[NL] Dutch telecommunications providers KPN and VodafoneZiggo must grant competitors access to their fixed telecommunications networks

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On 27 September 2018, the Dutch Authority for Consumers and Markets (ACM) adopted the market analysis decision on Wholesale Fixed Access (WFA). Under the Decision, Dutch telecommunications providers KPN and VodafoneZiggo must grant competitors access to their fixed telecommunications networks in order to mitigate the potential effects of their collective significant market power (Article 14(2) Directive 2002/21/EC - SMP). The Decision is effective as of 1 October 2018.

Prior to the Decision of 27 September 2018, the ACM's market analysis decision of 17 December 2015 already imposed the obligation on KPN to grant competitors access to its fixed networks. On 1 January 2016, Vodafone and Ziggo launched their joint venture VodafoneZiggo. As a result of that joint venture, a unique situation exists in the Netherlands, in which two telecommunications providers with their own fixed and mobile networks are active simultaneously: KPN with its copper and glass fibre network, and VodafoneZiggo with its cable network. The establishment of the joint venture gave rise to the question of whether the market analysis decision of 17 December 2015 should be revised. Ultimately, the ACM answered that question in the affirmative, and conducted a new market analysis.

In its 2018 market analysis, the ACM considers that neither KPN nor VodafoneZiggo enjoys individual significant market power (SMP) in an unregulated market for fixed telecommunications networks. However, the ACM establishes that KPN and VodafoneZiggo enjoy collective SMP in such a market (ex Article 6a.1(5)(a) of the Telecommunications Act - Telecommunicatiewet - Tw). The ACM attributes that to the incentive and opportunity both parties have to agree tacitly to refuse access to competitors. Subsequently, should they exclude alternative providers, KPN and VodafoneZiggo can gradually begin to charge excessively high retail prices for end-users. Moreover, the ACM does not foresee any new providers with the capability to rollout their own telecommunications infrastructure entering the market. Considering all these aspects, the ACM concludes that KPN and VodafoneZiggo can potentially cause competition problems. Consequently, in order to mitigate such competition issues, the ACM imposes obligations on both KPN and VodafoneZiggo (ex Article 6a.2(1) Tw). Among those obligations is the obligation that both parties must grant their competitors access to their fixed telecommunications networks (ex Article 6a.6(1)

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Tw).

In preparation of its Decision, the ACM conducted research from January 2017 to February 2018. After that preparatory research, the ACM published the draft Decision on 27 February 2018. Subsequently, market participants were invited for consultation (ex Article 6b.1(1) Tw) and Article 3:15 General Administrative Law Act (Algemene wet bestuursrecht). On 31 July 2018, the ACM notified the European Commission of the draft Decision, including the opinions of the market participants (ex Article 6b.2(1) Tw). On 30 August 2018, the European Commission approved the Decision with some comments.

Autoriteit Consument en Markt, Marktanalysebesluit Wholesale Fixed Access, 27 september 2018

https://www.acm.nl/sites/default/files/documents/marktanalyse-wholesale-fixed-access-20180928.pdf

Dutch Authority for Consumers and Markets, Market analysis decision Wholesale Fixed Access, 27 September 2018

Europese Commissie, C(2018) 5848 final, 30 augustus 2018

https://www.acm.nl/sites/default/files/documents/reactie-europese-commissie-marktanalyse-wfa-20180928.pdf

European Commission, C(2018) 5848 final, 30 August 2018

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