

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

Case NL/2017/1960

**Wholesale high-quality access provided at a fixed location
(Market 4) in Netherlands**

9 March 2017

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1. Executive summary

On 10 January 2017, the Commission registered a notification from the Dutch National Regulatory Authority, Autoriteit Consument & Markt (ACM), concerning the market for Wholesale High-Quality Access provided at a fixed location (WHQAFL Market)¹ in the Netherlands.

ACM defines a national WHQAFL Market which includes wholesale high-quality broadband access², wholesale terminating segments of leased lines, DWDM³ and dark fibre connections provided over copper and fibre infrastructure irrespective of its capacity. ACM proposes to designate KPN with significant market power (SMP), based on market shares, control over an infrastructure that is not easily replicated, scale and scope advantages, absence of potential competition and an absence of countervailing buyer power. However, the proposed access remedies only include the obligation for KPN to provide WHQAFL for services that use the copper local loop. ACM does not consider it necessary or proportionate to impose an obligation on KPN requiring it to provide access to WHQAFL using fibre-optic local loops.

On 10 February 2017 the Commission sent a serious doubts letter to ACM opening a phase II investigation pursuant to Article 7 of Directive 2002/21/EC as amended by Directive 2009/140/EC. The Commission's serious doubts concern ACM's market definition and SMP assessment.

On the basis of the analysis set out in this Opinion, BEREC considers that the Commission's serious doubts are justified.

2. Introduction

On 10 January 2017, the Commission registered a notification from the Dutch National Regulatory Authority, ACM, concerning the WHQAFL Market in the Netherlands. On 23 January 2017, a request for information (RFI) was sent by the Commission to ACM and a response was received on 26 January 2017.

The Commission initiated a phase II investigation, pursuant to Article 7 of the Framework Directive 2002/21/EC as amended by Directive 2009/140/EC and issued a serious doubts letter on 10 February 2017. 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 whether or not the Commission's serious doubts are justified.

¹ Corresponding to market 4 in Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

² Only products having the priority of traffic were included in the relevant market.

³ Dense Wavelength Division Multiplexing.

On 16 February 2017 the EWG sent an RFI to ACM and a response was received on 17 February 2017.

The EWG met on 21 February 2017 in Brussels. During this meeting the EWG met with ACM to gather further information and clarification in response to the EWG RFI 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.

A draft opinion was finalised on 8 March 2017 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 9 March 2017. This opinion is now issued by BEREC in accordance with Article 7 of the Framework Directive.

3. Background

Previous notifications

The previous review of the WHQAFL Market in Netherlands was notified to and assessed by the Commission under case NL/2012/1408. In this notification OPTA (ACM's predecessor) found that the relevant market included wholesale high-quality broadband access⁴, wholesale terminating segments of leased lines and dark fibre connections over copper and fibre infrastructure irrespective of its capacity. The geographic market was defined as being national in scope.

OPTA found KPN to have SMP on the relevant market. OPTA proposed to impose on KPN (i) access to WHQAFL for services that use copper and fibre-optic local loops; (ii) non-discrimination on the basis of equivalence of output (EoO), a margin squeeze test and a prohibition to differentiate tariffs that have the effect of hampering competition; (iii) transparency and publication of a reference offer; and (iv) tariff regulation based on an Embedded Direct Costs (EDC) methodology.

In relation to this case, the Commission commented at that time that a price control obligation for fibre infrastructure would not be necessary, if there were sufficient competition safeguards in place and invited OPTA to lift the cost orientation requirement as soon as the safeguards are effective and the SMP operator's pricing behaviour is properly constrained.

On 3 September 2015 the Dutch Court⁵ annulled the regulation of fibre-based services imposed by OPTA on KPN in the WHQAFL Market⁶. The Dutch Court upheld the market definition, the SMP analysis, the analysis of potential competition problems and all the obligations imposed on KPN with respect to its copper networks.

