

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

**Case NL/2015/1727  
Wholesale local access provided at a fixed location in the  
Netherlands**

**28 May 2015**

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## 1. EXECUTIVE SUMMARY

On 31 March 2015, the Commission registered a notification from the Dutch national regulatory authority, *Autoriteit Consument & Markt* (“ACM”), concerning the full analysis of the wholesale local access market provided at a fixed location<sup>1</sup> in the Netherlands.

The draft measure defines a wholesale market for access to the copper network at MDF and SDF, VULA<sup>2</sup> and FttH access at the ODF. ACM finds the relevant market to be national in scope. The draft measure proposes to designate KPN as the only operator having significant market power in the relevant wholesale market and proposes the imposition of a range of regulatory remedies on KPN including access remedies, obligations of transparency and non-discrimination, and price controls.

On 30 April 2015, 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 Framework Directive”). The Commission’s doubts concern the definition of the relevant wholesale market and in particular, the exclusion of the cable network of *UPC/Ziggo* from the definition of the relevant wholesale market. In light of the view taken by the Commission as to the definition of the relevant wholesale market, it also expresses serious doubts that ACM’s assessment of significant market power complies with Article 16(1) and 16(2) of the Framework Directive.

On the basis of the economic analysis set out in this Opinion, BEREC considers that the Commission’s serious doubts are not justified.

BEREC therefore suggests that the Commission should adopt a decision under Article 7(5)(a) of the Framework Directive lifting its reservations in relation to the notified draft measure.

## 2. INTRODUCTION

On 31 March 2015, the Commission registered a notification by ACM, concerning the market for wholesale local access provided at fixed location (WLA). On 10 April 2015, a request for information (RFI) was sent to ACM, and a response was received on 15 April 2015.

The Commission initiated a phase II investigation, pursuant to Article 7 of the Framework Directive, with a serious doubts letter on 30 April 2015. In accordance with the BEREC rules of procedure the Expert Working Group (EWG) was established immediately after that date with the mandate to prepare an independent BEREC opinion on the justification of the Commission’s serious doubts on the case.

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<sup>1</sup> Corresponding to Market 3a 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 (the Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79

<sup>2</sup> Virtual Unbundled Local Access

On 7 May 2015 the EWG sent a first list of questions to ACM. Answers were received from ACM on 11 May 2015. A second list was sent on 8 May 2015 and the answers received on 11 May 2015.

The EWG met on 13 May 2015 in London. During this meeting the EWG held an audition with ACM to gather further information and clarification in response to the questions sent the week before and to additional questions. The objective of the EWG was to reach clear conclusions on whether or not the Commission's serious doubts are justified.

On 13 May 2015 EWG held a conference call with the Commission upon the latter's request. The Commission explained in detail to the EWG the reasons behind its serious doubts. This gave the group a more complete understanding of the case.

A draft opinion was finalized on 21 May 2015 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 28 May 2015. This opinion is now issued by BEREC in accordance with Article 7(5) of the Framework Directive.

### **3. BACKGROUND**

#### **Previous notifications**

The previous full review of the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location in the Netherlands and was notified to and assessed by the Commission under case number NL/2011/1278. In this decision OPTA (ACM's predecessor) concluded that wholesale access to the copper network at MDF/SDF<sup>3</sup> level and access to fibre to the home (FttH) at ODF level were part of the same market, whereas wholesale access to fibre to the office (FttO) lines was considered to be in a separate market. ACM did not include cable access in its wholesale market definitions. KPN/Reggefiber<sup>4</sup> was found to have significant market power (SMP) on the former market and made subject to a full set of obligations.

MDF/SDF access over copper loops was regulated by means of a safeguard cap, i.e. a tariff ceiling based on the estimated Embedded Direct Costs (EDC) prices for 2011 and increased with the consumer price index in each year of the charge control period. FttH and FttO ODF access were both regulated on the basis of a Discounted Cash Flow (DCF) model. The market for FttO access was notified and assessed under case NL/2012/1407 (C (2012) 9967). KPN was found to have SMP and made subject to a full set of obligations. The implementation of the DCF model for FttH ODF access was notified to and assessed by the Commission under case NL/2013/1439.

