

Dutch regulator ACM publishes market study and guidelines to coordinate the rollout of fibre-optic broadband

Kluwer Competition Law Blog
May 18, 2021

Pauline Kuipers, Piet-Hein Eijssen, Matteo Steiner (Bird & Bird)

Please refer to this post as: *Pauline Kuipers, Piet-Hein Eijssen, Matteo Steiner, 'Dutch regulator ACM publishes market study and guidelines to coordinate the rollout of fibre-optic broadband', Kluwer Competition Law Blog, May 18, 2021, <http://competitionlawblog.kluwercompetitionlaw.com/2021/05/18/dutch-regulator-acm-publishes-market-study-and-guidelines-to-coordinate-the-rollout-of-fibre-optic-broadband/>*

On 6 May 2021, the Netherlands Authority for Consumers & Markets (“**ACM**”) published its updated market study (“**FtTH market study**”) into the roll-out in the Netherlands of fibre-optic broadband networks for households (*Fiber-to-the-Home*). In the annex to this report, the ACM provides guidelines on how the roll-out of fibre-optic networks could be coordinated within the applicable telecommunications and competition laws.

The FtTH market study and attached guidelines describe – not only for market parties, but specifically for municipalities – how the further roll-out of fibre-optic broadband networks in the Netherlands may be stimulated, while preventing overbuild of fibre networks and reducing delayed roll-out, nuisance for citizens and competitive concerns.

The ACM FtTH market study of 2019

In April 2019, ACM started a market study into fibre-optic roll-out in response to complaints from the market and articles in the national media on potentially harmful strategic behaviour by telecom operators. The ACM described in its initial FtTH market study report of October 2019 that as a result of the already installed nation-wide cable infrastructure there is generally no economic justification for building two additional fibre-optic broadband networks. As a result, it is essential for operators to be the first mover in the roll-out of fibre-optic networks in a particular geographic area.

ACM considered this market dynamic induced strategic behaviour by market players. For instance, market players prematurely announced (without completing the required preparations) the roll-out of fibre-optic networks, used delay tactics in permit procedures to frustrate the business case of competitors and in some cases the installation of networks led to so-called strategic overbuild. However, ACM did not establish any infringement of the competition or telecommunication laws on the FtTH market. [fn]See for more details our earlier blog in Dutch on the initial FtTH market study report.[/fn]

The updated ACM FtTH market study of 2021

On 6 May 2021, ACM published its updated FtTH market study report following a period intensive building of fibre-optic infrastructures, market entry of new players as well as disputes between operators regarding the roll-out of networks.

ACM maintains that co-investment agreements remain the most suitable possibility to realize a rapid roll-out. The European Electronic Communications Code (“EU Telecom Code”) of December 2018 offers the opportunity for the Dutch legislator to stimulate the roll-out of fibre-optic networks by allowing operators to cooperate in the installation of a fibre-optic network on the basis of a co-investment agreement. However, ACM concludes that in practice market players are reluctant to cooperate under a co-investment agreement and no co-investment agreement has yet been submitted to ACM for review.

ACM notes that with the deregulation of the market for wholesale access to fixed networks in 2020 [fn]On 17 March 2020, the Dutch Trade and Industry Appeals Tribunal (“CBB”) annulled ACM’s Wholesale Fixed Access decision which designated telecom providers KPN and VodafoneZiggo as having joint significant market power and required them to open up their fixed networks in the Netherlands to other providers.[/fn], access regulation on the copper and fibre networks of KPN and the cable network of VodafoneZiggo ceased to apply. The ACM mentions in its FtTH report that several parties have expressed their concerns with respect to the available options to purchase wholesale access to fibre-optic networks. The ACM is currently investigating whether new (*ex ante*) access regulation needs to be imposed on fibre networks (and other networks) in order to safeguard competition on the Dutch telecoms market in the long term. The ACM continues to monitor the market for the roll-out of fibre and will intervene if it finds anti-competitive behaviour.

