of April and submitted to the Board of Regulators for electronic voting. On 24 April 2012 the final opinion was adopted by the BEREC Board of Regulators, acting by a two-thirds majority of its members.

2.2 Substantial Background: Market 4 reviews in the Netherlands

On 21 February 2012, OPTA notified the Commission a draft decision concerning the market for unbundled access to fibre-to-the-office (FttO) networks (ODF–FttO access), which has been identified by OPTA as a relevant separate product market with a national geographic extension. In particular, that market has been considered a submarket of the wholesale market for (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location: market 4 of the Recommendation on relevant product and service markets⁴. OPTA further concluded that no operator has SMP in that specific submarket.

The notified draft measure relates to the third round review of the wholesale market for (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location. The present review is composed of another OPTA decision adopted on 29 December 2011, previously notified to the Commission (NL/2011/1278). In that regulatory measure, OPTA found that access to the copper connection network of KPN (on the basis of MDF and SDF access) and access to the residential fibre-optic connection networks (ODF access (FttH)) form part of the same relevant market, while ODF access (FttO) does not. Moreover, OPTA identified KPN as a company enjoying SMP on that market and imposed obligations on it. The Commission expressed comments⁵ on that decision concerning the lack of notification of the full market 4 (i.e. necessity to notify at the same time also the market for FttO access), although the Commission did not object to the market definition proposed.

⁴ Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC.

⁵ Comments letter 21 December 2011, SG-Greffe (2011) D/25142.

In the previous round of market analysis concerning the Dutch market 4 (cases NL/2008/0826 and NL/2010/1041)⁶, OPTA included both access to copper loops (based on MDF and SDF access) and to fibre loops (based on ODF access) without differentiating between FttH and FttO in the wholesale market 4. Both 2008 and 2010 decisions were overturned by Court rulings⁷ stating that OPTA had not substantiated to a sufficient extent the inclusion of unbundled FttO loops in the relevant wholesale product market. In particular the Court was not convinced that the consistent price differences would have allowed a sufficient substitutability on the demand side.

In this regard, the Commission - in its comments letter on the 2010 case⁸ - was not fully convinced that the same chain of substitution between fibre and copper based products, which characterised residential and urban area, applied to the same extent in business parks where there is a business customers' demand for symmetrical capacity connections that can only be provided by fibre networks laid in those areas (FttO networks). However, in the absence of sufficiently important price differences and of plans by FttO operators to further expand their networks to other business parks (all business parks largely having been served), and the evidence provided by OPTA indicating that KPN would have SMP also on a differently defined product market, the Commission only invited OPTA to strengthen its decision in terms of market definition.

In the present round of market 4 review, and in particular in the draft decision notified on 21 February 2012, the Commission has expressed its concerns on OPTA draft decision. The Commission serious doubts refer to the lack of sufficient evidences supporting both a) the finding of a separate submarket for FttO-ODF access and b) the non-existence of an SMP operator. Accordingly, the Commission considers the draft decision as potentially having an effect on the ability of any undertaking established in other Member States to offer electronic communication services and therefore the draft measure would create barriers to the internal market.

Within the present opinion, BEREC takes into consideration the reasoning adopted by OPTA in the above mentioned draft decision and the Commission's serious doubts both on market definition (section 2) and SMP designation (section 3). At the end of each of those sections, BEREC assessment is expressed. Some final remarks are elaborated in the last part of the opinion (section 5).

⁶ As a matter of fact, the 2010 decision represented a recovery decision of the 2008 one, requested by the Dutch court and aimed at improving the motivation of the market definition, in particular about the substitutability of MDF-access and ODF-FttO access.

⁷ Trade and Industry Appeals Tribunal, decision 3 May 2011, AWB 10/498, AWB 10/536 and AWB 10/545, LJN: BQ3135.

⁸ Comments letter 15 March 2010, SG-Greffe (2010) D/3098.

