ZIENSWIJZE VAN UPC NEDERLAND B.V.
MET BETREKKING TOT EEN ONTWERPBESLUIT INZAKE MARKTANALYSE OMROEP
(OPTA/AM/2008/201541)

1. SUMMARY AND CONCLUSIONS

1.1 In its draft Market Analysis Decision for broadcasting transmission (the **Decision**) OPTA identifies a wholesale market for transmission of television-signals and for access to a broadcasting transmission platform within UPC's footprint. Having applied the three criteria test, it concludes that this market is susceptible to ex ante regulation, goes on to designate UPC as having Significant Market Power (SMP) on that market and proposes various remedies, including far-reaching new access obligations to comply with reasonable requests:

- for transmission of television-signals;
- for resale of analogue television-signals;
- supply at the wholesale-level of access to the broadcasting transmission platform (which would allow alternative providers to – in effect – take over the entire end-user subscription);
- moreover, according to OPTA, these obligations also entail that UPC must allow providers of digital television-signals to use its conditional access system to enter into direct customer relations with the end-users.

1.2 OPTA's measures are not aimed at ensuring that programme providers will continue to see their programmes being distributed by UPC. According to OPTA, it is not authorised to regulate this side of the market. Instead, OPTA's proposed regulation of the market is aimed at creating an entirely artificial market of alternative ‘infrastructure-less’ providers of radio and television-signals who seek to distribute their programmes or programme-packages over UPC’s network <u>instead of</u> and/or <u>in addition to</u> the programme-packages distributed by UPC.

1.3 This remedy seems to be inspired by the wholesale line rental (WLR) obligation imposed on KPN three years ago, which force KPN to allow resale of connections to its fixed telephony network, allowing carrier selection service providers to take over the entire contractual and billing relation with customers who have already chosen to buy their telephony service from these alternative service providers.

1.4 These proposed ex ante measures are without precedent. UPC is not aware of any other countries where similar obligations have been imposed on cable operators, in spite of the fact that cable penetration in the Netherlands is not unique. There is no empirical evidence that the access remedies envisaged by OPTA support a viable businesscase. The reasons for OPTA to impose WLR on KPN, do not apply to UPC, as OPTA has itself recognised in defending its previous decision not to impose resale on UPC.

1.5 OPTA's measures appear to be aimed at controlling retail prices of UPC, and increasing consumer choice. Both these aims are already realised through the increase in competition which has taken place over the last regulatory period, and which is likely to further intensify over the next regulatory period. As the Commission observed in the context of its current Recommendation on the relevant markets, digitisation has resulted in more broadcasting platforms becoming available to the average household. The choice available to Dutch households is among the broadest in Europe. Consumers therefore already are offered a rich choice of alternative service providers. Although each of these providers claims its own unique selling point (e.g. 'no wires needed' for DTT or 'no decoder needed' for additional TV-sets), the key factor determining consumer choice today is digital sound/image quality. In this respect, all digital providers are comparable in the perception of the consumer, which has resulted in a significant increase in UPC's churn numbers over the last regulatory period, a trend which is likely to only sharpen over the next regulatory period. This has already resulted in real price contraints on UPC's retailprices (which have been stable during the last regulatory period and are acknowledged to be low compared to those in other Member States).

1.6 UPC therefore does not believe there is any basis or need for OPTA's intrusive and farreaching market intervention, and does not agree to OPTA's analysis of the market. In particular it is of the opinion that:

i) OPTA's definition of the relevant markets is flawed;

ii) there are no grounds to designate UPC as having significant market power; and

iii) OPTA should not impose the remedies it is proposing, but should instead withdraw the remedies it imposed in its previous market analysis decision.

1.7 The position of UPC is explained in more detail in this position paper. Before discussing OPTA's market definition, its analysis of significant market power, and the remedies it is proposing, UPC will begin with a discussion of the three criteria test. As some of the factors which are of key importance to the discussion of the three criteria test, are also relevant for the other parts of OPTA's market analysis, some repetition could not be avoided.

1.8 To support its position, UPC relies on the following two documents which have been prepared on joint instruction of UPC and Ziggo and are attached as Annexes to this position paper:

iv) "**The Dutch TV Market**" (**Annex 1**): a series of slides prepared by Bain & Company which offers a broad overview of the market, on the basis of market intelligence from sources like Telecompaper, Screendigest and company financials, as well as the various reports prepared for OPTA over the last few years.

v) "**Observations on OPTA's Draft Market Analysis for RTV Broadcasting in the Coverage Area of UPC and Ziggo**" (**Annex 2**): a note by RBB Economics who have been asked by UPC and Ziggo to comment on several economic aspects of OPTA's Decision, i.e. OPTA's analysis of the competitive constraints faced by UPC and Ziggo, and the cost-benefit analysis that OPTA has undertaken on the basis of the proposed remedies.

2. THREE CRITERIA TEST

A. Introduction

2.1 OPTA must take the Commission's Recommendation of 17 December 2007 (hereafter: the **Recommendation**) as the starting point for its market analysis. Whereas in its previous recommendation the Commission included as market 18 the wholesale market for broadcasting transmission, it decided not to include this market anymore in the Recommendation, having concluded that this market no longer meets the three criteria test. As in the previous recommendation, no retail market was included.

2.2 In the Decision, OPTA recognises that it must apply the three criteria test if it is to impose new obligations on UPC on the wholesale market for broadcasting transmission. Following its definition of the relevant market in the Netherlands and its assessment of SMP on these markets, it goes on to apply the three criteria test, concluding that in the Netherlands the three criteria are in fact met.

2.3 UPC does not agree to this analysis and is of the opinion that none of the three criteria apply in the Netherlands, as will be explained below. At the wholesale level, this follows from the Commission's Recommendation. The reasons for the Commission to delist market 18 from its current Recommendation, apply very much in the Netherlands. Circumstances in the Netherlands are not exceptional to the extent that they warrant a deviation from the Recommendation. At the retail level (which is important, as OPTA's measures are really aimed at remedying a perceived lack of pricing pressure at the retail-level), UPC calls into memory the Commission's serious doubts letter of 3 November 2005 (hereafter: the **Serious Doubts letter**). The reasons and forward looking expectations cited by the Commission then to support its serious doubts as to why the three criteria test were not met for the retail market, have turned out to come true for the Dutch market. The Dutch market is dynamic and very much in transition as a result of ongoing digitisation, as the Commission again pointed out in its letter of 21 December 2005, in which it withdrew its serious doubts, stressing the need for OPTA to closely monitor market developments.

2.4 Because of the fundamental importance of the three criteria test in this particular case, where OPTA intends to substantially increase regulation of a market which has been struck off the Commission's Recommendation for not meeting the three criteria test, this topic is addressed before UPC offers its views on OPTA's market definition, its assessment of SMP and the remedies it is proposing to impose.

B. The Commission's reasons not to include broadcasting transmission in the Recommendation also apply in the Netherlands

2.5 In its second Recommendation on the Relevant Markets, the European Commission has concluded that the wholesale and retail markets for broadcasting transmission do not meet the three-criteria test, and has decided not to include these in its list of recommended markets which must be reviewed by the national regulatory authorities.

2.6 OPTA must take the utmost account of this Recommendation. As OPTA (and the ERG) have correctly recognised, applying (new) *ex ante* regulation on a market which is not included in the Recommendation, is only permitted if OPTA can show that the national characteristics of this market are such that the three criteria test is met.

2.7 The reasons put forward by the Commission in its explanatory note to the current Recommendation, as to why no retail-market is included and why the second and third criteria have not been met for the wholesale-market, also very much apply in the Netherlands. OPTA's arguments to the contrary must be rejected.

Retail market offers sufficient level of infrastructure competition

2.8 The reason given by the Commission to again not include a retail market, is that households normally have up to three potential means of receiving broadcast content, and that this number is likely to even increase with further technical developments.

