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Autoriteit Consument & Markt
(ACM)
Zurichtoren
Muzenstraat 41
2511 WB Den Haag
Netherlands

For the attention of
Mr Henk Don
Member of the Board

Fax: +31 70 722 23 55

Dear Mr Don,

**Subject: Commission Decision concerning Cases NL/2018/2099 and NL/2018/2100: Wholesale fixed access market in the Netherlands**

**Comments pursuant to Article 7(3) of Directive 2002/21/EC**

## 1. Procedure

On 31 July 2018, the Commission registered a notification from the Dutch national regulatory authority, ACM,[1] concerning the wholesale fixed access market[2] in the Netherlands.

The national consultation[3] ran from 27 February 2018 to 10 April 2018.

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1 Under Article 7 of 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), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

2 Corresponding to markets 3a and 3b 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.

3 In accordance with Article 6 of the Framework Directive.

On 6 August 2018, a request for information[4] was sent to ACM and a response was received on 9 August 2018. A supplementary RFI was sent on 9 August 2018 and a reply was received on 9 August 2018.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

## 2. DESCRIPTION OF THE DRAFT MEASURE

### 1.1. Background

*Market 3a*

The last review of the market for wholesale local access provided at fixed location in the Netherlands was notified to and assessed by the Commission under case NL/2015/1794[5]. In this decision ACM concluded that the following products were part of the relevant wholesale market: (i) access to the copper network at the Main Distribution Frame (MDF) and the Sub Distribution Frame (SDF) level, (ii) virtual unbundled local access (VULA), and (iv) Fibre-to-the-Home (FttH) access at the Optical Distribution Frame (ODF). KPN was designated as operator with significant market power (SMP) in the market and was subject to the following obligations: access, transparency, non-discrimination and price control. The access remedy included the obligation for KPN to provide: (i) MDF-access for full and shared local loop unbundling (LLU), (ii) VULA, (iii) ODF-FttH access, and (iv) all associated facilities.

The non-discrimination obligation was differentiated according to the access product: VULA and MDF access had to be offered on an Equivalence of Output (EoO) basis and ODF-FttH access on an Equivalence of Input (EoI) basis. The price control obligations imposed on KPN consisted of: (i) a 'safety' cap based on the previous price cap increased by the Consumer Performance Index (CPI) for existing LLU, except for MDF pair bonding services where cost-orientation would apply; (ii) cost-orientation (based on the wholesale price cap/Embedded Direct Costs methodology WPC/EDC[6]) for new LLU services; (iii) a price cap based on the LLU cap increased by the incremental costs specific to the VULA product; and (v) a price cap on KPN's FttH access based on a Discounted Cash-flow (DCF) model.

*Market 3b*

Market 3b is deregulated since 1 May 2012.

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4 In accordance with Article 5(2) of the Framework Directive.

5 C(2015)8657.

6 The EDC methodology is a Fully Allocated Costs (FAC) methodology. This is a top-down methodology based on the actual (replacement) costs of KPN. EDC (FAC) enables the SMP operator to recover its costs and gives the access seeker a cost-oriented price that, according to ACM, provides the right build or buy signal. The EDC methodology is used since the start of regulation of KPN.

## 1.2. Underlying retail markets

ACM defines the following underlying retail markets: (i) fixed internet access and (ii) business services.

*Retail fixed internet access market*

The difference between the retail market definition in the previous and the present notification is that fixed telephony and TV services which are bundled with internet access are now included in the market. ACM further establishes that the same retail services are possible over cable, fibre and copper networks.

Based on the assessment of the single SMP criteria (notably retail market shares[7], the possibility to offer fixed-mobile bundles, technological advantages or superiority and economies of scale and scope), ACM concludes that neither KPN nor VodafoneZiggo enjoy single SMP in the retail fixed internet access market.

ACM then considers that in the absence of SMP-based regulation there is a risk of joint SMP at retail level. ACM states that its analysis is based on *Airtours/Impala I and II* case law[8] and the Commission's SMP Guidelines[9].

The NRA first analyses the incentive(s) and possibility of KPN and VodafoneZiggo to adopt collusive behaviour, which would be detrimental to retail competition. As regards the incentives of both players, ACM expects that in absence of the SMP-based regulation, KPN would no longer offer MDF or ODF access (FttH)[10] or would do so only on commercially unattractive conditions (constructive refusal of supply).