3 MARKET DEFINITION

3.1 OPTA reasoning

OPTA considers the FttO-ODF access market as a separate submarket of Market 4⁹ with a national geographic extension. OPTA's analysis does not include the 3-criteria test since the market has been considered as covered by the scope of the Recommendation on relevant markets.¹⁰

OPTA's arguments are mainly based on the following features of FttO-ODF access and the underlying retail markets:

- a) Self-supply market composed only by vertically integrated operators. Market for FttO-ODF is composed by operators that are all vertically integrated, at least to a certain extent. There is no merchant market as the market is solely composed of internal supply to the product chain of each operator.¹¹
- b) Different types of end-users in different areas. OPTA differentiates categories of end-users: business customers using services delivered via FttO networks and residential customers purchasing services over FttH networks. Although a limited overlap in the type of end-users could occur, almost all end-users in FttH areas are residential customers and all end-users in FttO areas are business customers.
- c) Different network deployment strategies for FttO. FttH network is largely rolled-out on the basis of area glazing or demand bundling, while FttO network is deployed on the basis of small-scale demand bundling. In 2011 KPN changed its FttO roll-out strategy in this regard discontinuing its FttO pre-investments and focusing on the upgrading of its copper network. In that respect OPTA adjusted its network vision (compared to its previous decisions) according to the new KPN FttO roll-out strategy.
- d) Different (higher) costs for FttO-ODF access. OPTA cannot exactly determine what is the difference between the market prices for FttO-access and unbundled copper access (and FttH-access) since at present there is no external supply of FttO-ODF access.¹² OPTA had therefore to estimate a market price for FttO-access, which strongly depends on the expected future network rollout. The new OPTA network vision implies less certainty with regard to future demand, leading to a shorter depreciation period and a lower penetration rate (accompanied by an average lower density in FttO areas) and consequently higher investment costs per FttO connection.

⁹ Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location.

¹⁰ The Commission has not objected this approach.

¹¹ A very different situation characterised the FttH-ODF and unbundled copper access market where KPN (jointly with Reggefiber) as a market share of nearly 100% and where different alternative operators purchase wholesale access.

¹² For FttO-ODF access, depending on the type of area, KPN charges prices between € 85 and € 355 per month, while the rates for unbundled MDF access are regulated and have a cap of € 6.54 per month. Nevertheless, OPTA acknowledges that it cannot be easily established if these rates could arise (be kept) on a competitive market.

OPTA therefore adopted the conclusion that FttO access market prices are not likely to be similar to the unbundled copper and FttH access prices.

In light of these characteristics, OPTA justifies its market definition on the basis of a lack of substitutability between unbundled copper network access and FttH-ODF network access on one side and FttO-ODF network access on the other.

As regards unbundled copper access, OPTA observes that at least to a certain extent the same services can be supplied via ODF-FttO access and via unbundled copper access and that quality differences sometimes are not relevant, despite a higher capacity and sometimes a higher availability guarantee, in the form of protected access on FttO-networks. However, OPTA indicates relevant differences in terms of cost (and pricing). Therefore, OPTA believes that demand substitutability from unbundled ODF-FttO access to unbundled copper access is not likely to happen since purchasers of FttO-based services would not switch from fibre to copper because of a small but significant and non-transitory price increase.¹³

As regards ODF-FttH access, although highlighting that the difference between FttO and FttH is not of a technical nature, OPTA explains that supply-side and demand-side substitution between FttH-ODF access and FttO-ODF access is not possible because those networks do not geographically overlap.

Regarding the geographical market definition, OPTA defines the FttO-ODF access market as national.¹⁴ The supply structure of the market is determined by KPN's virtually nation-wide coverage and the comparable overall coverage of other fibre optic suppliers. KPN has one national tariff scheme where four different pricing - areas are identified (but not actually used in a merchant market). According to OPTA the distinction between the areas mainly reflects cost differences (different density and digging costs) and it is not indicating different competitive conditions.¹⁵ Moreover, the borders of those areas - which are very fragmented - are not stable and change accordingly to the deployment of new connections.