2.9 This is also true for the Netherlands, where the number of alternative broadcasting platforms available to most households is among the highest in Europe (i.e. four for most households, and five where FttH has already been rolled out.[1]

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1 See slide 11 of the Bain Report.

Wholesale market: significant market dynamics as a result of transition from analogue to digital delivery platforms (second criterion)

2.10 As one of the key reasons not to include the wholesale-market, the Commission mentions the increase of platform competition as the transition from analogue to digital delivery platforms occurs, resulting in more platforms and a strong impetus for platforms to compete and attract end-users, among others by obtaining content.

2.11 These reasons also very much apply in the Netherlands.

2.12 Market shares for competing digital platforms have all met or exceeded OPTA's own projections of three years ago.[2] DTT of KPN now has more digital subscribers than UPC.[3]

2.13 Moreover, there is still significant potential in IP-TV. KPN and Tele2 currently have (near) national coverage providing IP-TV over ADSL-2+. While current uptake is in line with OPTA’s projections, its growth has been less spectacular than that of other digital platforms, in spite of the fact that the Netherlands continues to have a broadband penetration which is among the highest in the world. An explanation for this may be found in the structure of the market, in which the incumbent KPN controls both DTT and IP-TV. Perhaps because of the upcoming overhaul of its fixed network, it has chosen to focus its efforts and marketing push on DTT during the first regulatory period. While this choice has paid off handsomely, there is no reason to expect that KPN will not put similar efforts over the next three-five years into the expansion of its IP-TV offering, to capitalise on its ongoing investments in its Next Generation Network (which KPN refers to as its 'All-IP' project). KPN's intention to participate in Reggefiber (which is still subject to merger control approval), the leading provider of glassfibre-networks, may (if its plans are approved) further spur this development. Therefore, the fact that IP-TV has not yet developed to the same extent that it has in some other Member States (like Belgium, which has similar levels of cable penetration), is thus the result of a strategic business choice made by KPN. [4]

2.14 These developments are also likely to boost other IP-TV providers like Tele2, who will be able during the next 3 to 5 years to benefit from FttH and NGN through KPN’s obligations with respect to wholesale broadband access and unbundling of the local loop, including subloop unbundling and access to the optical distribution frame.

2.15 As the Commission correctly observes, the ongoing transition from analogue to digital has indeed resulted in fewer capacity constraints, and a new impetus for

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2 See slide 45 of the Bain Report.
3 See slide 59 of the Bain Report.
4 See slides 81, 82 of the Bain Report.

platforms to acquire attractive content. This is evidenced by the Premier League Football Channel ("Eredivisie Live") which is transmitted over various platforms, including UPC's, on the basis of commercial agreements. There is no indication that content providers are having difficulty on the Dutch market in getting their programmes distributed to end-users.

Cable operators are already subject to significant must-carry obligations which will be extended to their digital offering (third criterion)

2.16 The third criterion requires OPTA to consider whether potential market power problems can be addressed either by competition law or indeed by other regulatory measures that will apply regardless of the outcome of this market analysis. As the Commission has observed, perceived problems of access to transmission platforms for specified channels and services can be addressed by national must carry rules which are imposed by article 31 of the Universal Service Directive.

2.17 As follows from the discussion of the second criterion, UPC believes that the current state of the Dutch market is already such that platform providers have no real incentive or even possibility to unreasonably deny distribution of third party content. However, even if such a risk of access refusal were real, this is very significantly reduced by statutory must-carry obligations which exist on the Dutch market, and which are even expected to be substantially extended in the future.

2.18 Under the Dutch Media Act, cable operators are currently required to transmit at least fifteen television (and twenty-five radio) programmes to all subscribers. This is interpreted to mean that these programmes must be transmitted in analogue format. Programmes which must be carried, include Dutch language public broadcasting (local, regional, national and Flemish), and such other programmes as advised by the local, independent programme council. This must-carry obligation applies only to cable operators, and not to other programme distribution platforms.

2.19 A recent legislative proposal provides that this obligation will also apply in the digital cable domain if a significant number of end users should use this as their principal means of receiving radio and television broadcasts. During the transition from analogue to digital, cable operators may even be obliged to offer the must-carry programmes in both formats. This proposal has been approved by the Second Chamber of Parliament and is currently pending before the First Chamber of Parliament (who do not have the power to amend legislative proposals).5

[5] First Chamber of Parliament, 2007 – 2008, 31 356, A.

C. OPTA's reasons for considering that the three criteria are fulfilled

2.20 In chapter 10 of its Decision, OPTA applies the three criteria test to what it considers to be the relevant market, i.e. the (wholesale-)market for transmission of television-signals and access to a broadcasting transmission platform.

2.21 In doing so, OPTA also addresses the issues raised by the Commission in the Serious Doubts letter, in response to OPTA's proposal three years ago to identify a retail market for broadcasting transmission (even though this market was not included in the first recommendation) and to impose retail price-regulation on that market.

2.22 As will be explained below, OPTA's reasons cannot justify a deviation from the Commission's Recommendation.

First criterion: existence of high and non-transitory barriers to entry?

2.23 In its Serious Doubts letter, the Commission noted that the (retail-)market for broadcasting transmission is characterised by innovation, which allows alternative providers of broadcasting platforms to enter the market. OPTA's own projections of three years ago already confirmed this by predicting significant growth of market shares for these alternative platforms. Furthermore, the Commission pointed to the ongoing digitisation, and the increased capacity this should ultimately result in.

2.24 In its Decision, OPTA identifies several indicators which are relevant in assessing this first criterion, concluding that all of these indicators point to the existence of non-transitory barriers to entry.

2.25 UPC will show for each of these indicators why OPTA's conclusions are wrong.

(i) The market is characterised by benefits of costs, scale and synergy

2.26 While it is true that a provider on the market may benefit from economies of scale and scope, this indicator should be put into perspective for several reasons:

- Firstly, the relevant question is whether this offers UPC an advantage relative to other providers on the market. Compared to KPN (which is active on the broadcasting market in each of DTT, IP-TV and FttH), it is KPN rather than UPC which has the advantage in this respect. This is all the more evident if the full breadth of its offering and its total turnover on the Dutch communications market are taken into account[6].

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6 See slides 16 en 19 of the Bain Report.

- Secondly, OPTA's assertion in this context that there are significant costs of switching between platforms, is not supported by its own analysis of the relevant market, where it concluded correctly that switching costs are not high enough to warrant separate market definitions for the different platforms. As the Commission correctly noted in its serious doubts letter, increased competition between platforms has prompted providers to subsidise decoders, significantly lowering switching costs.[7]

- Thirdly, the impact of technological developments and innovation should not be underestimated in this respect. For example, more and more flatscreen televisions are being sold with built-in digital tuners capable of decoding DTT signals.[8] [9] KPN benefits from its experience and network in retailing by promoting bundled sales of its DTT-smartcards by retailers of these tv-sets; the customer buys its digital television-subscription at the same time as buying a new digital flatscreen. Similar technological advantages exist for IP-TV: costs of IPTV decoders are already cheaper than those for digital cable, and are expected to drop further, as worldwide take-up of IP-TV grows.[10] This will be a significant benefit to KPN and other IP-TV providers over the next three to five years.

(ii) Limitations in capacity and significant initial investment

2.27 OPTA observes that the rollout of DSL-IPTV, glassfibre and satellite all require significant initial investments. It acknowledges that this may be different for DTT, but notes that this platform only offers limited capacity.

2.28 UPC submits that initial investments are less important if these investments have already been made. This is the case in the Netherlands, where DTT, (digital) satellite and IP-TV are all available throughout the country. The initial investments required for these platforms thus no longer are a barrier to entry. All current platform providers have made significant investments which they intend to recuperate, if not in the short term, then at least in the long term.

2.29 Moreover, again the relative importance of this indicator should not be overlooked. UPC's own digitisation also requires significant investments. Over the last three years, UPC has invested some [CONFIDENTIAL] [11]), behind KPN's DTT, who is gaining digital subscribers faster than UPC.