7 Market shares measured in connections in the presence of regulation:

| | Q4 -2014 | Q4 -2015 | Q4 -2016 | Q2 -2017 |
|---|---|---|---|---|
| **KPN** | 40-45 %<br>[[redacted] %] | 40-45 %<br>[[redacted] %] | 40-45 %<br>[[redacted] %] | 40-45 %<br>[[redacted] %] |
| **VodafoneZiggo** | 45-50 %<br>[[redacted] %] | 40-45 %<br>[[redacted] %] | 40-45 %<br>[[redacted] %] | 40-45 %<br>[[redacted] %] |
| **Other own network** | 0-5 %<br>[[redacted] %] | 0-5 %<br>[[redacted] %] | 0-5 %<br>[[redacted] %] | 0-5 %<br>[[redacted] %] |
| **Other via KPN network** | 5-10 %<br>[[redacted] %] | 5-10 %<br>[[redacted] %] | 5-10 %<br>[[redacted] %] | 5-10 %<br>[[redacted] %] |

8 Case T-342/99, Airtours plc v Commission EU:T:2002:146, paragraph 62; Impala I: Case T-464/04, EU:T:2006:216; and Impala II: Case C-413/06 EU:C:2008:392.

9 Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications network and services (2018 SMP Guidelines), OJ C 159, 7.5.2018, p. 1.

10 ACM points in this respect to its letter of 27 December 2013 related to a withdrawal of ODF Fibre –to-the-Office (FttO) offer in relation with the deregulation of the FttO market. ACM also calculated the margins of wholesale services compared to the margin of retail service generated via MDF access, VULA and Wholesale Broadband Access (WBA). The calculation shows that, at the current wholesale tariffs, KPN has no incentive to offer MDF access and VULA (considering a product of higher bandwidth).

ACM also claims that VodafoneZiggo would not provide access voluntarily.[11] Absent access based retail competition, ACM anticipates that both operators would have a strong incentive to tacitly agree on excessive retail prices. ACM also considers that both operators have the possibility to reach such an understanding based on a sufficient degree of symmetry, such as: (i) very similar high market shares; (ii) cost structures characterised by high fixed costs and low variable costs, where differences in variable costs have a relatively small effect on pricing; (iii) technological possibilities which allow both operators to carry out network upgrades over the next few years and offer higher speeds; (iv) product differentiation which as regards to content offers and reputation does not lead to superiority of one of the two parties; and (v) the vertical integration of both operators.

Second, ACM assesses the complexity and stability of the market based on the number of parties, market growth, technological developments and limited impact of any service innovation which can be foreseen with sufficient certainty at the present point in time. In this regard, ACM points to the fact that the market is stable in terms of subscriptions and argues that anticipated technological developments will only have limited destabilising effects, as they generally coincide in time (for example KPN plans to [redacted] fibre roll out in [redacted] and VodafoneZiggo plans to [redacted] DOCSIS 3.1 [redacted]).

Third, ACM considers that since payback periods and network depreciation often amount to several decades, breaking the understanding in order to generate short-term profits but at the cost of lower profits in the long-run is not a strategy both operators are likely to pursue.

Lastly, ACM investigates (i) prices and *Average Revenues Per User* (ARPU) developments in triple-play tariffs[12], (ii) profitability in terms of *Earnings Before Interest, Tax, Depreciation and Amortisation* (EBITDA)[13] and *Return on Capital Employed* (ROCE),[14] and (iii) low investment intensity by operators[15].

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11 Operator [redacted] asked for access to VodafoneZiggo's cable network in May 2017 but this request was rejected.

12 ACM observes that KPN's and VodafoneZiggo's ARPU [redacted]. Tele2's ARPU [redacted] [redacted] T-Mobile's ARPU [redacted].

13 The EBITDA margin of KPN and VodafoneZiggo in the period 2013-2015 is between [redacted] % and [redacted] %. ACM expects KPN's and VodafoneZiggo's margin to grow to [redacted] % and [redacted] %, respectively, by the end of the regulatory period. The integrated margin of VodafoneZiggo is higher than the integrated benchmark of around 30 rated Western-European telecommunications companies, calculated by S&P Global in its report "Industry Top Trends 2017 – Telecommunications". The EBITDA margin on fixed services is much higher than the one on mobile services.

14 VodafoneZiggo's average ROCE over the period 2013-2017 was approximately [redacted] as its weighted average cost of capital (WACC), while KPN's ROCE [redacted] in 2015, [redacted].