3.2 Commission's concerns

The Commission's concerns about OPTA's market definition of FttO networks relate to the lack of sufficient evidence supporting the finding of a separate submarket for FttO-ODF access, mainly based on:

- a) Lack of evidence concerning higher cost and risk of FttO roll-out. The Commission considers that since FttH areas were rolled-out primarily on the basis of area glazing, i.e., without prior contractual commitment by the end-users to connect, the investment risk can be considered as higher by several factors than in case of an FttO

¹³ In order to assess the substitutability OPTA performed the SSNIP test as indicated in point 40-43 of the Commission guidelines on market analysis and the assessment of significant market power (2002/C 165/03).

¹⁴ Despite its request of information about the definition of geographic market, at the end the Commission has not raised concerns on it.

¹⁵ As a matter of fact, the relative presence of alternative operators in these areas is variable and no data regarding KPN market share for different tariff area is available.

investment, as the latter is carried out on the basis of either grouped or individual actual connection requests. In addition, the intrinsic investment cost in an FttH area is likely to be higher, due to the larger coverage area and the likely higher end-user density.

- b) The absence of overlap between FttH and FttO areas. The Commission emphasises that OPTA recognizes an overlap not only in the types of retail services provided over FttH and FttO, but also in the type of customers. As such, there are business customers in the FttH areas, who would indirectly benefit from regulated FttH-ODF access prices. OPTA's market definition approach could eventually lead to a situation where, in the absence of regulation as proposed, business customers in some specific areas connected to FttO would pay higher prices for what are essentially the same services as those delivered to business customers connected to (regulated) FttH networks.

3.3 BEREC assessment

BEREC believes that OPTA provided enough evidences regarding the lack of substitutability between unbundled copper network access and FttH-ODF network access on one side and FttO-ODF network access on the other. BEREC considers this lack of substitutability, which is precisely related to the specific characteristics of the Dutch FttH/FttO networks as described in section 2.1, to be supportive of OPTA's definition of a separate relevant market for FttO-ODF access.

In light of the evidence brought forward by OPTA, BEREC reckons that the Commission's serious doubts relating to the market definition may therefore be not justified. The Commission's serious doubts about market definition are assessed in what follows.

Cost and Risk of FttO deployment

Based on the account facts and reasoning produced by OPTA, BEREC appreciates the assumptions and argumentations plausible and correctly developed. Therefore, BEREC is not supporting the Commission's first serious doubt about the higher cost of FttO roll-out.

In its decision, in order to verify the substitutability on the demand-side between unbundled copper access and FttO-ODF access, OPTA made an estimation of a market price for FttO-ODF access.¹⁶ OPTA based its analysis on the assumption that KPN's present and future FttO roll-out is mostly based on small-scale demand bundling. This assumption led OPTA to consider in its assessment a shorter depreciation period and a lower penetration rate, which - coupled with an average lower density in FttO areas - implied higher investment costs per FttO connection.

The recent development of KPN's strategy, mainly focusing on upgrading its copper network rather than deploying its FttO network, is recorded - confirming OPTA assumption - and may

¹⁶ OPTA could not take into consideration KPN FttO-ODF wholesale access prices (ranging from 85 to 355 euros per month + 500/1400 euros one-off) as no alternative operator is currently purchasing access. Thus those prices, even though are much higher than regulated unbundled copper access prices (6.45 at MDF / 7.41 at SDF euros per month), are not signalling any clear information neither about costs nor about demand elasticity.

justify differences in terms of respectively cost and pricing. This is in particular in line with the consideration that KPN's new strategy will lead to much less business customers connected to FttO networks than previously expected.

