Authority for
Consumers & Markets

Muzenstraat 41
2511 WB The Hague
+31 (0)70 722 20 00
www.acm.nl

Public

Summary

The Netherlands Authority for Consumers and Markets (hereinafter: ACM) carried out a market analysis in the wholesale call termination markets for both individual public telephone networks at a fixed location and individual mobile networks. ACM concludes that there is a risk of significant market power. Potential competition problems have also been identified for call termination providers with both fixed and mobile networks, namely KPN, Odido, and VodafoneZiggo. ACM therefore sees reason to impose access and transparency obligations on these call termination providers. Since KPN is the only provider providing the call termination service with associated facilities to be purchased from KPN (such as co-location facilities and the provided Ethernet services), KPN is additionally subject to a tariff obligation for this. For all other providers, the obligations will be withdrawn.

Background

The previous market analysis decision regarding fixed and mobile call termination (FTA-MTA-5) was adopted on 1 June 2017. ACM has, inter alia, the statutory duty under the Dutch Telecommunications Act to examine, at the latest within five years of a market analysis decision, whether the existing obligations need to be maintained or withdrawn.

By Delegated Regulation (EU) 2021/654 of 18 December 2020, the European Commission set a single maximum Union-wide mobile voice termination tariff and a single maximum fixed voice termination tariff. The European Commission has also removed the wholesale fixed and mobile call termination markets from the list of markets in the Annex to the *Recommendation on relevant product and service markets within the electronic communications sector*. This means that ACM no longer has the power to set the call termination tariffs itself. However, ACM retains the power to impose other obligations if warranted. In that case, ACM should assess whether ex ante regulation in the defined call termination market is justified by the so-called three-criteria test (in line with the Commission Recommendation).

Three-criteria test

In this Decision, ACM subjected the call termination markets to the three-criteria test. ACM concludes that there are high non-transitory barriers to entry on the wholesale fixed and mobile call termination market, that the structure of the market does not tend towards effective competition within the relevant time horizon, and that competition law alone is not sufficient to sufficiently remedy the market failure in question. ACM therefore concludes that all three criteria of the test are met, and that the wholesale fixed and mobile call termination markets are eligible for ex ante regulation.

Definition of relevant markets

The relevant markets are determined on the basis of product characteristics and geographical characteristics. ACM took the market analysis decision FTA-MTA-5 as the starting point for the market definition. ACM has defined the following markets:

a) call termination on geographic numbers, 084/087-, 085, 088, 112, 14, xy-, 116xyz, and 0970 numbers on an individual fixed network throughout the Netherlands, referred to as ‘call termination on an individual fixed network’ or simply ‘fixed call termination’; and
b) call termination on 06- and 0970-numbers on individual mobile networks or in short ‘mobile call termination’.

The relevant markets mentioned above cover the whole of the Netherlands, and are limited to the Netherlands.

Dominance analysis
ACM assesses whether there are providers with significant market power on the relevant fixed and mobile call termination markets on the individual networks. For its assessment, ACM uses a number of criteria, namely: (I) market share, (ii) barriers to entry and potential competition, and (iii) buyer power.

i. Market share is an important criterion in determining market power. The relevant markets are defined as call termination on individual and own networks, and therefore each termination provider is by definition a monopolist in the relevant market with a market share of 100 percent.
ii. The existence of barriers to entry into a relevant market and the absence of potential competitors on this market are circumstances that contribute to the degree of market power of a provider. Entry into the relevant market is not possible because the provider of a telephony network fully controls access to its end-users and only it can deliver voice traffic to those customers.
iii. Buying power – important for assessing market power – is no longer relevant for setting termination tariffs due to price regulation at the European level. However, providers can restrict access. It is therefore relevant whether buyer power can lead to these providers not being able to refuse access. Real-world experiences have shown that buyer power has not prevented the denial of such access.

ACM concludes that all providers of call termination on individual networks have significant market power in the Netherlands.