There were two subsequent notifications from ACM. The first (case number NL/2014/1601 C (2013) 7876) implemented certain changes to the calculation of price-caps for MDF/SDF access in the period 2009-2011. The second (case NL/2015/1725 C(2014) 3907) imposed

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<sup>3</sup> The following technical terms are used and abbreviated as follows: Fibre to the Office (FttO), Main Distribution Frame (MDF), Sub Distribution Frame (SDF), Optical Distribution Frame (ODF), Fibre to the Home (FttH).

<sup>4</sup> KPN and Reggefiber B.V. together established a joint venture, Reggefiber Group B.V., with the objective of constructing fibre loop networks

price control remedies on new MDF services consistent with ACM's methodology defined in the 2011 decision (case NL/2011/1278 discussed above).

The Commission did not raise any comments in relation to the above cases.

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

### *Current notification*

The current notification of the WLA market in the Netherlands was notified to and assessed by the Commission under case number NL/2015/1727.

ACM confirmed in response to the RFI that an analysis of dominance at the retail level is not a legal requirement in the Netherlands for the purpose of the market analysis. However, in line with previous market analyses, ACM considered the competitive situation in the retail markets as an additional economic justification to start an analysis.

In the notified draft measure, ACM started by conducting an analysis of the following retail markets underlying the wholesale market under consideration:

- Fixed Internet access market;
- Fixed telephony markets – single calls, dual calls and multiple calls; and
- Business network services.

ACM concludes that, in the absence of regulation, there is a risk of joint dominance of KPN and UPC/Ziggo on the internet access market and a risk of single dominance on the fixed telephony markets and the business services market.

ACM concludes that MDF-access, SDF-access and ODF-access FttH are substitutes and belong to the market for WLA. ACM further concludes that VULA, when it gives alternative operators the same functionalities as MDF/SDF/FttH-access (based on the criteria set out in the Explanatory Note to the Recommendation on Relevant Markets<sup>5</sup>) is part of the same relevant wholesale market. ACM concludes that the conditions of competition in relation to FttO (ODF-FttO access) services are not the same as in the markets for unbundled access and therefore concludes that it does not belong to the same relevant wholesale market.

ACM considered whether cable services should also be considered within the relevant wholesale market. ACM considers that there is no form of cable access possible to implement during the next regulatory period that would fulfil the three cumulative criteria for VULA. It therefore concludes that the direct and indirect substitution from cable networks is not sufficient to find that cable services should form part of the relevant wholesale market.

ACM proposes to designate KPN as the only operator having significant market power in the relevant wholesale market for WLA and proposes the imposition of a range of regulatory remedies for MDF, ODF-FttH and VULA on KPN including access remedies, obligations of

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<sup>5</sup> Brussels, 9/10/2014 (2014/710/UE).

transparency and non-discrimination and price controls. ACM proposes to withdraw the obligation for KPN to provide SDF-access, including SDF backhaul.

#### *Commission's serious doubts*

The Commission considers that ACM has not sufficiently taken into account cable in its analysis of the relevant wholesale market, irrespective of its finding whether unbundling or any other comparable virtual access products on cable are economically and/or technically feasible in a forward-looking perspective in the Netherlands. The Commission considers that both the copper/fibre network of KPN and the cable network of UPC/Ziggo might be sufficiently interchangeable or substitutable because they can be used at any geographic location in the Netherlands as a wholesale input to satisfy the needs of consumers, namely to provide retail broadband services for consumers at comparable prices, either individually or as part of a bundle. Further, the Commission considers that, in view of the existence of a cable network providing a substitutable retail service to that offered by KPN, ACM should have taken into account UPC/Ziggo's self-supply on its own cable infrastructure when delineating the wholesale market subject to the current market review.