The current notification which is subject to the Commission's serious doubt is also related to the market review of Wholesale Local Access provided at a fixed location⁷ in Netherlands. In 2011⁸ OPTA concluded that wholesale physical access to the copper network at MDF/SDF⁹

⁴ Only products with a contention ratio of up to 1:20 were included in the relevant market

⁵ College van Beroep voor het bedrijfsleven (CBb).

⁶ CBb 3 September 2015, ECLI:NL:CBB:2015:280.

⁷ Corresponding to market 3a in the Recommendation on Relevant Markets.

⁸ NL/2011/1278, SG-Greffe (2011) D/25142.

level and access to Fibre-to-the-Home (FttH) at ODF¹⁰ level were part of the same market, whereas wholesale physical access to Fibre-to-the-Office (FttO) at ODF level was considered to be in a separate market.

In 2012¹¹ a review of the market for FttO access was notified and assessed by the Commission. The market comprised FttO access at ODF level and was national in scope. KPN was found to have SMP in the relevant market. OPTA imposed obligations on it relating to access to FttO, price control, transparency and non-discrimination obligations.

On 18 December 2013 the Dutch Court concluded¹² that the information collected by OPTA was insufficient for determining that KPN had SMP in the relevant market for FttO ODF access. Therefore, OPTA's SMP finding was overturned and no obligations were imposed on KPN.

In its latest review of the FttO market notified to and assessed by the Commission under case NL/2016/1886 ACM kept the market definition¹³, but did not find SMP in the relevant market. The Commission had no comments.

Current notification and the Commission's serious doubts

Summary of notification

The notified draft measure concerns the full analysis of the WHQAFL Market in the Netherlands.

ACM defines the following underlying retail markets: a fixed internet access market, fixed telephony markets (single, dual and multiple calls) and business network services¹⁴. ACM concludes that, in the absence of regulation in the WHQAFL Market, there is a risk that KPN has SMP on the fixed telephony markets for dual and multiple calls, and a SMP on the business network services market.

ACM defines the relevant WHQAFL Market as comprising of wholesale high-quality broadband access, wholesale terminating segments of leased lines, DWDM and dark fibre connections over copper and fibre infrastructure irrespective of its capacity. Services without priority of traffic, including all services over coaxial cable and Ethernet services without traffic priority are not part of the relevant product market. The geographic market is defined as being national in scope.

On the basis of the wholesale market definition, ACM proposes to designate KPN with SMP. The criteria used by ACM are market shares, control over an infrastructure that is not easily

⁹ Main Distribution Frame /Sub Distribution Frame (SDF).

¹⁰ Optical Distribution Frame.

¹¹ NL/2012/1407.

¹² CBB 18 December 2013, ECLI:NL:CBB:2013:273.

¹³ ACM clarified that products in FttO ODF access market are not substitutes for the products in the WHQAFL market as the former are passive wholesale products with local handover points, while the latter are active wholesale products provided at central (metro core, regional or national level).

¹⁴ In 2015 ACM delineated the product market for business network services as comprising conventional leased lines, closed Virtual Private Networks (VPNs), dark fibre and light paths, as well as open VPNs. The relevant geographic market was found to be national. See case NL/2015/1794.

replicable, scale and scope advantages, absence of potential competition and absence of countervailing buyer power.

ACM proposes to make KPN subject to the following obligations: access, transparency, non-discrimination and price control.

The access remedies include the obligation for KPN to provide high-quality wholesale access for services that use the copper local loop. ACM does not consider it necessary or proportionate to impose an access obligation for WHQAFL using fibre-optic local loops.

Summary of serious doubts

The Commission expressed serious doubts in relation to the compatibility of the proposed SMP designation as well as the relevant product market definition with Article 15(3) and Article 16(4) of the Framework Directive justified in light of the objectives laid down in Article 8 of the Framework Directive.

In relation to the SMP assessment, the Commission has serious doubts that KPN would be able to behave to an appreciable extent independently of competitors, customers and ultimately consumers given the proposed definition of the relevant product market. In this regard, the Commission also notes that:

- (i) The level of KPN's market shares does not, in itself, suggest a presumption of single dominance at the end of the regulatory period;
- (ii) KPN's scale advantages on the copper network do not seem to contribute to the SMP finding; and
- (iii) According to ACM, KPN has no further advantage based on products and services diversification.