It is therefore most likely that this factor will finally have an impact also in terms of higher prices for business customers located in FttO areas. In this regard, OPTA reported price differences between business products based on copper (and FttH-access) on one side and products based on FttO-access on the other. These differences, according to OPTA analysis, can be as well explained by differences in the underlying costs of rolling out the network in consumer areas and business areas (density, distances between locations and the type of roll-out)¹⁷.

Considering the above elements and the perceived higher quality as one of the key-drivers for adopting FttO access, BEREC agrees with OPTA on the unlikeliness of a demand substitution from ODF-FttO access to unbundled copper access as a consequence of a relative price increase of the former.

However, in this context the Commission opposes the consideration that the risk of an FttH investment could be higher than the risk of an FttO investment as the latter is carried out on the basis of "investment on demand". The quantification of differentiated investment risks between FttH and FttO deployments would require a complex specific analysis; anyway BEREC does not share the implication on the definition of the relevant market of this Commission's argument, because of two main reasons:

- a) The investment risk, which has to be considered in the cost of capital of the SMP operator for the purpose of setting access prices, has a smaller relevance - compared to average cost per unbundled access - in determining the competitive price to be used within the "hypothetical monopolist test".
- b) From OPTA estimations, average costs per unbundled copper access (and per unbundled access in FttH-areas - which form part of the same relevant market) seem to be lower compared to FttO areas. This outcome of OPTA's market analysis is due to larger coverage area and higher end-user density (e.g. the average digging costs per residential customer in FttH areas compared to business customers in FttO areas).

In line with these considerations, BEREC is of the opinion that OPTA provided enough evidences that its past assumptions¹⁸ are no longer endorsed by the recent and prospective

¹⁷ Prices of internet retail for FttO services (quality 1:10) vary between 875 one-off + 190 per month (business area at 10 MB) / 2125 one-off + 759 per month (city area at 50 Mb). Internet retail prices for xDSL on copper extend between 275 one-off + 30 per month (ADSL start best effort quality) / 570 one-off + 625 per month (SDSL business quality 1:1). Finally for FttH business services prices (best effort quality) are: 45/55 euros per month (50/100 Mb). These data are based on KPN tariffs published on the internet and provided by OPT within email exchange on 12 April 2012.

¹⁸ As highlighted in section 1.2, in the previous round of market analysis, those decisions with OPTA including both access to copper loops and to fibre loops (based on ODF access) without differentiating between FttH and FttO in the wholesale market 4, were overturned by Court rulings.

market developments and therefore a lack of substitutability between FttO-ODF network access and unbundled copper network access (/FttH-ODF access¹⁹) could be reported.

Relevance of overlap between FttO and FttH areas

OPTA analysis shows that the Dutch retail markets over fibre (internet access, fixed telephony, corporate network services) are composed of business customers using services delivered via FttO networks and residential customers purchasing services over FttH networks. Moreover, FttO and FttH areas do not geographically overlap, which according to OPTA imply that FttH-ODF and FttO-ODF accesses are not direct substitutes.

In BEREC's view this argument is reasonable because the differentiation of geographical coverage of the two networks and the differentiation of type of end-users in different areas prevent the usage of the FttO network in FttH areas and vice-versa.

However, OPTA admits that an overlap in the type of end-users of FttH and FttO networks and in the type of retail services provided over both networks is possible (specifically business end-users who are located in FttH areas). This seems to support the Commission's second concern focusing on the situation of business customers in FttH areas benefiting from lower (regulated) access prices compared to business customers in FttO areas paying higher (non-regulated) access prices.

BEREC generally agrees with this Commission argument and it seems to be a matter of significant price discrimination. Nevertheless, BEREC considers such overlap as negligible as business end-users located in FttH areas are estimated between 1 and 5% of all business end-users.²⁰

Therefore BEREC is of the opinion that the Commission's argument is not strong enough to seriously doubt OPTA's consideration of lack of substitutability between FttO and FttH access.

¹⁹ However, it might be worth noting that OPTA's cost estimation has been functional to the assessment of the substitutability between unbundled copper access and FttO-ODF access.