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7 See slide 21 of the Bain Report.
8 See slide 30 of the Bain Report.
9 See page 12 of the Stratix report for OPTA.
10 See slide 83 of the Bain Report.
11 See slide 59 of the Bain Report.

2.30 This also proves that DTT's limited capacity has not resulted in a barrier for KPN to successfully enter the market for television broadcasting. DTT's current programme offering covers 90 % of the most watched programmes in the Netherlands. [12] A significant number of subscribers apparently prefers the availability of this smaller selection of 'must have' programmes at a reduced price, to the offer of UPC's bigger standard offering at a premium price. Should this change during the next three to five years, then KPN is able to respond to this (1) as its frequency capacity for DTT is about to be further increased and (2) technological developments will allow it to make better use of available capacity[13] and (3) by bundling DTT with IP-TV which offers the ability to offer an unlimited number or programs.

(iii) Infrastructure which is not easily replicated

2.31 OPTA states that UPC's infrastructure is not easily replicated, and that UPC is therefore the only provider which is able to offer digital as well as analogue television during the next 3 to 5 years.

2.32 OPTA's assertion that UPC's infrastructure is not easily replicated is besides the point. OPTA fails to appreciate that television broadcasting infrastructures have already been replicated on the Dutch market, resulting in the entry of satellite, DTT, IP-TV and FttH. As OPTA has correctly recognised, these platforms are active on the same market. This proves that replication of UPC's infrastructure is not relevant. This is furthermore clearly supported by the Commission's letter of 21 December 2005. The Commission states that even if alternative platforms could not be considered to be part of the relevant market then, in innovation driven markets, entry barriers relative to existing infrastructure may be less relevant. Already then, even the possibility of entry of the aforementioned infrastructures indicated that barriers based on existing infrastructure are low or decreasing or in any event only transitory in nature. This expectation has proven to be right, and is confirmed by OPTA's current assessment that these alternative platforms are all active on the same market as cable.

2.33 Aside from this, OPTA overestimates the importance of an analogue signal. Market research show that this is only important to a relatively small number of customers, whose number is likely to decrease over the next few years, [14] as digital becomes more important, [15] and prices for additional decoders drop further or become altogether unnecessary (for being built into TV-sets).[16]

12 See slide 26 of the Bain Report.
13 See slide 71 of the Bain Report.
14 See slide 42 of the Bain Report.
15 See slide 67 of the Bain Report.
16 See slides 30 and 83 of the Bain Report.

(iv) Access to digital frequency spectrum is restricted

2.34 OPTA considers the fact that a license is required for the use of frequency spectrum to result in a barrier to entry. Again, this argument would only hold true if no license for DTT had been given out. The reality is that this license is being held and successfully exploited by the biggest provider of communications services on the Dutch market. Consequently, it must be concluded that DTT is being used to its fullest technological and commercial extent, and that KPN is not restricted by any entry-barriers in this respect.

(v) No repeated, successful market entry

2.35 While OPTA acknowledges that DTT, DSL-IPTV and FttH have over the last few years entered the market, in addition to cable and satellite, it argues that these platforms only exert limited competitive pressure in terms of price, functionality, switching costs or geographical reach. OPTA also notes that the number of providers is limited; in addition to UPC, there are Canaldigitaal, KPN, Tele2 and a number of smaller providers active on glassfibre.

2.36 UPC agrees that the number of providers is not as high as it could have been. If the decision had been made not to allow KPN to obtain full control of the DTT license, an additional provider would have been allowed to enter the Dutch market. Similarly, if there had not been a strong consolidation among ADSL-providers, a larger number of DSL-IPTV providers might have been active today besides KPN. KPN's proposed participation in Reggefiber, if allowed, may also be a disincentive to other service providers to offer television services over glassfibre. The fact that there are not as many providers as there could have been, is therefore not due to the position of cable, but rather the result of decisions that have been made to allow KPN to expand and consolidate its already significant presence on the market.

2.37 This is not to say that the market for television broadcasting is not already competitive or that there are too few providers on the market. There is a broad variety of platforms and providers, resulting in a rich offering of radio and television packages already being available to consumers. [17]

2.38 Moreover, the structure of the Dutch broadcasting market seems more important than the number of active provider. This structure is sound, with all possible broadcasting infrastructures having been rolled out, resulting in (on average) four (and sometimes five) different platforms being available to a household.

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[17] See slides 7, 8, 16, 18, 19, 27, 28, 30 and 34 of the Bain Report.

2.39 UPC does not agree to OPTA's assessment that alternative platforms exert limited competive pressure in terms of functionality. Although each platform claims its own unique selling point (e.g. 'no wires needed' for DTT or 'no decoder needed' for additional TV-sets), the key factor determining consumer choice today is digital sound/image quality. [18][19] In this respect, all digital providers are comparable in the perception of the consumer, with alternative providers offering digital tv at lower prices than UPC is able to.

2.40 UPC furthermore disputes OPTA's assertion that these platforms only exert limited competitive pricing pressure on each other, as will be more fully explained in the chapter on OPTA's SMP analysis. OPTA's observation in this respect that the presence of satellite could not prevent UPC raising its prices prior to 2006, is completely irrelevant. Not only because these one-off price increases by UPC were necessary to undo the effects of municipal price regulation and to raise prices to competitive levels (as the Commission correctly noted in its Serious Doubts letter, and has since been confirmed by OPTA's own economical advisor Lexonomics[20]), but also because UPC's prices have stabilised since, in absence of retail price regulation.[21] This can only be explained by the increase of competition.

(vi) Broadcast market not characterised by ongoing technological innovation

2.41 OPTA takes the remarkable position that the Dutch broadcasting market is not characterised by technological innovations, contradicting the Commission's observation to the contrary in its Serious Doubts letter of 2005. To support its position, OPTA points to a supposedly lagging digitisation, as well as complementary use of digital alternatives (i.e. consumers subscribing to alternative digital platforms in addition to cable).

2.42 UPC contests that digitisation on the Dutch market is lagging. Digital penetration on the Dutch market has doubled in less than three years, which is in line with the forecast of OPTA's advisor Dialogic three years ago (which predicted a penetration in the range between 35 % and 56 %). Moreover, this level of digitisation is comparable to that in many other European Member States. [22] The number of alternatives available to the average Dutch household is higher than in many other Member States. [23]

18 See slide 30 of the Bain Report.
19 See paragraph 1 of the Interview.NSS report for OPTA.
20 See page 21 of the Lexonomics report for OPTA..
21 See slide 60 of the Bain Report.
22 See slide 66 of the Bain Report.
23 See slide 11 of the Bain Report.

2.43 OPTA's assertion that many digital subscribers use digital as a complement to UPC's analogue offering is not supported by empirical data, which shows a trend moving away from complementary use towards more substitution.[24] In short, what seems to be happening is that subscribers start off by trying out DTT in addition to their cable subscription, but then go on to cancel their cable-subscription when they are convinced of the quality of DTT. This trend is clear evidence that the product offerings of other digital television providers have matured, and are seen by growing numbers of consumers as perfectly acceptable alternatives to cable. This effect is likely to increase over the next few years.

2.44 Aside from these trends towards even higher levels of digitisation and substitution (instead of complimentary use), there is also plenty of other evidence that the market is characterised by innovation. Technological advances enable 'over-the-top' providers like Joost and Apple-TV/iTunes to offer television services over existing broadband internet connections, further reducing barriers to entry. UPC also points to its own role as pioneering innovator, being the first operator on the Dutch market to offer interactive services like VoD and HD-TV. This level of innovation by UPC is itself a clear indicator of competitive pressure.

(vii) Digitisation will lead to voluntary access

2.45 OPTA refers to the Commission's remark in its Serious Doubts letter that digitisation may lead to access either on a voluntary basis or because of wholesale regulation of the kind then proposed by OPTA. OPTA goes on to state that no access has been granted, in spite of request by KPN, YouCa and another unidentified party.