In relation to the relevant product market definition, the Commission notes that if KPN were to hold SMP, it is likely that KPN would be dominant in a segment of the market where constraints from the competitive upstream FttO ODF access market inputs or VULA¹⁵ inputs would be insufficient. Thus, the Commission considers that evidence provided by ACM indicates a break in the chain of substitution and an existence of at least two separate markets for WHQAFL.

4. Assessment of the serious doubts

On 10 February 2017, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7 of Directive 2002/21/EC as amended by Directive 2009/140/EC. The Commission's serious doubts concern the compatibility of the proposed SMP assessment and product market definition with Article 15(3) and Article 16(4) of the Framework Directive justified in light of the objectives laid down in Article 8 of the Framework Directive.

¹⁵ Virtual Unbundled Local Access.

Concerns of the Commission

The Commission has serious doubts in relation to ACM's assessment of SMP. The Commission considers that:

- (i) KPN's market share (actual and estimated market share evolution by the end of the regulatory period) cannot be considered as 'very large' according to the SMP guidelines and, in itself, does not indicate the existence of SMP.
- (ii) The market power of KPN can be constrained by potential competitors which can enter the WHQAFL market using their own infrastructure, through a regulated input from the upstream 3a market (LLU, VULA or enhanced VULA upon request), or through an input from the effectively competitive upstream FttO ODF access market (also considered to fall within the scope of market 3a).
- (iii) According to ACM, the number of fibre lines will be double the number of copper lines at the end of the upcoming regulatory period. The Commission noted that the upstream FttO ODF access market was considered to be competitive by ACM and thus, FttO access network infrastructure cannot be interpreted as being difficult to replicate.
- (iv) The effectively competitive upstream FttO ODF access market as well as the regulation of the rest of market 3a (copper and fibre) can largely address KPN's scale advantages on the copper access network. In this regard, the Commission considered that Tele2's investment in Metro Core (MC) roll-out was not given sufficient weight in the notified draft measure and noted ACM's acknowledgment of the reduction in KPN's scale advantages since 2012.
- (v) KPN has no advantage on products' and services' diversification, since almost all alternative providers are able to offer the same products and services on the retail market. Moreover, given that all providers of WHQAFL are to some degree vertically integrated, vertical integration does not provide any additional advantage for KPN other than higher network coverage.
- (vi) According to ACM, for all WHQAFL services over copper with capacity between 10-20 Mbit/s there is a WHQAFL service available over fibre with an equally high or even higher upload capacity for the same or lower price. The Commission also refers to ACM's statement that FttO ODF access is sufficient to replicate WHQAFL services over fibre.

In the context of considerations outlined above, the Commission considers that the alleged competition problems identified by ACM appear to be limited to relatively low bandwidths, rather than being based on the underlying infrastructure. However, given ACM's proposed relevant product market definition which includes all products independent of bandwidth and underlying technology, the Commission did not agree with ACM's conclusion that there is no competitive constraint on the supply of copper-based products exercised by the competitive supply of fibre-based products and that KPN has SMP in such product market.

In relation to the relevant product market definition, the Commission notes that if KPN were to hold SMP, it is likely that KPN would have SMP in a segment of the market where constraints from the competitive upstream FttO ODF access market inputs or VULA inputs would be insufficient. Thus, the Commission considers that evidence provided by ACM indicates a break in the chain of substitution and an existence of at least two separate markets for WHQAFL.