²⁰ Data, referring to business end-users with 5 or more employees, are based on the information delivered by OPTA on the 12th of April correspondence. In this regard, see also footnote 85 at page 50 of the draft decision.

4 SMP DESIGNATION

4.1 OPTA reasoning

The market for FttO-ODF is composed by operators which are all vertically integrated, at least to a certain extent. There is no merchant market as the market is solely composed of self-supply.

KPN is the main operator and has some advantages compared to its competitors. However OPTA believes that these advantages do not allow KPN to act largely independently from its competitors.

In deciding not to designate KPN as having SMP, it appears to BEREC that OPTA took into account the following factors:

- a) Stable market share between 40% and 45% for the period 2008-2011, which - according to the Commission's guidelines on market analysis²¹ - gives no presumption of dominance;
- b) Great uncertainty about the future development of the market. Prospective market configuration with KPN expected market shares in 2014 between 40% and 55%;
- c) Growing market, where strategic business decisions of parties can have significant influence on its development. Thus relatively less importance can be given to a high market share than in a saturated market;
- d) KPN has higher network coverage than its competitors. The competition advantage for KPN is however limited as the alternative operators together would be able to reach coverage which is comparable to KPN's. Therefore KPN's infrastructure is not difficult to replicate by third-party access to alternative networks;
- e) All operators in the market are at least to a certain extent vertically integrated, meaning that these operators (both KPN and alternative operators) are not dependent on FttO-ODF-access of third parties to provide services to the underlying markets in their own coverage areas. Even if there is some degree of buyer power, it is not sufficient to provide a counterweight to a possible dominant position of KPN;
- f) KPN has in general higher economies of scale compared to its competitors. However the economies of scale in this market are partly local and regional and are created by a higher density of connections in a particular area. There are also areas where KPN has a lower density of connections compared to its competitors, and therefore rather, fewer or no economies of scale;
- g) KPN has a more extensive product offering than the alternative operators and is therefore able to spread its fixed costs over more different types of services through which its average costs per product will be lower than the alternative operators;
- h) KPN cannot really exploit its dominant position on copper because of the existing access regulation on that market. Moreover, customers' switching costs from copper to fibre create a limited competitive advantage to KPN;
- i) There are no significant entry barriers in the market. Different vertically integrated operators are active and entry is possible also at local and regional levels;

²¹ Commission guidelines on market analysis and the assessment of significant market power (2002/C 165/03).

For these reasons OPTA assumes that KPN cannot act independently from competitors and wholesale customers.²² OPTA therefore considers that in the absence of regulation, competitors will be able to maintain their current position compared to KPN in the next regulatory period.

Moreover, OPTA believes that by not intervening in this market, in a situation where there is no clear reason to do so, OPTA gives the best investment incentives to both KPN and its competitors to proceed to further roll-out their FttO-networks.

However, because of the uncertainty of the development of the market, OPTA will monitor the developments in the market for FttO- ODF access closely.

4.2 Commission's concerns

The Commission has serious doubts about the outcome of OPTA's analysis because of the lack of sufficient evidence supporting the finding of non-existence of an SMP operator. The Commission serious doubts on OPTA's reasoning mainly concern the fact that OPTA does not consider KPN's competitive advantages to be so effective and conclusive to designate it as SMP operator.