2.46 It should be noted that in its previous decision, OPTA imposed on UPC the obligation to offer wholesale transmission services, to parties seeking to distribute content in addition to UPC's offering. This obligation has applied for (most of) the past regulatory period. Yet no party has actually requested this form of access imposed by OPTA.

2.47 In the past (before OPTA imposed this access obligation), UPC has provided such wholesale transmission services to Canal+, enabling that company to sell premium programmes to customers with its own conditional access system. However, Canal+ has ceased these activities. Therefore, there is little evidence of an actual interest in wholesale transmission services over cable of the kind previously used by Canal+ and imposed by OPTA in the market analysis decision currently in force.

24 See slide 50 of the Bain Report.

2.48 There are however indications that digitisation is prompting content providers to explore new business models and consider alternative access arrangements. The recent arrangement agreed between UPC and Eredivisie Live is an example of this which illustrates that digitisation is creating new business opportunities for programme providers.

2.49 OPTA's references to KPN and YouCa are irrelevant, as both of these parties have specifically asked for resale (i.e. being able to sell the UPC programme package instead of UPC, rather than offering new program packages in addition to those of UPC). Under OPTA's existing market analysis decision, UPC was not under any obligation to comply with such requests. Moreover, the Dutch Competition Authority has rejected a complaint by KPN that UPC's refusal to co-operate with resale constitutes an abuse of a dominant position.[25] These cases therefore offer no evidence of persistent and real barriers to entry.

(viii) Subconclusion on first criterion

2.50 As UPC has shown, there is no real evidence that high, non-transitory barriers to entry exist. On the contrary, various competitors have already entered the market, and have succeeded in obtaining significant market shares, exceeding OPTA's own estimates.[26]

Second criterion: tendency towards effective competition

2.51 As with the first criterion, OPTA discusses various indicators to conclude that there is no tendency on the Dutch broadcasting transmission market towards effective competition. As UPC will show, OPTA's arguments must be rejected.

(i) Transition to digital

2.52 Referring to the Commission's explanatory note to the current Recommendation, OPTA states that the transition from analogue to digital (and the resulting impetus in competition) is unlikely to take place over the next three to five years in the Netherlands. According to OPTA, digitisation was slow to start in the Netherlands, and is currently lagging, both compared to earlier predictions and to other Member States. OPTA recognises an increased level of competition as a result of digitisation, but concludes that these new market dynamics are unlikely to result in an effectively competitive market within three to five years.

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25 Decision of the Dutch Competition Authority NMa of 20 July 2007, caseno. 5702/44.

26 See slides 45, 46 of the Bain Report.

2.53 As already stated in the discussion of the first criterion, OPTA's statement that digitisation in the Netherlands is lagging is false. Three years ago the Commission considered that limited switching at that time could be explained by the fact that alternative infrastructures had only appeared on the market recently and were still in the process of being rolled out. However, during the last three years, digital competitors of UPC have realised double digit growth. Current penetration levels exceed OPTA's own estimates of three years ago. In the case of DTT, even the upper boundary of Dialogic's prognosis has been exceeded.[27] In comparison to other EU Member States, the Dutch penetration level is not low, but appears to be average.[28] These trends also justify the Commission's view that OPTA perceived problems regarding the use of digital terrestrial equipment and satellite dishes were unlikely to affect the further roll out of alternative infrastructures.

2.54 OPTA's position that this trend is unlikely to result in an effectively competitive market within 3 to 5 years is – for the purposes of the second criterion – irrelevant. Even if the statement is true, the test is whether there is a tendency towards effective competition – not whether effective competition will exist at the end of the regulatory period. In particular, there is no requirement for UPC's market share to have sunk below fifty per cent (although, as explained further on, UPC’s market share is indeed lower than fifty per cent if the market is defined properly). As the Commission has rightly observed in its Serious Doubts letter (and as substantiated in the RBB-report), in order to exert price constraints on UPC, it is not necessary for a competitor to obtain a substantial market share.

2.55 Moreover, UPC does not share OPTA's conservative view of developments in the next three to five years. Various market researchers predict that the majority of connections on the Dutch market will over the next three years become digital with analogue becoming a legacy product for a relatively small group of consumers.[29] Analogue penetration is generally expected to drop to some 10-20% by the end of the current regulatory period. Ongoing developments mentioned by OPTA, like the current complementary use of other digital platforms and DTT decoders being built into television sets, are likely to benefit alternative providers in the future, rather than to restrict them. This will result in an additional constraint on UPC, who sees its subscribers increasingly willing to switch to alternative platforms.

(ii) Increase in product diversification

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27 See slides 45, 46 of the Bain Report.

28 See slide 66 of the Bain Report.

29 See slide 67 of the Bain Report.

2.56 OPTA recognises that other platforms (FttH, DSL-IPTV) and operators (KPN) are able to offer a diverse product portfolio of television broadcasting services.

2.57 While UPC contends that it is also possible for satellite providers to offer innovative new services (like HDTV and interactive services of the kind successfully offered by BSkyB on the UK market[30]), the importance of these services should not be overstated. Innovative new services (like VoD and HDTV) are quoted by only a limited number of Dutch consumers as reasons to switch to digital.[31] The main reason for consumers to choose digital television is the quality of the audiovisual signal. In that respect, all providers of digital television are more or less equal in the perception of the average consumer.

(iii) Increased demand for triple play bundles

2.58 OPTA states that the increased demand for triple play bundles will make it increasingly important for UPC's competitors to offer such bundles. As becomes apparent later on in the Decision, OPTA is of the opinion that the ability to offer analogue TV is in its view essential for competitors to compete effectively with triple play bundles of their own.

2.59 OPTA assertion that analogue TV is an essential element in a multiplay bundle is not supported by facts. In fact, its own research shows that many consumers today choose bundles without television (e.g. broadband and telephony).

2.60 As OPTA's own market research shows and is supported by BAIN,[32] the availability of analogue TV within a bundle has limited or no value to consumers in their choice of a multiplay bundle. Instead, multiplay customers cite other reasons for choosing their bundle, such as discounts or the convenience of a single provider/single bill.[33]

2.61 Moreover, there can be no doubt that KPN and Tele2 are already able to offer bundles which include television, and are already doing so, and can continue to do so in the future.

2.62 Only the satellite providers like Canaldigitaal are not offering such bundles, but in view of existing wholesale offers for broadband and (IP-)telephony they have the possibility to offer such bundles. In any event it is not the lack of a television offering which is preventing them from offering triple play.

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30 See slide 55 of the Bain Report.
31 See slide 30 of the Bain Report.
32 See slide 42 of the Bain Report.
33 See pages 5, 6 of the EIM report for OPTA.

(iv) Switching costs

2.63 According to OPTA, consumers experience additional switching costs if they switch from analogue cable to another digital platform, as compared to switching to digital cable. This is mainly due to the fact that they will need to purchase additional decoders to connect second and third tv-sets in the house.

2.64 As OPTA observes, this is not an issue for KPN, who already offers multi-television subscriptions at fees comparable to those of UPC, using its DTT platform. If necessary, it will also be able to bundle this with its own IP-TV offering, to also provide a multi tv-set solution to its IP-TV customers.

2.65 Furthermore, as the Commission indicated in its letter of 21 December 2005, the purchase of a new modem or settopbox in case of switching does not in itself necessarily constitute a deterring switching cost. This is due to the general downward trend in retailprices for such hardware, as well as the tendency in the market to subsidise the purchase price.

2.66 Consequently, the supposed switching costs from analogue to digital which OPTA refers to, can in itself not justify the conclusion that there is no tendency towards effective competition.

(v) Economies of scale in sale and distribution-networks

2.67 According to OPTA, UPC enjoys various economies of scale due to its substantial customer base. This offers UPC opportunities of upselling (the ability to sell new products to existing customers), and also increases its value on the wholesale-market to programme-providers.

2.68 UPC's opportunities of upselling fall far short of those enjoyed by KPN, which serves far greater numbers of customers. Even Tele2's current customer base is by no means insignificant: it currently serves some 1.244 million customers on the Dutch market.