15 Based on CAPEX/Turnover ratios of KPN and VodafoneZiggo between 2013 and 2017, ACM observes that investment intensity of KPN and VodafoneZiggo has been significantly reduced since

In this regard, ACM considers that, even in the presence of the current wholesale regulation, KPN and VodafoneZiggo have the incentive and opportunity to increase prices in the retail market, while these price increases cannot be fully explained by the improvement in the product range. Under the Modified Greenfield approach (absent regulation and thus disregarding the price pressure coming from retail products offered by alternative operators on the basis of access to KPN's infrastructure), ACM expects prices to be further increased. In this respect, ACM considers that high profitability of both operators does not translate into intensified technology investments.

ACM therefore considers it plausible that in the retail market, due to low price elasticity of demand and stable similar market shares, KPN and VodafoneZiggo, in the absence of SMP-based regulation, would be able to align their pricing strategies and to charge excessive prices. ACM finds the retail market sufficiently transparent in terms of prices and assumes a retaliation mechanism based on temporary price wars (for example through retention offers).

Moreover, ACM analyses reactions from (i) parties with their own infrastructure active in the retail market, including Delta and Caiway (combined market share of [redacted] %), Tele 2 and T-Mobile that have already rolled out a core network and OTT providers[16], and (ii) countervailing buying power. Given the very low market shares of parties with their own infrastructure, limited competitive pressure of OTTs and the fact that mass-market customers are unlikely to exercise sufficient countervailing buying power, ACM concludes that these elements do not affect the stability of the tacitly collusive equilibrium.

*Retail business services market*

ACM finds that the retail market for business services consists of conventional leased lines, closed VPNs, open VPNs, dark fibre and light paths.

Based on the assessment of single SMP criteria (including the analysis of retail market shares[17], control of infrastructure difficult to replicate, vertical integration, economies of scale and scope, product-service differentiation, lack of countervailing buying power, absence of potential competition), ACM concludes that in the absence of regulation, there is a risk that in the coming regulatory period, KPN will have single SMP.

## 1.3. Market definition

ACM concludes that the relevant wholesale market has significantly changed since the last market review. ACM now finds a wholesale market for Wholesale Fixed

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the market consolidation in 2014. KPN expects their gradual decrease in the coming years while VodafoneZiggo indicated that from 2018 they should be stable and in line with ratios of 2015-2017.

16 OTT parties are still very limited in size.

17 KPN, VodafoneZiggo, Tele 2, and Eurofiber market shares amounted to [redacted]%, [redacted]%, [redacted]%, [redacted]% and [redacted]%, respectively, in Q2 of 2017 (in the presence of regulation based on the number of connections). ACM expects that in the absence of regulation KPN's market shares would rise to [redacted]% at the end of 2021. Market players such as Colt and Tele2 that are currently dependant on copper regulation will see their market share decline.

Access (WFA), which is comprised of both wholesale local access and wholesale central access at a fixed location for mass-market products. ACM found that the following products are part of the market: Unbundled access to copper MDFs and to fibre connections in residential areas (ODF-access FttH), VULA and wholesale broadband access to copper, fibre and cable networks (including at a central level).

ODF-access FttO and access to mobile networks are not part of the relevant market.

In 2015 KPN started to upgrade its copper network with technologies such as vectoring. Therefore, copper unbundling at MDF level can only be used by access seekers for the provision of legacy products such as ADSL+, SDSL and leased lines over copper with limited speeds up to 24 Mbit/s. Consequently, access seekers have migrated their retail customers to alternative products, both at local and central level, in order to provide higher speeds.[18] Furthermore, ACM does not expect future network rollout of alternative operators to the MDF.

ACM acknowledges that there are technical distinctions between physical and VULA services. The regulated VULA product should have the following characteristics: (i) be offered at 161 future-proof MC locations; (ii) be available at all bandwidths, overbooking factors and all other parameters within the technical capabilities of the relevant underlying local loop and active equipment, including unicast and multicast functionalities[19]; and (iii) be a "layer 2 Ethernet service" that guarantees transparency in the transmission technique and allowing access seekers to use their own equipment at the customer's location.[20] However, ACM does not find functional differences between VULA and wholesale broadband access at national level. VULA (available at 161 MC locations) and KPN's WBA/Open Wholesale Model (OWM) (provided at national level) are almost identical in terms of functionalities and technical specifications, the only notable difference being the price structure of the respective products.[21]

WBA access to cable is included in the relevant wholesale market based on direct and indirect constraints. Retail services on copper, fibre and cable networks are

[18] Tele 2 migrated a large portion of its customers to VULA over copper at the Metro Core (MC) level (161 access points). Online and T-Mobile on the other hand migrated their MDF access to WBA/OWM at the national level. Only some customers, who are not looking for higher speeds, continue to be served on the basis of the legacy products, due to the lower access prices of these products.