In particular:

- a) The Commission adopts a different general interpretation of OPTA market shares dynamic: i) KPN held stable market shares over 40% for the period 2008-2011, but while OPTA stressed the fact that there was no increase, the Commission considers the lack of a clear decrease relevant for detecting market power. Moreover, only one competitor had a slight increase of market share. ii) KPN will most likely have a stable market share within the next regulatory period. In this regard, OPTA foresees that KPN in 2014 will have a market share between 40% and 55%. While OPTA highlighted the uncertainty on the evolution, the Commission stresses that no decrease of market share is foreseen.
- b) The Commission doesn't share the view of OPTA about the future growth of the market and in particular the uncertainty on the evolution of market shares that this growth could create. According to the Commission, the growth in the market will come from smaller businesses (business parks are already covered) which are less capable to connect at high network costs. That will likely limit FttO growth and give a higher competitive advantage to networks with greater coverage close to smaller businesses – most times KPN's.
- c) The Commission doesn't believe that competitors' networks, although jointly similar in coverage to KPN's, could exert a competitive constraint to KPN. This is mainly because of the multi-side coverage demand and the competitive disadvantage (in terms of efficiency and costs) of relying on several third-parties FttO network access.

²² In OPTA reasoning this is also confirmed by the fact that - in absence of regulation - wholesale customers buy FttO-access from KPN and competitors on the downstream high quality WBA market to compete on the retail markets.

According to the Commission, OPTA didn't provide enough evidences that the different coverage does not represent a high barrier to entry or at least to expansion.

- d) The Commission believes that KPN can benefit of a first mover advantages in more areas than its competitors because of its large presence and because it has not to face switching thresholds from copper. KPN can take advantage of switching its customers from copper network (and spreading deployment expenditure over multiple customers and services).
- e) The Commission does not place on an equal footing the vertical structure of the different market players. Vertical integration of KPN's competitors is limited by their limited network coverage. For the Commission, KPN is therefore the only operator which can fully benefit from its vertical integration.

The Commission notes that already at this stage, KPN has certain competitive advantages that could allow it to strengthen its position and to act independently from its competitors, customers and ultimately end-user.

4.3 BEREC assessment

BEREC shares the Commission's serious doubts about the non-existence of an SMP undertaking in the relevant market identified by OPTA. The Commission's SMP concerns against OPTA reasoning are assessed in what follows.

Market share dynamics

BEREC considers that the Commission's interpretation of KPN market share dynamic is correct. KPN's market share over 40% has been quite stable over the past three years and the fact that no decrease has occurred represents an indication of presence of SMP.

Moreover, in SMP assessments, market share is relevant as a reflection of market power. Therefore the difference between the market share of the undertaking in question and the market shares of the competitors is as relevant as its absolute dimension.²³ In this regard, the market share of KPN is more than twice that of its main competitors (all under 20%) and the market share of each of KPN's competitors is generally (excluding Eurofiber) not increasing over the relevant period. These elements give an interpretation of the relevance of KPN market shares in term of market power closer to the Commission approach.

Furthermore, BEREC considers it relevant that, taking into account the market dynamics in 2011 (when KPN's new FttO network deployment strategy has been announced and put in place), KPN took more than the majority of market growth.

Finally, OPTA foresees a development of the market structure within the next regulatory period where KPN maintains or even increases its market share. Therefore, also taking into

²³ Footnote 77 in Commission guidelines on market analysis: "The greater the difference between the market share of the undertaking in question and that of its competitors, the more likely will it be that the said undertaking is in a dominant position." *United Brands v Commission* [1978] ECR207.

consideration the uncertainty on market development, KPN's position will not be negatively affected. Considering a forward-looking approach, it is clear that the competitive conditions in the market are not improving.

Replicability of infrastructure

The market is characterized by different competing infrastructures. Therefore a certain replicability of KPN's infrastructure has been possible. However, in a context of SMP analysis, it is still significant to assess whether the control of those different infrastructures allows different competitive advantage and, in case, whether these competitive differences have the nature to impede effective competition.

KPN has a much higher network coverage compared to its competitors singularly taken. However, the competitors' combined coverage is similar to KPN's. BEREC believes that the relevance of multi-sites as a characteristic for the demand and the consequent necessary third-party access to KPN's or several other operators' networks imply a disadvantage for alternative networks operators.