2.69 UPC's supposed advantage vis-à-vis programme providers must also be qualified. Whereas KPN may not yet be able to offer programme providers the same numbers of 'eyeballs' as UPC, it certainly has accumulated sufficient critical mass which no programme provider can afford to ignore. KPN also wields power over programme providers of a different kind: it is one of the largest television advertisers on the Dutch market.

2.70 Besides, OPTA's proposed remedies do nothing to reduce the supposed disadvantage of smaller parties, who – if the remedies proposed in the Decision come into effect – will still have to acquire their own customers (‘eyeballs’) on UPC's network, and who will still need to enter into their own negotiations with programme providers.

(vi) Competitive pressure of existing market parties, potential competitors and price elasticity

2.71 OPTA notes that UPC will only experience limited pricing pressure from its competitors. Out of these competitors, only KPN will realise substantial further growth over the next few years but its market share (number of customers) will remain significantly lower than UPC's.

2.72 OPTA underestimates the impact that churn is already having on UPC. UPC has already suffering significant churn losses.[34] [35] Meanwhile, KPN is already serving more digital customers than UPC[36] while its digital customer base is growing faster than UPC’s. These trends – which are likely to only increase over the next few years as complementary use by DTT subscribers will decrease and more and more of these DTT customers terminate their analogue cable subscription – put very real competitive pressure on UPC.

2.73 Moreover, the supposed shortcomings of any one platform (DTT, IP-TV or FttH) can be compensated by the fact that KPN is able to offer all three, as well as DVB-H. Consequently, if it really is restrained by the fact that IP-TV is only available on one TV-set, or by the fact that the DTT programme package currently has 23 (rather than 32) programmes and no interactive services, it can circumvent these limitations by combining these different propositions.

2.74 When it comes to FttH, OPTA considers that the rollout of this platform will remain relatively modest (although it will more than triple from 200,000 as of the beginning of 2008 to 650,000 per 2011). However, this is no reason to deny its impact on the market. Again, as the Commission rightly observed in its Serious Doubts letter, it is not necessary for a competitor to acquire a substantial market share in order to be able to exert pricing contraints on UPC. The prospect that FttH can be rolled out anywhere in UPC's footprint, and that rollout may result in dramatic levels of churn, [37][38] already results in competitive pressure. This effect is strengthened by KPN's

[34] See page 5 of the RBB Report.
[35] See slide 58 of the Bain Report.
[36] See slide 59 of the Bain Report.
[37] See page 6 of the RBB Report.
[38] See slide 56 of the Bain Report.

intention to take a share (with an option to acquire a controlling stake) in Reggefiber, the largest FttH provider.

2.75 Another prospect which OPTA fails to take into account, is KPN's upcoming NGN-rollout ('All-IP'). Although this is expected to take place during the next three to five years, OPTA's dynamic analysis does not include this aspect, nor its effect on the IP-TV offerings of KPN (and other (potential) providers like Tele2, T-Mobile, Vodafone and other providers with substantial existing customer bases).

(vii) Development of cable prices

2.76 OPTA's observations on the development of cable prices are contradictory. While on the one hand it argues that increased competition has had no effect on UPC's prices, on the other it recognises that price levels have stagnated. It tries to explain this contradiction by attributing this stagnation solely to regulatory intervention.

2.77 This assertion is false. Already on 13 October 2005, UPC issued a press release that it would increase its prices for 2006 only with inflation. This was before the Commission issued its Serious Doubts letter on 3 November 2005 and OPTA took the previous market analysis decision. This contradicts OPTA's suggestion that UPC set its prices as a concession to avert regulation. Moreover, UPC has since continued this trend, in absence of any retail price regulation, and without concrete threats of regulatory intervention. This can only be attributed to the increase in competition.

(viii) Subconclusion on second criterion

2.78 OPTA fails to recognise the dynamic nature of the relevant market, which shows a clear tendency to effective competition. Alternative digital platform operators have become active on the market and have been able to acquire sufficient critical mass. Moreover, further growth of IP-TV may be expected, in view of developments in other Member States, the already high broadband penetration in the Netherlands, KPN's upcoming NGN rollout, and the continuing rollout of FttH initiatives, which have been boosted by KPN's participation in Reggefiber.

Third criterion: effectiveness of competition law and other regulatory obligations

2.79 Finally, in its discussion of the third criterion, OPTA discusses must-carry rules and competition law, respectively, to conclude that neither is sufficiently effective to address the perceived lack of effective competition over the next 3 to 5 years.

(i) *Must-carry rules*

2.80 OPTA wrongly states that current must-carry rules only benefit Dutch public broadcasters, Flemish public broadcasters and local and regional broadcasters. While it is true that these broadcasters have a statutory right to be included in the must-carry package, the remainder of this package is determined annually on the basis of the statutory advice of programme councils. UPC is obliged to follow this advice (notwithstanding exceptional circumstances). Program councils have a large degree of freedom in making their programme selection, and programme providers tend to undertake roadshows to present their programme offerings to programme councils. Thus, they can secure distribution of their programme to UPC-subscribers.

2.81 OPTA's assertion that this statutory regime is not keeping pace with the development of service offerings is not true. As stated *supra*, a legislative proposal is currently pending before the First Chamber of Parliament, which would extend UPC's existing must-carry obligations from the analogue domain to the digital domain.

2.82 Finally, OPTA states that the existing must-carry regime does not remedy what it perceives to be the main competitive problem: alternative television-signal providers not being granted access to UPC's infrastructure. As will be explained in UPC's discussion of OPTA's analysis of market power, this statement is based on a misguided view of the market, which wrongly assumes that there is a real demand for this type of access.

(ii) *Competition law*

2.83 To support its conclusion that competition law is not effective, OPTA points to the 'essential facility'-doctrine, and the supposedly high thresholds for invoking this doctrine.

2.84 The Dutch Competition Authority has in the past undertaken various inquiries into the cable sector (including a full inquiry into UPC’s costs), giving it specific insight and experience. This in itself makes it singularly well equipped to address any real competition issues if they should arise.

2.85 Looking back at the past regulatory period, it should be noted that no real competition issues did arise. The only complaint against UPC that was filed with the Dutch Competition Authority during the last regulatory period, was from KPN and was aimed at enforcing resale. The fact that this complaint from KPN, owner of multiple national television broadcasting platforms, was denied, can hardly be seen as evidence of the ineffectiveness of competition law.

2.86 If anything, this lack of complaints confirms that there have been no true competition problems. In the absence of any real competition problems, the question whether competition law offers an effective remedy seems therefore only theoretical. If there was no need over the last regulatory period to intervene *ex post*, surely this doesn't indicate the need to intervene *ex ante* over the next regulatory period.

(iii) Subconclusion on third criterion

2.87 OPTA seriously underestimates the impact of existing and future must-carry regulation. UPC concludes that its existing obligations are sufficiently effective to address any access issues, noting that such issues have not actually come up over the last regulatory period.

Conclusion: three criteria test not met

2.88 UPC concludes that the Dutch wholesale market for transmission of television-signals does not meet the three criteria test. Consequently, OPTA may not impose new obligations in this market, as it is proposing to do in the Decision.

2.89 UPC furthermore notes that OPTA's focus in the three criteria test seems to be mainly on the retail market although it is proposing to regulate the wholesale market. However, OPTA stops short of explicitly applying the three criteria test on the retail market.

3. DEFINITION OF THE RELEVANT RETAIL MARKET

A. Retail product market

3.1 OPTA starts its delineation of the relevant market with the retail market. OPTA (in the opinion of UPC: rightly) concludes that the retail market should be delineated in a broad fashion, encompassing the supply of television signals via the different broadcasting platforms – cable, satellite, DTT, DSL and glass fibre networks. In its previous analysis of the broadcasting transmission market of 17 March 2006 OPTA concluded that there was a separate market for the transmission of television programmes <u>via the cable</u> within the territory of the cable operator concerned. In the Decision OPTA has recognised, therefore, that the broadcasting transmission market is subject to significant dynamics which have resulted in a market encompassing the different broadcasting transmission platforms.