[19] KPN must at least offer all product features that it offers its own downstream business. In addition, KPN should comply with requests for access to product features that could be provided by the active equipment employed, but are not yet implemented by KPN. The multi- and unicast functionalities must ensure that VULA customers can differentiate their products as much as possible. In this regard, KPN should allow access seekers to add streams to the existing multicast service of KPN or improve its quality using their own multicast streams. Moreover, access seekers can choose to offer internet only to its customers, where multicast/unicast is not applicable.

[20] ACM finds that the layer 2 Ethernet service allows VULA customers to differentiate their downstream services in the same way as this is possible with unbundled access.

[21] ACM explains that the possibility of multicasting via VULA (and the lack thereof via more central access) makes no difference in practice, because alternative operators that take VULA access still transmit their own channels on KPN's multicast in order to avoid unnecessary network load through parallel transmission of the same programmes.

found to be functionally equivalent and retail prices for these services are comparable. As regards the direct constraints, ACM argues that cable is included in the relevant market based on the technical and economic viability of such access and the likelihood of switching provider. Cable access is already provided in other Member States and in the Netherlands by smaller cable operators and previously by Ziggo[22]. Almost all residential customers have access to the cable network in the Netherlands. ACM considers that an access seeker purchasing cable access could have a positive business case already at a very low market share. ACM argues that a potential new entrant would not incur switching costs, but a hypothetical price increase between 5-10% of one platform would influence its choice of wholesale platform. Furthermore, ACM concludes that the costs of switching of existing customers from KPN's copper-based WBA product to cable would be relatively low, as both access products would only require the interconnection at national level. On the other hand, for operators who provide retail services via KPN’s (central) OWM or (local) VULA, switching would be more difficult, given the tariff structure of such products.[23] However, such operators would be able to connect new customers via the cable platform or migrate only part of their customer base. ACM also finds that sufficiently strong indirect pricing constraints are exercised by services delivered via the cable network on copper and fibre based services, which further justifies including cable into the relevant market.[24]

The relevant geographic market is national.

### 1.4. Finding of significant market power

ACM first analyses whether either KPN or VodafoneZiggo have single SMP in the WFA market (on the basis of criteria including market shares, technological advantages or superiority, vertical integration, product and service diversification, economies of scale and scope), and concludes that it is not the case for either of the two operators.

ACM then analyses if the two operators have joint SMP in the wholesale market for WFA. Similarly to the retail market analysis, ACM assesses the incentives and possibility of KPN and VodafoneZiggo to adopt collusive behaviour. Via an analysis based on game theory[25], ACM submits that, in the absence of regulation, two operators actively competing on the market would normally have the incentive to grant access to their networks and determine themselves their wholesale tariffs.

[22] Ziggo provided such access in the past. The offer was withdrawn in March 2015.

[23] The tariff structure of these products requires the payment of a relatively large one-off fee combined with a relatively lower variable tariff.

[24] ACM carries out a critical loss analysis of a 10 % price increase at wholesale level both for fixed internet access via copper and fibre and finds in both cases that the actual loss is greater than the critical loss, hence rendering the price increase unprofitable.

[25] ACM uses a game theoretical model to analyse which incentives parties have to reach an understanding. The model is designed as a two-phase game, for the wholesale and retail market. In the first phase, the parties determine whether they grant or refuse access to the WFA market. In the second phase, parties determine which price they set at retail market. The combination of these two choices determines the profit the parties can achieve. The matrix shows that the joint profit of KPN and VodafoneZiggo is greatest when they both deny access.