The Commission considers that an SMP assessment carried out in an appropriately delineated wholesale market, i.e. considering cable in this specific case, might result in a different SMP finding thus potentially leading ACM to adopt a different regulatory approach to the one which it has adopted. The Commission notes that while ACM finds single dominance in the wholesale market, it finds a risk that KPN and UPC/Ziggo are jointly dominant on the retail internet access market. The Commission does not consider that ACM has sufficiently explained how the findings of KPN's SMP at the wholesale level is justified, when in a retail market that is directly downstream KPN's market power is constrained by UPC/Ziggo, which is relying on a wholesale input which KPN does not control. The Commission considers that ACM has not sufficiently explained such discrepancy between its conclusions at the retail and wholesale level given that cable as an alternative infrastructure to KPN's network is present at both wholesale and retail level.

The Commission also sets out its view that ACM's assessment of a risk of joint dominance in the retail market for fixed internet access lacks substantial justification.

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

On 30 April 2015, 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 doubts concern compliance with Article 16(1) and (2) of the Framework Directive, in particular:

## **(a) Market Definition**

### **(i) Direct constraints**

#### *Concerns of the Commission*

The Commission refers to Article 15(3) of the Framework Directive which stipulates that the NRAs shall, taking utmost account of the Recommendation and the Guidelines, define relevant markets appropriate to national circumstances.

The Commission notes that the market definition for the purposes of assessing market power should be done prospectively (i.e. on a forward-looking basis). Thus, in spite of ACM's view that there is currently no means to unbundle the cable network, it should have also assessed whether a cable network may support wholesale access services on the basis of virtually unbundled access in the timeframe of this market review, particularly if there was demand for such service. In support of this view, the Commission cites a study by WIK Consult for ACM on this matter.

Further, the Commission states that various types of wholesale virtual access to cable networks are or may in the timeframe of this review be considered possible in the Netherlands, in view of developments observed in other Member States, on the basis of either ex ante regulation or other, sometimes operator-internal reasons.

The Commission suggests that, in light of the substitution between cable and [copper/fibre] at the retail level, ACM should have taken into account cable self-supply. The Commission refers in particular to paragraphs in the Explanatory Note of the EC Recommendation, "...where there is no merchant market and where there is consumer harm at retail level, it is justifiable to construct a notional market when potential demand exists. Here the implicit self-supply of this input by the incumbent to itself should be taken into account. [...] Alternative operators' self-supply should, in particular, be assessed when alternative operators' networks are included in the relevant market due to the strong direct pricing constraints they exert on the incumbent operator."<sup>6</sup>

#### *BEREC's Assessment*

BEREC considers that ACM has defined the relevant product market in accordance with the Recommendation on Relevant Markets by including all substitutable local access products provided at a fixed location. ACM analyzes the demand-side and supply-side substitutability of all products and services that can be seen as substitutable or sufficiently interchangeable including virtual access (VULA) to fibre and cable networks. BEREC considers that ACM has therefore correctly ensured that national circumstances are taken into account when defining the relevant market, in accordance with the Recommendation on Relevant Markets.

In its assessment of substitutability between physical unbundled access and virtual unbundled access, ACM takes account of the three main conditions set out in the Explanatory note to the Recommendation on Relevant Markets<sup>7</sup>, namely:

- Access occurs locally;

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<sup>6</sup> Page 13 of the Commission's letter

<sup>7</sup> at pages 43 and 44

- Access is generic and provides access seekers with a service-agnostic transmission capacity uncontended in practice; and
- Access seekers have sufficient control over the transmission network to consider such a product to be a functional substitute to LLU and to allow for product differentiation and innovation similar to LLU.

In its assessment, ACM concludes that services which involve active access to cable networks, irrespective of the level of centralization, do not satisfy the three cumulative criteria formulated by the Commission in the Explanatory Note to the Recommendation on Relevant Markets. Therefore, ACM considers that active access to cable networks is not a substitute for unbundled access to copper and fibre networks. Further, in its market analysis ACM gives an account of the lack of virtual products comparable to unbundled access currently available on the cable network.