Views of ACM

ACM considers that:

- (i) Inclusion of copper and fibre in the same product market has been accepted by the Commission and the Dutch Court in previous review;
- (ii) The proposed product market definition has not changed substantially compared to the previous review of the WHQAFL Market in Netherlands. The delineation of market boundary between low- and high-quality wholesale access products based on whether access products have priority of traffic resulted in the exclusion of Lite Ethernet services. However, the Commission did not express concerns in relation to such market delineation in its serious doubts letter;
- (iii) KPN is still having a competitive advantage in the relevant product market which includes copper- and fibre-based products;
- (iv) KPN has higher fibre network coverage relative to the network coverage of other operators;
- (v) Obligations imposed on KPN's copper based products would act as an incentive for KPN in upgrading its existing VULA product.
- (vi) VULA products cannot replicate legacy ILL 2 Mbit/s leased lines due to technical characteristics; and
- (vii) Currently, VULA products do not provide an alternative for a substantial part of the copper lines in the WHQAFL-market, such as SDSL-services and specific Ethernet-over-copper products. In their view (par 695 and 696) KPN supports the statement of ACM that VULA is not (yet) an alternative for a substantial part of the copper lines in the WHQAFL-market .
- (viii) The Dutch Court's ruling annulled remedies on fibre-based products in the previous review and accepted regulation of the copper-based products.

BEREC's Assessment

SMP Finding

BEREC agrees with the Commission that the estimated market share at the end of the regulatory period does not, in and of itself, suggest a presumption of SMP, particularly when considered alongside other factors. BEREC considers that the availability of upstream regulated products (ULL¹⁶, VULA, enhanced VULA upon request, etc.) and the effectively competitive upstream FttO ODF access market limits KPN's control of infrastructure that is not easily replicated, as well as KPN's scale advantages (as evidenced by Tele 2 network's presence in all of KPN's MC locations). Furthermore, BEREC notes that both the Commission and ACM are of the view that KPN has no advantage based on products and services diversification and that vertical integration does not provide any extra advantage for KPN relative to the advantages KPN already has because of its better network coverage.

Moreover, since, as ACM argues, all products independent of bandwidth and underlying technology are subject to the chain of substitution, BEREC is of the view that ACM has not sufficiently taken into consideration the competitive pressure that fibre-based products exert

¹⁶ Unbundled Local Loop.

over copper-based products. Thus BEREC is of the view that the Commission's serious doubts in relation to ACM's SMP assessment are justified.

Finally, BEREC notes that Commission's serious doubts concern both the relevant product market definition and SMP assessment as presented by ACM, but do not suggest deregulation of the whole WHQAFI Market. The Commission is of the view that the alleged competition problems appear to be limited to relatively low bandwidths, thus indicating the potential existence of separate WHQAFI Markets

Market definition

BEREC shares the Commission's serious doubts on the existence of a single market for high-quality access.

BEREC considers that in circumstances where ACM has proposed to impose remedies on copper-based products only, the conditions of competition between the supply of copper- and fibre-based WHQAFI services would seem to be sufficiently different to justify the identification of different product markets.

In this regard, BEREC notes that some of the copper-based products, for example ILL 2 Mbit/s leased lines, cannot, according to ACM¹⁷, be substituted by fibre-based or VULA access products due to technical characteristics.

In addition, at low bandwidths (upload capacity of less than 10 Mbit/s), copper-based products are significantly cheaper than fibre-based products, thus limiting the competitive constraint imposed by fibre-based products.

Relatively slow migration to fibre based services at the retail level¹⁸ also indicates that a substantial base of retail end users are likely to continue purchasing copper-based services in the coming years, thus potentially making it a market worthy of monopolisation.

For the reasons set out above, BEREC considers that the evidence submitted by ACM appears to point towards an existence of at least two separate markets for WHQAFI. In this sense, BEREC shares the Commission's serious doubts on the existence of a single market for WHQAFI.

BEREC also notes that the identification of separate product markets could potentially lead to a different outcome in terms of SMP assessment.

5. Conclusions

On the basis of the economic analysis set out in section 4 above, BEREC considers that the Commission's serious doubts regarding ACM's draft decision on the WHQAFI Market in Netherlands and in particular, serious doubts regarding the proposed product market definition and SMP assessment for the WHQAFI Market in Netherlands - as expressed in the Commission's letter to ACM of 10 February 2017 - are justified.

¹⁷ According to paragraph 259 of ACM's draft decision.

¹⁸ According to ACM, at the end of 2015 70% of all retail high quality access connections were copper-based down from 76% at the end of 2012.