However, this is not the situation in the Netherlands, where VodafoneZiggo is not providing access and KPN, in ACM's assessment, only started offering a commercial wholesale access product under the threat of regulation. The likelihood of collusive behaviours is assessed, in a similar way to that carried out in the retail market analysis. Namely, ACM considers the following elements illustrating the degree of symmetry between the two operators: (i) comparable wholesale market shares of [redacted]% for VodafoneZiggo and [redacted]% for KPN, (ii) cost structures consisting of relatively high fixed costs and relatively low variable costs, (iii) comparable technological possibilities and opportunities to carry out network upgrades, (iv) product differentiation, (v) vertical integration of both operators, (vi) high frequency of interactions between the two operators, (vii) limited complexity and high degree of stability of the market (in terms of number of market players, market maturity with a very limited market growth in terms of connections and limited destabilising effect of technological developments, as these are predictable and clearly defined).

ACM concludes that KPN and VodafoneZiggo are to a large extent symmetrical, which in ACM's view leads to the conclusion that both operators have the opportunity to collude in the absence of regulation. ACM also claims that network investments are being postponed by operators, referring among others to KPN's strategic plan to [redacted].

Sufficient transparency of the market is analysed against the focal point of refusal of access.[26] ACM further considers that retaliation is possible in two ways: (1) lowering a retail tariff, which is quick to implement and observe, or (2) granting wholesale access[27]. ACM considers that a mere threat of these types of retaliation will prevent parties from deviating from the coordinated outcome. The external stability of the collusive outcome is assessed in line with the analysis at retail level. ACM considers that the tacit collusion will not be disrupted by small regional network operators. In addition, given the high barriers to entry, significant entry capable of challenging the collusive equilibrium is unlikely. ACM concludes that since only internal sales are made in a Greenfield scenario, there is no possibility of access seekers exercising countervailing buying power.

### 1.5. Regulatory remedies

Given that that there is an equal risk of competition-limiting behaviour by both parties, ACM intends to impose obligations on both KPN and VodafoneZiggo, arguing that regulation of only one of the two joint SMP operators would not be sufficient to resolve the identified potential competition problems.

[26] ACM considers that the previous VULA offer, as well as the voluntary offer of KPN of 27 February 2018 (submitted the same day as the start of the national consultation) was concluded under the threat of regulation and should be disregarded in a Modified Greenfield assessment. This approach to market analysis was upheld by the Administrative High Court for Trade and Industry in its decision concerning ACM's 2015 market analysis. In addition, ACM concludes that the offer does not sufficiently remove the identified market failure(s) at retail level based on the way the offer was made, the views submitted by market participants and its own assessment,

[27] The fact that access will be granted can be rapidly verified. ACM considers that a marketing campaign has to take place well before the service is provided to the retail customers. Prices announced in these campaigns are a sufficient basis for the other party to initiate a retaliation mechanism.

ACM considers that imposing access on both operators maximises the possibilities for alternative providers to compete in the retail market with KPN and VodafoneZiggo. ACM notes that because the networks of KPN and VodafoneZiggo vary locally and regionally, the same specific advantages of the different networks are not available at every user location. Having regard to the pace of KPN's implementation of vectoring technology and characteristics of KPN's and VodafoneZiggo's network (speeds, upgrade capabilities, capacity guarantees for business end users and so on), by imposing an access obligation on both operators alternative providers have the possibility to assess which network is best suited to offer the desired retail services in a particular location.

In addition, ACM considers that regulating two parties will better promote competition in the market for wholesale fixed access, while the current regulation targeted only at KPN was not able to improve competition in the market significantly.[28]

Overall, ACM argues that regulation of both operators allows for more innovation and investment and for better prices, choice and quality for wholesale customers and retail clients. The regulator argues that a situation in which only KPN is regulated would limit the choice of end users because access-seekers would not be able to offer cable-based retail services. ACM explains that even if VodafoneZiggo provides nationwide coverage, the characteristics of both networks (in terms of speeds, upgrade capabilities, capacity guarantees for business end users and so on) differ locally and regionally. Conversely, a situation in which obligations are only imposed on VodafoneZiggo would have a negative impact on the competitive position of undertakings that are already purchasing wholesale access from KPN, with the risk that they leave the market or have to write off investments that they have made to use KPN's network.

*Remedies imposed on KPN*

ACM proposes to impose the following remedies on KPN[29]:

i. On the basis of a reasonable request, provide (i) unbundled access to its copper network's MDFs; (ii) VULA over its copper network; (iii) access to the residential ODFs of its fibre network (ODF FttH access); (iv) VULA over its fibre network; and (v) access to associated facilities;

ii. Transparency and publication of a reference offer;

iii. Non-discrimination;[30]

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28 ACM explains that, to date, virtually no competition exists in the market for access to fixed networks. On the basis of the regulation currently in force, Tele 2 offers wholesale services, on a limited scale, that only provide coverage in a part of the Netherlands.