BEREC notes that active access services to a cable network which are provided in the Netherlands are not currently comparable to physical unbundled access. BEREC does not consider that, on the basis set out in ACM's market analysis, these products satisfy the three cumulative criteria formulated by the Commission in the Explanatory Note to the Recommendation on Relevant Markets. BEREC notes in this respect that the Commission does not raise any issues with ACM's analysis of the three criteria in its letter.

ACM has assessed the direct constraints on Market 3a and concluded that they do not exercise such a direct constraint. This conclusion is not contested in Commission's serious doubts letter. During the conference call of 13/05/2015 (BEREC – Commission), the Commission expressed concerns about the absence of analysis of indirect constraints which cable products in Market 3b (under review by ACM) may exert on Market 3a due to the fact that such wholesale services exist in other Member States. However, BEREC understands that in the Netherlands, only one cable operator, Rekam, provides a wholesale offer (frequency unbundling to permit third parties ISPs to provide internet service they themselves do not provide and which covers only 0.8% of the population), whereas UPC/Ziggo does not.

The Commission concludes on the basis of the WIK study that VULA on cable is possible and that a prospective analysis must take this into account. However the two main access seekers – Tele2 and Vodafone - come to opposite conclusions in their contributions to the public consultation: they observe that it is technically impossible within the market analysis time frame to implement a VULA offer on a cable network.

BEREC observes the following:

- Existing cable wholesale offers are not VULA (contrary to what the Commission seems to consider at p13 of its serious doubts letter) because the points of handover are central. The Belgian cable level 2 offer to which the Commission referred in its conference call with the EWG is central with a broadband resale obligation. As noted in the explanatory note of the recommendation on relevant markets, "Simple resale of broadband connectivity over CATV networks should not be included in the WCA market"<sup>8</sup>.
- The capacity of a coaxial cable is not sufficient to allow the duplication of television offers through the use of IP Multicast or a second DVB-C flow. The video flow must be

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<sup>8</sup> Explanatory note, p. 46.

shared by the different operators active on the cable. DVB-C simulcrypt allows such sharing with the possibility of differentiation by adding only the channels not broadcasted by the cable owner (as is done in Belgium). However, such an offer is always central and never local. The WIK study clarifies – and this is not contested – that the DOCSIS 3.x standard can be improved to provide VULA, but such a development is not in the hands of a single cable operator, even of a major group such as Liberty Global. All the members of Cable labs (the normalisation body for DOCSIS and Euro DOCSIS) must agree to proceed with such a development. As a consequence, even if UPC/Ziggo would want to develop a VULA offer, it needs the approval from a large number of third parties. Even if this agreement can be obtained, it requires that every member agrees on the exact specifications and upgrade standards on a consensual basis. The likelihood that an operational result can be achieved within the timeframe of a market analysis is very low. Indeed, in response to questions from the EWG, WIK clarified that in their view such a process would require at least 10 years from now.

In conclusion, it is BEREC's opinion that including cable on Market 3a is at best speculative rather than prospective and it therefore does not share Commission's opinion about its serious doubts regarding the non-inclusion of cable in Market 3a.

BEREC further considers that as cable is not included in Market 3a, it follows that any self-supply from cable should not be considered to exercise a direct constraint. The Explanatory Note quoted by the Commission suggests, that "Alternative operators' self-supply should, in particular, be assessed when alternative operators' networks are included in the relevant market due to the strong direct pricing constraints they exert on the incumbent operator." However, the Explanatory Note also suggests that the assessment of alternative operators self-supply is not justified "if alternative providers have difficulty in entering the merchant market readily." As discussed above, ACM has explained in its notification that on basis of technical analysis, cable will have difficulty in entering the merchant market for the supply of WLA services.<sup>9</sup> This is supported by the conclusions of the WiK-Consult Report on access to cable networks as an alternative to VULA remedies.