3.2 In retrospect the question can be raised whether these market dynamics where not already sufficiently visible or in any event foreseeable in 2006; in general such a fundamental change in the market does not occur from one day to the next but is a process of several years which can be forecast well in advance. This question is less relevant in a discussion of the Decision which is intended to replace the decision of 2006. However, the fact that in retrospect OPTA's analysis in 2006 has been insufficiently forward looking should be a reason for OPTA to pay more attention to the market dynamics in the current decision. The Decision does not reflect this.

3.3 On the issue of triple play bundles (paragraphs 319 through 340 of the Decision), OPTA states that there are indications that in the future a bundle market for triple play may emerge, but in OPTA's view these indications are insufficient to already define a market for bundles at this stage. In this respect OPTA considers that two factors are particularly relevant: the absence of any specific switching costs resulting from a switch from the bundle to the individual products included in the bundle, and differences in consumer preferences with regard to the composition of the bundle.

3.4 According to OPTA costs of switching from a bundle to individual products are comparable to the costs of switching between individual products. UPC believes that OPTA overlooks a number of factors in this respect. For example, customers will find it attractive to purchase several services included in a bundle from one supplier, as this may have significant advantages such as one invoice, one address for service, etc. These benefits would be lost in the event of a switch to individual products.

3.5 With regard to consumer preferences OPTA refers to an investigation by Heliview from which it infers that there is a group of customers which does not attach the same importance to all the components of the bundle and could decide to drop one of those components in case of a price increase of the bundle (paragraph 337 of the Decision). UPC does not understand how this could militate against the existence of a bundle market. OPTA seems to assume that bundles have to comprise all the different components (internet, fixed and mobile telephony and television). However, bundles can also consist of combinations of television and telephony only or television and internet only. Indeed, in the case of UPC, these bundles are more significant to its businesscase as it has no mobile network of its own, unlike KPN. Such smaller bundles should also be included in the analysis. The important point is that the competitive pressure on the prices of television packages of UPC is increasingly coming from combinations of television transmission services with other electronic communication services, as a result of which UPC has to take into account the prices of those bundles in the prices of its television packages. In this context UPC refers to the attached report of RBB Economics which describes in more detail the effects of convergence and multiplay on pricing.

3.6 Apart from the foregoing the analysis by OPTA is arbitrary: OPTA mentions four factors, two of which would indicate the existence of a bundle market and two of which would indicate the existence of separate markets for the individual services. OPTA does not indicate how it has weighed these different factors and has come to the conclusion that the factors pointing to the existence of separate markets are decisive.

3.7 By defining a separate market for the transmission of television programmes OPTA is ignoring the price pressure emanating from bundles of television programmes and other services. OPTA states in its Decision that it has taken the transition to a triple play market into account in its analysis of market power, but it does not refer to this aspect in its analysis of market power.

B. Retail geographic market

3.8 As recognised by OPTA homogeneity of the competitive conditions is the decisive factor in a delineation of the relevant geographic market. The infrastructure of satellite networks, DTT, DSL and glass fibre networks is "more or less national" (paragraph 344 of the Decision) according to OPTA, and these platform providers have a national offering.

3.9 According to the Commission's Guidelines on the market analysis39, the process of defining the limits of the geographic market proceeds along the same lines as those relevant in relation to the assessment of the demand and supply-side substitution.

3.10 Given the fact that alternative infrastructures are part of the relevant geographic market having national coverage, the retail geographic market is not restricted to the coverage area of the individual cable operators, but is national.

3.11 In determining the geographic market OPTA, however, does not seem to pay attention to the national coverage of alternative infrastructures, but focuses on a number of differences between the various cable operators, in strategy, market shares and pricing, which in OPTA's view are indications of separate geographic markets, coinciding with the territories covered by the different cable operator.

3.12 The differences between the cable operators are however not important enough to justify the conclusion that there exist separate geographic markets. This can be

[39] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03; OJ C 2002 165/6).

inferred from the fact that the other platform providers respond to the offerings of the cable operators with an uniform, national offering of their own. Should there be competitively relevant differences between the offerings of the cable operators, then the other platform providers would react to these different offerings with different offerings of their own for the various geographical footprints of cable operators. As far as the transmission of television programmes is concerned, the cable operators are the "incumbents" and the other platform providers have to build up their market position by capturing market share from the cable operators. These other platform providers therefore could not afford to ignore differences between the offerings of the cable operators, if these differences were relevant in the competition for customers.

3.13 In addition to the foregoing, the differences between the cable operators mentioned by OPTA in its Decision are too insignificant to justify the delineation of separate geographic markets:

- Differences in strategy between the larger cable operators and the small cable operators cannot be an indication of the existence of separate geographic markets, considering that the larger cable operators account for more than 90% of the total number of cable subscribers.

- The differences in market shares between cable operators in their respective territories are small. For example, OPTA refers to a difference in market share of Digitenne of 2% between the territory of UPC and the territory of Ziggo. Such a difference is much too small to conclude that the territories of UPC and Ziggo constitute different geographic markets. Normally such small differences in market share are seen as an indication that different territories belong to one and the same market.

3.14 OPTA is not able to verify OPTA's statements in paragraph 353 regarding the number of subscribers in relation to "homes passed" of the various cable companies as set out in table 8, as this table is marked "confidential" by OPTA. OPTA does not explain why the number of subscribers in relation to "homes passed" is a relevant measure for the delineation of geographical markets. UPC believes that it is not; there are a few areas in the Netherlands where for reasons typical to that area the number of "homes passed" is smaller than in other areas, but these reasons are in most cases historical and relate to the lay-out of the network and have nothing to do with the competitive conditions. Besides, although UPC is unable to verify the figures included in the table, it does not believe the number of subscribers in relation to "homes passed" is so different for the various cable companies that it can be seen as an indication of different geographic markets. Rather the opposite is likely to be true: the difference is probably so small that it points to the existence of a national market.

3.15 By defining geographic markets coinciding with the territories covered by the cable operators OPTA is underestimating the market power of the other platform providers and overestimating the market power of the cable operators. In OPTA's analysis it is comparing market shares of the cable operators in their territories with market shares of the other platform providers in those same territories. As a result OPTA is ignoring the economies of scale which the other platform providers derive from the fact that they operate at a national scale.

C. Analysis of market power on the retail market

3.16 OPTA discusses several criteria in its analysis of market power on the retail broadcasting transmission market. On the basis of the discussion of these criteria OPTA concludes that UPC has a dominant position on these markets. In the following paragraphs UPC will comment on OPTA's discussion of these criteria.

(i) Market shares

3.17 OPTA's analysis of market shares suffers from the fact that OPTA has not properly defined the retail market. By taking as a basis for its analysis a separate market for the transmission of television programmes, OPTA is ignoring the competitive pressure from bundles of the transmission of television programmes with other electronic communication services. And by taking as a basis for its analysis relevant geographic markets coinciding with the territories covered by the cable operators, OPTA is looking at market shares which are too high in the case of the cable operators and too low in the case of the other platform providers.

3.18 For a correct assessment of the competitive restraint emanating from bundles it is particularly important that the other parties in the market historically have a strong position in the supply of other electronic communication services such as telephony and internet, and can leverage that position when recruiting subscribers for their broadcasting transmission platform. KPN is the most prominent example of this. An analysis of the retail market which does not take this dimension into account is incomplete and cannot serve as a basis for a finding of dominance.

3.19 UPC's market share on a national market for the transmission of television programmes amounts to 20-30% in terms of the number of subscribers. The market shares of the other platform providers on this national market are set out in the table below. A market share of UPC of 20-30% in this market – compared to a combined market share of 20-30% for its competitors – cannot justify a conclusion that UPC has a dominant position in this market.