Besides the high transaction costs coming from a composite third-party access, in order to competitively "duplicate" KPN infrastructure, alternative operators must also be able to purchase FttO-ODF access, which at the moment is not a merchant market (and there is no market price) and thus it could not happen readily. Furthermore, the fact that at present KPN's competitors are purchasing downstream wholesale products in order to compete in the retail markets does not represent a competitive constrain for KPN in the FttO-ODF access market²⁴, that does not represent a relevant factor for the SMP analysis, but in case in the assessment of market susceptible of ex-ante regulation and/or in the selection of proportionate remedies.

For these reasons, BEREC shares the Commission's view and believes that OPTA did not provide enough evidence in order to conclude that the competitors can easily replicate KPN's network and produce an effective constrain on KPN's competitive advantage.

Switching costs and first mover advantage

As the market is composed only of self-supply, the relevant switching costs to be considered for the SMP assessment are those applying at retail level. The retail services underlying FttO-ODF access are characterized by high switching costs: both competition for new market segments and first mover advantage are in place.

BEREC agrees with OPTA that those switching costs are in principle the same for all operators; however, high constraints on the demand side could hamper the effectiveness of competition and this outcome would favour the larger operator which is expected to take the majority of future market growth.

²⁴Further considering the serious doubts expressed by the Commission on Dutch market 5 notifications (case NL/2012/1299)

OPTA considers that most of the future growth in the market will come from small businesses, which are still connected on copper. In this regard, BEREC considers that the nature of the future demand and the presence of high switching costs between providers give a clear indication on KPN having significant market power, for the following reasons:

- a) High switching costs from fibre to fibre produce a clear first mover advantage which the larger network can benefit from in most cases, especially towards smaller sites.
- b) The presence of switching costs from copper to fibre not only represent an additional cost, but also a transaction cost which affects (increases) the likelihood of KPN to be first mover. In this regard, it is worth mentioning that the possibility of leveraging market power from copper to fibre (despite of copper ULL access regulation) is more likely for small businesses, which have not got any countervailing buyer power.

BEREC believes that these elements can present KPN with an appreciable effect on the conditions under which the competition can develop in the market.

Finally, BEREC recognises the uncertainty in the future development of the market, as highlighted by OPTA: products based either on fibre or copper, different access to infrastructure and/or WBA and uncertainty in KPN roll-out programmes. However, BEREC believes that KPN is facing a lower uncertainty compared to its competitors, since most of those market variables are to a certain extent under its control.

Vertical integration, economies of scale and -scope

OPTA and the Commission agree on the relevance of larger economies of scale and scope of KPN in order to contribute to create a SMP position. However, the Commission disagrees with OPTA's position when OPTA considers the lack of KPN's competitive advantage over competitors as deriving from the fact that all operators are vertically integrated.

BEREC's view is that the network coverage of KPN compared to the competitors puts a different light on how the respective vertical integrations could be interpreted. Therefore BEREC shares the Commission's opinion that KPN is the only operator which could fully benefit from its vertical integration.

Moreover, it is worth noting that KPN's main competitor - Eurofiber - does not operate in all of the product chain levels, and therefore it can benefit from economies of scope only to a smaller extent, due to the limited activity in the retail market.

Finally, it is BEREC opinion that the position of KPN on horizontally related markets and possible horizontal leveraging cannot be completely disregarded. This factor should be evaluated as an element of KPN's market power in ODF-FttO access.

Because of the above reasons BEREC believes that KPN can obtain relevant competitive advantages from larger economies of scale and scope and its vertical integration.

5 CONCLUSIONS AND RECOMMENDATIONS

BEREC wants first of all to emphasise that market definition concerning ODF-FttO access has been very controversial in the Netherlands during the last 4 years. This is mainly due to the complex and specific market conditions, as described in section 2.1.