## **(ii) Indirect constraints**

### *Concerns of the Commission*

The Commission expresses concerns that ACM has "not appropriately assessed the boundaries of the relevant market since it has not considered self-supply by UPC/Ziggo (the cable operator) in the analysis of the market for wholesale local access at a fixed location".

### *BEREC's assessment*

BEREC notes that even if direct constraints do not exist between Cable and copper/fibre (as discussed above in sub-section (a) (i)), self-supply of UPC/Ziggo could, in principle, be a relevant consideration if cable were found to be in the relevant upstream WLA market due to indirect constraints. In this respect, BEREC notes that ACM has conducted a detailed assessment of indirect constraints of cable on the basis of critical loss analysis. The conclusion of this analysis is that ... "a price increase is indeed profitable, due to the very small number of clients, who as a result of this price increase on retail level switch-over to cable services" (see paragraph 80 of the ACM draft notification).<sup>10</sup> BEREC is not aware that the Commission has expressed any concerns about ACM's critical loss assessment. BEREC notes that the Commission does not comment on the extent to which ACM has taken account of the factors set out in the Explanatory Note to the Recommendation on Relevant Markets<sup>11</sup> setting out how the Commission considers that NRAs should take account of indirect constraints from existing or potential CATV-based wholesale access.

BEREC therefore considers that the Commission's concerns about ACM's lack of assessment of self-supply from cable are not warranted. ACM does not need to take into account self-supply from cable in the relevant WLA market, as it has found cable outside of that relevant market (on the basis of its assessment of direct and indirect constraints).

### **(b) SMP analysis**

#### *Concerns of the Commission*

The Commission has serious doubts as regards ACM's assessment of significant market power. The Commission considers that an SMP assessment should be carried out in an appropriately delineated wholesale market. As above, it considers that cable has not been adequately assessed and this might result in a different SMP finding thus potentially leading ACM to adopt a different regulatory approach than the currently proposed one.

The Commission also notes that while ACM finds single dominance in the wholesale market, it finds a risk that KPN and UPC/Ziggo are jointly dominant on the retail internet access market. The Commission does not consider that ACM has sufficiently explained how the findings of KPN's SMP at the wholesale level is justified, when in a retail market that is directly downstream KPN's market power is constrained by UPC/Ziggo, which is relying on a wholesale input which KPN does not control. The Commission considers that ACM had not sufficiently explained the discrepancy between its conclusions at the retail and wholesale level given that cable as an alternative infrastructure to KPNs network is present both at the wholesale and retail level. It notes however that there is no need to conclude on SMP at the retail level in order to reach a conclusion on the wholesale level.

Aside from this, the Commission also considers that the assessment of joint dominance on the retail market for broadband did not adequately take account of symmetry, innovation and bundling.

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<sup>10</sup> ACM's detailed critical loss analysis is set out in Annex C of the draft notification.

<sup>11</sup> at page 46

## *BEREC's Assessment*

BEREC is of the view that the Commission has not put forward sufficient reasons to doubt ACM's market definition. Consequently, BEREC does not agree with the Commission's serious doubts as regards ACM's assessment of significant market power within the relevant wholesale market.

BEREC agrees with the Commission that there is no need to assess SMP at the retail level. Indeed, ACM itself notes that an assessment of significant market power at the retail level is not necessary for the purposes of assessing significant market power at the wholesale level. In its answers to the RFI, ACM stated that a single/joint dominance analysis at retail level is not a legal requirement in the Netherlands to start the wholesale analysis and impose obligations. The fact that the market is currently regulated is the legal requirement for the wholesale analysis.

BEREC does not therefore find it necessary to consider ACM's retail level analysis in detail, or to comment on ACM's assessment on the risk of joint dominance in the retail market for fixed internet access.

Nonetheless, BEREC does not agree with the Commission that it is incumbent upon ACM to explain a discrepancy between a finding of joint dominance at the retail level and single firm dominance at the wholesale level given that cable as an alternative infrastructure to KPN's network is present both at wholesale and retail level. In any event, BEREC considers that ACM's market analysis demonstrates why such a discrepancy can arise.