TV connections and market shares per player

TV connections

[CONFIDENTIAL]

TV market shares

in %	**2005**	**2006**	**2007**	**2008 Q2**
Ziggo	40-50%	40-50%	40-50%	40-50%
UPC	25-35%	25-35%	20-30%	20-30%
Other cable	5-15%	5-15%	5-15%	5-15%
CanalDigitaal	5-15%	5-15%	5-15%	5-15%
KPN	0-10%	0-10%	0-10%	0-10%
Tele2	0-10%	0-10%	0-10%	0-10%
Other (satellite/fibre)	0-10%	0-10%	0-10%	0-10%
Total	**100%**	**100%**	**100%**	**100%**

Source: Telecompaper

3.20 Moreover, UPC's market share is already declining since some time, and it can be expected that this decline will continue. On the national broadcasting transmission market UPC's market share has declined from 25-35% in 2005 to 20-30% today. The combined market share of its competitors has grown from 10-20% to 20-30%. A declining market share is not consistent with a dominant position.

3.21 In addition to the foregoing OPTA ignores the fact that cable companies have high fixed costs. As a result of such high fixed costs a small volume loss in response to a price increase can already cause a price increase to become unprofitable. In such circumstances a high market share says little about market power. For a more detailed discussion of this aspect UPC refers to the report by RBB.

(ii) Controlling infrastructure which is not easily replicated

3.22 As there are already four alternative infrastructures in the Netherlands, the question how difficult it is to replicate UPC's infrastructure is not relevant in the context of an analysis of market power.

3.23 However, OPTA does take into account that the analogue functionality of UPC's infrastructure cannot be easily replicated by UPC's competitors. OPTA finds this important because a significant group of end-users will continue to purchase analogue television signals during the next period of regulation. As UPC is the only party in the relevant market with an analogue functionality and this functionality is difficult to replicate for the other platform providers, UPC in OPTA's opinion has a significant competitive advantage vis-à-vis the other platform providers.

3.24 This reasoning is difficult to understand. OPTA itself has concluded that analogue and digital transmission of television programmes are substitutes belonging to the same relevant market. This finding cannot be reconciled with OPTA's finding that UPC is enjoying a significant competitive advantage because it is difficult to replicate its analogue functionality.[40] The other platform providers can offer the subscribers of UPC which are still making use of analogue transmission a more attractive alternative in the form of digital transmission. Accordingly, they do not have any interest in replicating the analogue functionality of UPC. Competing platform providers can solicit analogue subscribers of UPC by supplying decoders for free or at a discount. Such propositions are successfully offered in the market. In fact, UPC itself is supplying decoders to its subscribers in a rental model to introduce them to digital transmission.

3.25 UPC also refers to its comments in paragraphs 2.31 and following.

(iii) Switching costs

3.26 According to OPTA, UPC has a competitive advantage because customers who want to switch to digital television transmitted via other platforms will have to make extra switching costs compared to a switch to digital television of UPC: they will have to purchase an extra decoder if they have more than one television set and they have to change supplier. However, the costs of purchasing an extra decoder are outweighed by the advantages of digital transmission: a better quality of image and sound, more channels and more functionalities like an EPG of DVR. To the extent the purchase of a decoder functions as a barrier to switching other platform providers can remove this barrier by providing decoders for free or at a discount. Changing suppliers is not a relevant barrier to switch, especially if the customer switches to a supplier from which it is already purchasing other services such as telephony or internet access. In such cases a change of supplier of television signals can even be an advantage because this will enable the customer to purchase more services from one and the same supplier. UPC also points to the factors mentioned in paragraph 2.63 and following *supra*, which result in further reductions of switching costs.

(iv) Economies of scale and scope, diversification and customer base

[40] See slide 41 of the Bain Report.

3.27 OPTA discusses these alleged advantages of UPC in paragraphs 414 through 437 of its Decision. Competitors of UPC enjoy similar or even greater advantages. These advantages are therefore not relevant factors contributing to a dominant position of UPC. In fact, UPC's regional scale is a significant disadvantage of UPC compared to the other platform providers, which OPTA does not taken into account to a sufficient extent in its analysis. Reference is made to paragraph 2.67 and following, *supra*.

(v) Price development

3.28 In OPTA is view UPC is setting its prices independently of its competitors (paragraphs 457 through 461 of the Decision).

3.29 Firstly, current price differences are not as substantial as OPTA makes them out to be.[41]

3.30 Secondly, OPTA fails to appreciate that a price reduction would not be a rational response for UPC, as it is not able to introduce a smaller, lower priced basic package to compete with KPN's DTT offering. If it wanted to reduce its prices to match the price of KPN's DTT offering, it would have to reduce its prices for all its subscribers which would result in substantial financial net losses. Hence, the fact that UPC has failed to respond to KPN's DTT offering by lowering its prices, cannot be seen as an indication of market power. Besides, OPTA fails to appreciate that KPN prices its television proposition on an incremental basis, whereas this is not the case for UPC.[42] This would make it even more irrational for UPC to try to match KPN's prices for television. Cable operators are more likely to respond in making their triple play services more attractive, which is evidenced by current triple play offers[43] and their telephony offers.[44]

3.31 Thirdly, the more relevant question looking forward is whether UPC has the incentive and is able to increase its prices. This question must be answered in the negative, for the following reasons:

- Critical loss analysis shows that price increases of the standard subscription would already be unprofitable to UPC at relatively small volume losses ([CONFIDENTIAL] %);
- Additionally, a loss of subscribers to the standard package results in loss of the opportunity to sell additional network services (digital television, internet,

41 See pages 16 – 18 of the RBB Report.
42 See pages 19 – 20 of the RBB Report.
43 See slide 63 of the Bain Report.
44 See page 19 of the RBB Report.

telephony) at a time when consumers are increasingly open to triple play offerings. This suggests that a price increase would become unprofitable at even lower volume losses. [45]

3.32 It should also be noted that UPC has over the last few years not increased its retail prices by more than inflation, in the absence of retail price regulation. OPTA's assertion that this was only due to (the threat of) its regulatory intervention is demonstrably untrue, as explained in paragraph 2.77.

(vi) Conclusion

3.33 In view of the foregoing UPC concludes that OPTA is wrong in finding that UPC has a dominant position on the retail market for broadcasting transmission.

4. DEFINITION OF THE RELEVANT WHOLESALE MARKET

A. Wholesale product market

4.1 OPTA defines the relevant wholesale product market as the market for the transmission of television signals and the supply of access at the wholesale level to the broadcasting transmission platforms. According to OPTA both services – the transmission of television signals and the supply of access at the wholesale level to the platform – are always combined and therefore belong to the same market. The market as defined by OPTA includes both the analogue and the digital transmission of television signals and all the existing broadcasting transmission platforms (DTT, DSL, satellite and glass fibre networks).

4.2 OPTA distinguishes two models for the transmission of television signals (paragraph 479 of the Decision):

- a provider of television signals requests transmission to transmit signals to end-users <u>in addition to</u> the signals transmitted by the platform operator; and
- a provider of television signals requests transmission to transmit signals <u>instead of</u> the transmission of signals by the platform operator.

4.3 The market for the transmission of television signals as defined by OPTA should be distinguished from the market in which programme providers are seeking access to broadcasting transmission platforms for the transmission of their programmes. According to OPTA the latter market is a market for the wholesale transmission of <u>broadcasting content</u> which is not covered by the regulatory framework and by OPTA's powers under section 6a of the Telecommunications Act.

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45 See paragraph 2.2.3 of the RBB Report.

4.4 In UPC's view OPTA's market definition is highly artificial. There are currently no market parties in the Netherlands who have obtained access to broadcasting transmission platforms to transmit their own (packages of) television programmes to end-users, nor has any request for this type of access been made to UPC or, as far as is known to UPC, to any other platform provider in the Netherlands. In the past Canal+ has obtained access to UPC's network to transmit its own pay television programmes to households connected to UPC's network, but the successor of Canal+, Canal Digitaal, now relies exclusively on its own satellite platform.