The most interesting aspect in the updated FtTH report is the suggestion by ACM that municipalities, together with the operators, should actively take a coordinating role in selecting the areas for optical fibre roll-out as well as the terms and timing for building the networks. In essence, ACM suggests that municipalities may request operators to start their roll-out of fibre-optic networks in different geographic areas instead of installing parallel networks at the same locations. This is explicated in the attached annex to the report, in which guidelines for municipalities (and market parties) are given.

Annex to the ACM FtTH market study of 2021: guidelines on fibre-optic roll-out

In the Annex, ACM provides guidance on how the roll-out of fibre-optic networks could potentially be coordinated within the applicable telecommunication and competition laws. The solutions advocated by the ACM require cooperation between municipalities and market parties. The ACM aims to provide guidance by outlining a number of possible approaches that could have a (positive) effect on the (fast, broad and affordable) availability of fibre in municipalities and that are, in principle, possible within the framework of competition and telecommunication law. ACM invites municipalities to provide input on these suggestions and reach out to ACM if they encounter any issues and/or want to share their experiences.

In advance of the required formal approval that must be obtained from municipalities before building any network in public land (the ‘approval decision’), the ACM considers it advantageous for both municipalities and market parties to include as many conditions as possible in a cooperation agreement as this facilitates the statutory approval procedure and provides the parties involved with more legal certainty.

The ACM notes that the requirement for operators to receive approval decisions from municipalities before actual network building can begin and the statutory terms for decision-making, cooperation agreements provide municipalities with the opportunity to define practical conditions in consultation with the market parties concerning (a) the location of the work; (b) the time of the work; (c) the manner of implementation; (d) the promotion of the joint use of facilities and (e) coordination with other digging contractors, including fibre-optic parties. In the negotiation process, a municipality can also encourage operators to immediately include areas that were not part of their original roll-out plans. The ACM considers that a well-drafted cooperation agreement facilitates the approval procedure and provides the parties involved with more legal certainty.

Where roll-out plans of competitors clash, the ACM suggests that municipalities may coordinate which operator starts where with the roll-out. It notes that such coordination is limited to the operational aspects of planning and area selection and that no agreements are made explicitly concerning, for example, the manner of operation, promotion, commercial or strategic aspects. To ensure this, the ACM states that the necessary exchange of information regarding the roll-out plans and area selection should take place via the municipality (to avoid unlawful coordination of conduct by competing operators).

According to the ACM, municipalities may, provided they can substantiate this with reasons derived from the public interest – such as the prevention of additional nuisance and the acceleration of the roll-out in other areas – temporarily (e.g. for a couple of months) impose a ‘digging freeze’ preventing digging activities in an area where another party has recently installed or is installing a fibre-optic network. In case of serious reasons of public interest, a digging freeze can be imposed for longer than one year. Such measure could also stimulate market parties to accept access to another party’s network rather than delaying roll-out. However, the use of this power may not result in an operator being permanently blocked from rolling-out a fibre-optic network in a certain area.

Final remarks

The ACM announced that it will use its guidelines on coordinating the fibre roll-out as a ‘living document’ which may be amended on the basis of future market and legal developments. The ACM invites market players to provide their input on the guidelines. It remains to be seen whether these guidelines will sufficiently enable a further rapid and efficient roll-out of fibre-optic networks in the Netherlands.

In an – as yet – unregulated market for building and exploiting (providing wholesale access) fibre optic networks, the ACM not only looks into possible re-regulation – under the current telecoms framework and in anticipation of the ongoing implementation of the EU Telecom Code – of the FtTH market. As it seems that competition law does not provide a suitable instrument for addressing competition concerns, the ACM also clearly looks for more indirect ways to prevent distortions of competition at the stage of fibre-optic roll-out that may affect network competition in this market for many years to come.

Given the acknowledged limitations of its own powers, it is interesting to see that the ACM attempts to find creative alternatives to regulation by appealing to the responsibility and powers of municipalities as well as providing guidance and support to them in relation to fibre-optic roll-out and in discussions with competing operators.