OPTA first included both access to copper loops (based on MDF and SDF access) and to fibre loops (based on ODF access) in the wholesale market 4. Following two national court rulings and recent changes in the market, OPTA eventually revised its position expressed both in December notification²⁵ and February notification.²⁶ The Commission in its December comments letter²⁷ did not object to the definition of market 4, although highlighting the need of further evidences. In its present serious doubts the Commission expressed concerns about the robustness and sufficiency of the further evidences provided by OPTA.

In the present opinion, BEREC did not carry out a new market analysis but took into account facts, assumptions and reasoning produced by OPTA. In this regard, BEREC found OPTA's assumptions and argumentation correctly developed. Therefore, as previously highlighted, BEREC's opinion mostly shares OPTA reasoning about market definition and considers that Commission's serious doubts may not be justified.

Nevertheless, BEREC believes that OPTA should have investigated more accurately the position (present and forward-looking) of alternative operators' preferences in accessing KPN infrastructure. The key-element for the relevance of the market in question, in terms of application of ex-ante regulation, is the potential external wholesale demand, which at present is absent as the market is composed solely of self-supply. The presence of KPN's FttO-access offer, not matched by a demand, could not be a sufficient signal for assessing the relevance of the market (nor of course for its competitive conditions). In case the potential dimension of FttO-ODF access as a merchant market would result not significant, BEREC believes that OPTA should assess whether the identification of this market as susceptible of ex-ante regulation is completely justified (i.e. also performing the 3-criteria test as a preliminary step of the market analysis).

Finally, about the market definition, BEREC would like to emphasise that of course the current opinion applies to the specific market conditions in the Netherlands and no general conclusion could be inferred for any other country, where an ad-hoc exhaustive analysis will be needed in any case.

As for the designation of SMP undertaking, BEREC recognizes that in this market entry barriers are lower than in markets where no infrastructure competition is present. However, BEREC observes significant barriers to a positive expansion of competition. In this way KPN can benefit from the possibility to behave to an appreciable extent independently of competitors.

Regarding the further development of infrastructure-based competition in the market, BEREC would like to underline that according to the current regulatory framework, including the NGA

²⁵ Case NL/2011/1278.

²⁶ Case NL/2012/1298.

²⁷ Comments letter 21 December 2011, SG-Greffe (2011) D/25142.

Recommendation²⁸, possible trade-offs between competition promotion and investment incentives can be efficiently solved with a proportionate regulation combined with certainty on those rules. Moreover, and for this, the reconciliation of possible trade-offs has in case to be pursued by the selection of an appropriate set of proportionate remedies and is not related to the SMP assessment.

Therefore BEREC sees the OPTA's determination for the next regulatory period of the FttO-ODF access market as effectively competitive as not in line with the European regulatory framework.

As a matter of fact, BEREC considers the next regulatory period particularly important to the development of correct competitive dynamics in the relevant market identified, for different reasons:

- a) the change in KPN deployment approach;
- b) the assumption that a consistent demand growth is coming from small businesses;
- c) the recent trend of KPN acquisition of new FttO customers.

In this regard, BEREC acknowledges some uncertainty concerning future growth projections and agree with OPTA on the need to close monitor market developments. However, in BEREC's opinion that uncertainty does not justify foreseeing a pro-competitive evolution of market conditions, which - as OPTA suggested - should be closely monitored. As the regulatory certainty represents one of the key to promote efficient investment by all operators, OPTA should in this regard illustrate - where possible - how its intervention would be adapted in reaction to possible changes in market circumstances.²⁹

Therefore, BEREC shares the Commission's view in favour of designating KPN as SMP operator, which according to the regulatory framework should be followed by an appropriate and proportionate public intervention based on the competitive situation identified (in the upstream and downstream markets) and aimed at promoting efficient investments (art. 8(4) Access Directive³⁰ and recitals 9 and 20 NGA Recommendation).

²⁸ Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA) - 2010/572/EU.

²⁹ NGA Recommendation, item 6.

³⁰ Directive 2002/19/EC of the European Parliament and of the council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) as amended by Directive 2009/140/EC.