29 ACM changed or removed some of the obligations that it imposed on KPN following its 2015 market analysis for unbundled access, to allow KPN more room to phase-out legacy services on its copper network - notably in the areas where it has deployed fibre - and further upgrade its network. For example, ACM proposes to weaken the rules for phasing-out its copper access services and removes previous measures that ensured the application of a margin squeeze.

iv. Price control:

a) As in previous rounds of regulation, for KPN's MDF unbundled access ACM mandates an inflation-adjusted 'safety cap' based on an EDC model;[31]

As for KPN's other regulated wholesale products, ACM does not set the regulated rates in the current draft decision, preferring to allow KPN to negotiate these rates with access-seekers commercially during a period of six months, after which they will be adopted by ACM. In case no agreement is reached between the operators, ACM has the option of setting the tariffs as follows:

b) a price cap for KPN's copper VULA calculated by adding the VULA incremental costs (also calculated via an EDC model) to the MDF safety cap;[32]

c) a price cap for KPN's ODF FttH access based on a DCF model;[33]

d) a price cap for KPN's fibre VULA calculated by adding the VULA incremental costs (calculated via an EDC model) to the ODF FttH access cap.

*Remedies imposed on VodafoneZiggo*

ACM proposes to impose the following remedies on VodafoneZiggo:

i. On the basis of a reasonable request, provide wholesale central access to its cable network at national level (and to associated facilities), which must allow alternative providers to offer at least a bundle of internet with television and/or telephony to its retail customers and to use their own peripheral equipment;

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[30] KPN will be obliged to offer MDF and copper/fibre VULA access on an EoO basis and ODF FttH access on an EoI basis. According to ACM, EoI implementation costs for fibre VULA are high and would not be proportionate.

[31] ACM explains that the continued use of a safety cap is more appropriate than a cost oriented rate set via a bottom-up long run incremental costs (BU-LRIC) model. This is because of the uncertainties as to the remaining life of the copper network (which affects the depreciation period), the level of investment and of maintenance costs during the remaining copper lifetime, as well as the volumes of active lines in the transition towards KPN's VULA and FttH offerings. According to ACM, a price control remedy based on a safety cap allows to ensure stability of prices as well as regulatory certainty and predictability.

[32] According to ACM, the proposed approach for VULA price caps is better suited than a BU-LRIC model since it may be applied within a relatively short period of time, thus, providing greater (investment) certainty to market players, and is compatible with the pricing of other regulated services. Moreover, ACM considers that applying EDC to the VULA increment does not lead to uncertain variations in the price caps since this (backbone) part of the network is less subject to volume fluctuations, as it is used for several copper and fibre services.

[33] ACM explains that it is appropriate to continue pricing ODF FttH access based on a DCF model because it strikes the balance between encouraging investments and promoting competition. ACM is of the view that withdrawing the DCF model - and applying instead the Commission's recommended economic replicability test - would hamper regulatory certainty, thus affecting investment negatively.

ii. Transparency and publication of a reference offer;[34]

iii. Non-discrimination;[35]

iv. Price control, based on a 'top-down' EDC model of VodafoneZiggo's costs.[36] ACM does not determine the regulated tariffs for wholesale cable access in its draft decision, but gives VodafoneZiggo three months to submit a tariff proposal. Access-seekers can then negotiate this proposal with the SMP operator.[37]

Finally, ACM establishes that KPN and VodafoneZiggo will not be allowed to request regulated access to each other's networks, unless such access is not intended to impede competition or does not have the effect of impeding competition.

## 3. COMMENTS

The Commission has examined the notification and the additional information provided by the ACM and has the following comments:[38]

### Market definition

The Commission notes that ACM defines a converged wholesale broadband access market that combines access products provided at local and central level.

The Commission's Recommendation on Relevant Markets differentiates between the wholesale local access market "3a" and the wholesale central access market "3b".[39] However, in the explanatory note the recommendation, the Commission

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34 VodafoneZiggo must disclose a reference offer with the corresponding tariff proposal for WBA and the accompanying facilities within three months. This reference offer and the temporary tariffs are the starting point of the negotiations, which will be marked with a letter of intent in which the parties agree which negotiations take place during a certain period. When a positive negotiating result is reached, VodafoneZiggo and the customer sign a framework agreement. This framework agreement offers VodafoneZiggo greater certainty that customers also want to actually purchase services. VodafoneZiggo does not have to implement its wholesale services before a customer signs the framework agreement.