Such a discrepancy can arise because of the impact of the dilution effect on the SSNIP test analysis used to inform market definition. The dilution effect means that although a 5-10% price rise at the retail level might result in sufficient diversion to cable to make that price rise unprofitable (absent tacit collusion which is not usually assumed in a SSNIP test), a 5-10% rise at the wholesale level results in much less substitution which may not be sufficient to constrain the wholesale price rise. Thus dilution means that it is possible that cable should be included in the retail level but not in the wholesale market.

In addition BEREC notes that ACM has looked at five different retail markets. A 5-10% price rise at the wholesale level may be profitable even if there is a lot of substitution in the broadband market because there is less substitution in the other markets. Indeed, we note that ACM finds single firm dominance in the other markets, suggesting substitution is indeed limited. ACM's critical loss analysis takes these factors into account and suggests a 10% price rise, which results in a smaller price rise at the retail level, and, with this price rise, there would not be sufficient substitution to cable at the retail level to make this unprofitable.

Moreover, several wholesale markets are upstream markets of the retail markets that ACM has considered, including the cable market. Therefore a discrepancy between conclusions at the retail and wholesale level cannot be effectively understood without having assessed all wholesale markets.

Indeed, the possibility that competitive conditions may differ in the wholesale and retail markets is recognised by the Commission on page 15 of the Explanatory Note to the recommendation on Relevant Markets. This states that "*some wholesale inputs affect several downstream markets (e.g. broadband access can give operators access to several retail markets other than*

*internet services, such as, for example, voice, broadcasting and SMS). Therefore, the regulation of wholesale inputs may continue to be necessary even when one of the related retail markets appears to be effectively competitive [...]*

## **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 in relation to the WLA market - as expressed in its letter to ACM of 30 April 2015 – are not justified.

BEREC is of the opinion that the Commission's doubts on the absence of a proper market definition exercise and of an incorrect SMP analysis as a result of the exclusion of cable from the relevant wholesale market are not justified. In particular, BEREC considers that ACM has considered the availability of wholesale unbundled cable products within the timeframe of the review and has factored that assessment into its analysis appropriately. In particular, BEREC notes that ACM commissioned a study from WIK-Consult to consider this question and that study concluded that wholesale unbundled cable products were unlikely to appear within the timeframe of the review.

Due to the absence of wholesale cable products becoming available within the timeframe of the review, alongside no evidence of demand for such products having been adduced and insufficient indirect constraints having been identified mean that, in BEREC's view, ACM acted in a manner consistent with the Recommendation on Relevant Markets in not including UPC/Ziggo's self-supply on its cable network within the boundaries of the relevant wholesale market.

In light of BEREC's opinion as to the definition of the relevant wholesale market, BEREC does not consider that the concerns of the Commission in relation to the assessment of significant market power are justified. The Commission's concerns in relation to the assessment of significant market power rely entirely upon the issues identified in relation to the definition of the relevant wholesale market. The Commission does not suggest that ACM has incorrectly assessed significant market power in the wholesale market in the absence of those concerns.

BEREC notes that ACM has conducted an analysis of significant market power at the retail level (in the absence of wholesale regulation) and has concluded in respect of one of those retail markets (fixed internet access) that there is a risk that KPN and UPC/Ziggo hold a position of joint dominance. Whilst BEREC recognises that, in most cases, regulation at the wholesale level is necessary where competition concerns are identified at the retail level, BEREC does not consider that a formal assessment of significant market power at the retail level is required for the purposes of conducting an analysis of wholesale markets. BEREC does not therefore consider it necessary to further consider ACM's analysis of significant market power at the retail level. However, BEREC does not share the Commission's view that a discrepancy between conclusion in respect of significant market power at the wholesale and retail levels gives rise to an inconsistency which requires further justification.

In light of the Commission's concerns and the assessment set out above, BEREC therefore suggests that the Commission should adopt a decision under Article 7(5)(a) of the Framework Directive lifting the reservations in relation to the notified draft measure.