Potential competition problems
In the event that an operator has significant market power on a relevant market, ACM then need to impose appropriate obligations on this market participant. An obligation is appropriate if potential competition concerns may arise on the relevant market. ACM has analyzed the potential competition problems in the absence of national market regulation of call termination, but in the presence of the European price regulation where maximum voice termination tariffs have already been set.

In order to identify potential competition problems, ACM analyzed in more detail the following three categories:

i. Access refusal and barriers to access;

This problem concerns the ability of voice termination providers to restrict or deny direct access to their networks. Operators operating both fixed and mobile networks can circumvent European price regulation by refusing to grant direct access to one network (fixed or mobile), and instead provide access via internal redirection on the other network. The tariff for this internal transit operation is not capped by European legislation, which allows them to apply higher tariffs.

Only those call termination providers that have two networks (fixed and mobile), namely KPN, Odido and VodafoneZiggo, have the ability and incentive to do so. The other voice termination providers cannot set a transit tariff, as they only have a fixed network and not a mobile network.

ii. Non-price-related competition problems;

Several other potential non-price-related competition problems are related to the potential competition problem of access refusal and barriers to access. This concerns conduct that, in the presence of an access obligation, can be used to render the access obligation de facto ineffective.

ACM considers that (1) the withholding of information, (2) the use of delaying tactics and (3) unfair conditions, (4) quality discrimination where quality drops below a certain reasonable minimum level, (5) strategic product design, and (6) tying are potential competition problems in the fixed and mobile call termination markets on the individual networks of KPN, Odido and VodafoneZiggo, as these practices may undermine the effectiveness of an access obligation.

iii. Price-related competition problems;

European tariff regulation ensures that termination tariffs are cost-oriented. However, a voice termination provider that is the only one that can provide the facilities necessary for voice termination is able to charge more than cost-covering fees for these services. KPN has this ability because it is the only provider of the co-location facilities for call termination at KPN. The alternative offered, the purchase of Ethernet services via NL-IX, does not eliminate this ability, as NL-IX is owned by KPN.

Obligations

ACM considers that the applicable obligations under ACM's decision of 1 June 2 017 are no longer appropriate, and withdraws them, while simultaneously imposing the following obligations.

In order to avoid the identified potential competition problems, ACM imposes on voice termination providers that have a fixed and mobile network, namely KPN, Odido and VodafoneZiggo, the following:

I. Access obligation.
The obligation to comply with reasonable requests for access. This obligation implies that providers of call termination:
   a) provide access to network elements or facilities necessary for receiving the fixed and mobile call termination service;
   b) provide direct IP interconnection (at the request of the access-seeker) so that the access-seeker's telephony network can be directly linked to the fixed and mobile telephony network of the designated provider;
   c) provide for the provision of co-location facilities in such cases where access is provided at its own network location;
   d) provide for the option of connecting via a public internet connection (L3) if this technique is already used by the designated provider for interconnection with other telephony networks;

In addition, more detailed rules have been imposed in order to prevent de facto refusal of access.

II. Transparency obligation.
This means that the provider of call termination must provide, upon request, information necessary for a buyer to assess and choose an offer for call termination and interconnection, for example with regard to the form of access (and the technical implications thereof), the interconnection location(s) and the quality of direct interconnection. In addition, more detailed rules have been imposed to avoid de facto refusal of access.

III. In addition to the access and transparency obligations, KPN, as the sole provider providing access to its own network locations, is subject to a tariff obligation for the provision of the associated co-location facility. This will prevent KPN from charging excessive co-location fees. In the market analysis decision FTA-MTA-5, a monthly tariff was set using a tariff model based on 'fully allocated costs' of an efficient operator. ACM sees no reason to re-set the tariff (for the small group of buyers), and considers the current tariff set as a reasonable implementation of the tariff measure.

The imposition of the co-location tariff measure does not make it necessary to impose further tariff obligations for the provision of NL-IX ethernet services. After all, the purchase of regulated co-location services (and tariffs) serves as an alternative to the provision of NL-IX ethernet services, which also prevents KPN from imposing excessive charges.

The Decision enters into force on [date].