35 VodafoneZiggo will be obliged to offer cable access on an EoO basis.

36 As in the case of the regulation of KPN, ACM does not deem the imposition of a 'bottom-up' model proportionate. ACM argues that the modelling of a hypothetical efficient cable network foreseen by a bottom-up approach would have to be (partly) based on the network of VodafoneZiggo. ACM considers that VodafoneZiggo’s upgraded cable network can be considered very similar to a hypothetical efficient network that would need to be modelled for this purpose. Finally, the cable network would need to be modelled with cost and volume data, and for this ACM would need to use extensively information from existing market parties. Since VodafoneZiggo owns the largest network, its data will be especially relevant. In conclusion, ACM expects that in the specific Dutch case the difference between the outputs of top-down and bottom-up models will be relatively limited.

37 Until ACM adopts the final regulated cap, the tariffs from VodafoneZiggo's reference offer apply as the tariff ceilings.

38 In accordance with Article 7(3) of the Framework Directive.

39 Annex to the Recommendation on Relevant Markets, C(2014)7174 of 9 October 2014.

acknowledges that the market boundaries between access at local and central level are likely to be subject to change. Such changes may vary between Member States.[40] The explanatory note further states that in view of the emergence of non-physical (or virtual) access products it seems no longer appropriate to rely on the distinction between physical and non-physical access in order to draw the market boundaries between the different types of wholesale access products available to provide retail broadband services.[41]

Taking into consideration and given the specific market situation in the Netherlands, which is characterised by ubiquitous copper/fibre and almost ubiquitous cable coverage[42], the very high degree of virtualisation of wholesale access products, the very similar technical specifications of VULA at local level and OWM/WBA at central level, already observed patterns of demand substitution as well as the apparent existence of indirect constraints, the Commission considers that there might be grounds in this specific case to conclude in favour of a converged wholesale broadband access market in these particular circumstances. In any event, the Commission notes that if the ACM had reached the conclusion that different markets for local and central access exist, it would be called upon to consider the appropriateness of the same type of regulatory obligations referred to in Articles 9 to 13 of the Access Directive[43].

However, the Commission insists on the need for VULA and other access products included in the market definition to meet and continue to meet the requirement of functional equivalence with physical local access in order to comply with substitutability requirements as well as with the conditions prescribed by the Explanatory Note to the Recommendation on relevant markets[44].

Therefore, the Commissions asks ACM to further strengthen its analysis regarding the functional substitution between the local and central access products and to further monitor switching behaviour in the defined relevant market. The Commission further asks ACM to assess at the occasion of the next market review whether the trend towards virtual access products provided at a more limited number of access points continues and whether wholesale products provided at different network levels continue to be used interchangeably by access seekers. In this regard, particular attention should be paid to the technical characteristics and respective access price developments.

**Joint Significant Market Power**

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40 Explanatory Note accompanying the Commission Recommendation on relevant markets, SWD(2014)298 of 9 October 2014, Page 41.

41 Explanatory Note accompanying the Commission Recommendation on relevant markets, SWD(2014)298 of 9 October 2014, Page 41.

42 See page 16 of the explanatory note to the SMP Guidelines.

43 See also the Commission’s comment in case BE/2018/2073-74-75.

44 Explanatory Note accompanying the Commission Recommendation on relevant markets, SWD(2014)298 of 9 October 2014, Pages 43-44.

Given the particular circumstances of the Dutch broadband market as analysed by ACM, including the established similarity in incentives and the credibility of the proposed retaliation mechanisms, the Commission does not object to the finding of joint SMP.

**Proportionality of remedies**

The Commission points out that, in line with the EU Regulatory Framework, remedies imposed should be appropriate to address the competition problem identified and proportionate. This entails that NRAs should impose only those remedies that are strictly necessary to achieve the regulatory objectives set under Article 8 of the Framework Directive, notably the promotion of competition and consumer benefits, including through the promotion of efficient investment in new and enhanced infrastructures.

In the context of imposing remedies on jointly dominant operators, the extent of the obligations should therefore be limited to those that are necessary to disrupt the identified collusive equilibrium and thus restore competitive supply on the wholesale market by at least one of the undertakings which, acting non-collusively, would not be considered to have significant market power. In principle, regulatory obligations imposed on one of the undertakings considered to be jointly dominant could be sufficient to restore effective competition by ending the conditions conducive to tacit coordination around the identified focal point (actual or constructive denial of wholesale network access with a view to maintaining high retail prices). At the same time, this could limit to the minimum any distortion of investment or other strategic decisions that could be attributable to the imposition of wholesale access on regulated terms. If such a remedy were sufficient, the fact that access-seekers' choice and ability to compete would be further enhanced by gaining access to additional networks does not appear to be, in itself, a sufficient reason to extend the scope or intensity of access regulation. This implies that in such circumstances, the NRA should adequately weigh up whether imposing an access remedy on only one of the colluding parties may -in the specific circumstances of the case- be sufficient to resolve the observed retail market failures.

The Commission understands that ACM considers that the remedies imposed on KPN in the previous regulatory period were not sufficient to fully redress the observed retail market failures attributable to tacit coordination. If this were the case and a different design of remedies imposed on KPN could not achieve the desired result, it could be a sufficient ground for ACM’s proposal to extend access remedies to the cable TV operator, subject to the overall proportionality of the remedies imposed. Therefore, the Commission asks ACM to reinforce its reasoning as to the appropriateness and proportionality of its proposed access remedies in its final measure.

As regards network investment, the Commission notes that current investment levels are likely to reflect KPN's and VodafoneZiggo's strategies to maximise returns from high-margin retail customers, as they do not compete for wholesale customers. To the extent that ACM identifies low investment levels as an indicator of market failure, and of possible current tacit coordination, and/or foresees that a future tacit coordination absent regulation could enable KPN and VodafoneZiggo to maintain low investment levels or reduce them further, the Commission also invites ACM to better explain how the proposed remedies on both undertakings, requiring reasonable access to be granted to lower-margin wholesale customers, would enhance competitive pressure for efficient investment.

**Appropriate price control remedies in the medium to long term**

The Commission notes that ACM's approach to price control for access to NGA networks[45] deviates from the principles set out in the Commission's costing and non-discrimination Recommendation[46].

In line with the costing and non-discrimination Recommendation, in particular point 49, NRAs can decide not to impose cost oriented wholesale access prices on NGA networks. The Commission recognises that ACM's approach provides a degree of pricing flexibility and predictability to the SMP operators investing in fibre as it reflects the approach already applicable since 2014. The Commission, however, also notes that fibre rollout has been significantly reduced since 2014.

The Commission further notes existing safeguards including a copper anchor (safety cap based on a cost oriented price indexed for inflation), the partial imposition of EoI, as well as the complaint by existing access seekers that commercially negotiated rates may be subject to a margin squeeze, at least in the medium to long term.

The Commission, therefore, asks ACM to consider whether controlling prices of VULA FttC, fibre ODF, VULA FttH as well as cable bitstream by way of an economic replicability test (ERT), in line with the costing and non-discrimination obligation, would be sufficient to redress the observed retail market failures. The ERT could apply either from the start or as a fall-back in case commercial negotiations fail.

**Final remarks**

The European Electronic Communications Code ('the Code')[47] for which the legislative negotiations were recently finalised will introduce a number of significant changes in the regulatory framework, as regards *inter alia* the additional regulatory objective of promoting connectivity and access to, and take-up of, very high capacity networks by all Union citizens and businesses; and the provisions regarding price controls, and establishing the possibility for SMP operators to make regulatory commitments in respect of cooperative arrangements, that can be made binding by national regulatory authorities and taken into account in assessing the need for remedies. Having regard in addition to the relatively novel character of the market analysis in this case, the Commission invites ACM to closely monitor market developments specifically with regard to possible commitments regarding future cooperative arrangements or co-investment and their impact on investment levels as well as prices and competitive intensity at retail level, and to consider an

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45 See above chapter 2.5.

46 Commission Recommendation of 11.9.2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (Costing and non-discrimination Recommendation), OJ L 251, 21.9.2013, p.13.

47 Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast), COM(2016)590 - 2016/0288 (COD).

early review of its market analysis and remedies after the transposition deadline of the Code in national law.

Pursuant to Article 7(7) of the Framework Directive, ACM shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC[48] the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission[49] within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.[50] You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

[48] Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

[49] Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

[50] The Commission may inform the public of the result of its assessment before the end of this three-day period.