4.5 OPTA's failure to identify any demand for this type of access has led the College van Beroep voor het bedrijfsleven (CBb) to annul OPTA's previous decision regarding the broadcasting transmission market. OPTA has held meetings with market parties to determine whether there is a demand for this type of access and has taken a new decision on the basis of these meetings. However, these meetings have not revealed any clearly identifiable demand for this type of access. Therefore UPC has appealed OPTA's new decision to the CBb. A decision of the CBb in this appeal is expected next month. The CBb may well conclude again that OPTA has failed to identify any demand for this type of access. In any event there has not been any demand for this type of access since the decision of OPTA of 17 March 2006[46]. The lack of demand for the proposed measure clearly demonstrates that there is no genuine interest in (this part of) OPTA's defined market.

4.6 OPTA also takes as a starting point for this delineation of the wholesale market a provider of television signals who requests access to a broadcasting platform to transmit signals <u>instead of</u> the transmission signals by the platform operator. This requires the alternative provider to take over the subscriber relation from UPC altogether, or to – in the words of OPTA – offer the connection to its cable platform on the wholesale level.

4.7 In doing so, OPTA creates an entirely new, artificial market which does not currently exist (and has never been recognised as such by the Commission). Connections to broadcasting distribution platforms are always bundled with programs. Indeed, the reception of these programs is the very reason why consumers buy a subscription to a broadcasting platform. The examples OPTA mentions to support its theory, are incidental constructions aimed at allowing a cable operator like REKAM or COGAS to supplement its own limited offering with particular programs of services which they themselves cannot offer, but which can be made available by another cable operators. There is no indication whatsoever that these other cable operators have an interest in delivering the same services over UPC’s networks. Thus, OPTA’s

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46 UPC has received a demand from YouCa but this was a demand for a resale of UPC's standard package to UPC's subscribers which is not covered by OPTA's decision of 17 March 2006.

market for wholesale cable connection is entirely artificial and purely aimed at engineering a new market for ‘infrastructure-less’ providers of television signals.

4.8 OPTA not only expects demand for this type of access from parties who merely want to resell UPC’s analogue package instead of UPC, but assumes that there also is a demand from market parties who intend to transmit their own digital television programmes to end-users via one of the existing broadcasting transmission platforms in combination with the analogue programmes included in the standard package of the cable operators. OPTA's assumption that there exists a demand for this type of service is based on the responses to the questionnaires distributed by OPTA prior to the Decision. OPTA does not state in its Decision which market parties have stated that they are interested in this type of access.

4.9 The only party who has asked UPC to allow it to resell UPC's analogue standard package in the past is KPN. However, KPN is unlikely to be able to obtain resale under the Decision, as OPTA indicates that it will consider as unreasonable requests from parties who can replicate UPC’s television offering with their own infrastructure. Moreover, it does not appear to be rational for KPN to launch its own digital television offerings over cable, when it is already offering these over its own DTT and IP-TV platforms. Promoting IP-TV has obvious advantages to KPN, as this service is bundled with broadband access (and, possibly, telephony).

4.10 UPC has also more recently received a request relating to resale from YouCa. YouCa is a company recently set up by two individuals with extensive background in national media policy. UPC is not aware that YouCa is actually active on the market, or on any related communications market (e.g. broadband or telephony). YouCa has requested information from UPC, and representatives of the companies have recently met to discuss YouCa’s plans. From this, it has become apparent to UPC that YouCa’s plans are primarily driven by the ability to resell (parts of) UPC’s analogue and/or digital offering. This therefore offers no support to OPTA’s position that there is a clear demand from parties who want to bundle UPC’s analogue offering together with the their own digital content.

4.11 In summary, OPTA is taking as a starting point for its analysis of the wholesale market a demand for access to broadcasting transmission platforms which is purely hypothetical. A market definition should be based on a real and existing demand for a particular service. Defining markets on the basis of a hypothetical demand does not belong in a regulatory framework based on competitive law principles and designed to address clearly identified market failures.

B. Wholesale geographic market

4.12 OPTA concludes that the relevant geographic market for the service included in OPTA's definition of the wholesale product market is regional and coincides with the territories of the cable operators. This reasoning is difficult to follow and reinforces the impression that what OPTA is doing has more in common with engineering competition than with applying principles of competition law. If there existed a demand for the type of access described by OPTA in its definition of the product market, then this demand must be driven by the coverage of the platform to which access is sought: the greater that coverage, the larger the number of customers which the provider of the television signals can reach. OPTA says it is attaching much importance to the fact that a provider of television signals requires transmission via the platforms of the larger cable operators to reach a large audience (paragraph 508 of the Decision). However, a provider of television signals can reach a much wider audience via the other broadcasting transmission platforms which have national coverage.

4.13 Apart from the foregoing, OPTA's conclusion that there are different geographic markets is based on an analysis of differences between the wholesale offerings of cable operators which is again purely hypothetical. There are no wholesale offerings for the type of access as defined by OPTA. But even if there did exist a market for this type of access, the size of the customer base of the cable operators would not be a determining factor for the competitive conditions in that market.

4.14 It is therefore evident that the wholesale market – like the retail market (as discussed in paragraphs 3.8 to 3.15, *supra*) – is national. OPTA’s conclusion that this market is regional must be rejected.

5. ANALYSIS OF MARKET POWER IN THE WHOLESALE MARKET

5.1 OPTA's analysis of market power in the wholesale market is meagre. It is based on two factors: the market share of UPC in the retail market and the absence of countervailing power of providers of television signals seeking access to UPC's broadcasting transmission platforms (paragraphs 513 through 335 of the Decision).

5.2 In its discussion of OPTA's findings with respect to the retail market UPC has already explained that its market share is much lower than OPTA assumes, as it should be calculated on the basis of a national market, and that OPTA is attaching too much value to market shares as a measure of market power.

5.3 More importantly, the existing customer base of UPC is not a relevant measure of market power in the wholesale market defined by OPTA. A purchaser of television signals seeking access to a broadcasting platform in this hypothetical market is seeking such access to transmit these signals to end-users. Such a purchaser is not interested in the existing customer base of the owner of the broadcasting platform but in the coverage of that platform, which determines how many end-users can subscribe to his service. The coverage of the network of UPC is regional, as opposed to the coverage of the other broadcasting platforms which is national. This factor therefore militates <u>against</u> a dominant position of UPC.

5.4 OPTA's analysis of the countervailing power of the providers of television signals seeking access to broadcasting transmission platforms is again purely hypothetical, as there are no such providers. OPTA ignores the growth of digital content, available on other platforms and as part of UPC's digital offering.[47] Instead, OPTA again refers to KPN and YouCa in this respect. As discussed in paragraphs 4.9 and 4.10 *supra*, these examples offer no support to OPTA's theory that there is an real market failure, which requires the regulatory intervention OPTA is proposing. In any event, the fact that such – mostly hypothetical – providers of television signals could choose from different platforms (cable, satellite, VDSL, DTT and glass fibre networks) would give them sufficient leverage in their negotiations with the operators of those platforms.

5.5 Accordingly, OPTA has not carried out a proper analysis of market power which justifies a finding of dominance.

6. COMPETITIVE PROBLEMS IDENTIFIED BY OPTA

A. Introduction

6.1 In chapter 11 of the Decision, OPTA takes the position that UPC has the ability and the incentive to refuse access to alternative providers of television-signals (i.e. those providers who wish to enter into their own direct customer relations to offer programmes instead of or in addition to those of UPC).

6.2 As already stated, there are no "infrastructure-less" alternative providers of television-signals currently active on the market. This is in spite of the fact that OPTA imposed certain access obligations in its previous market analysis decision which currently still apply. No party has relied on these obligations to obtain programme transmission from UPC, and no party currently purchases programme transmission from UPC to reach its own customers.

6.3 The only 'access problems' OPTA refers to in its decision, are requests to resell UPC's analogue and digital programme subscriptions, firstly from KPN, and secondly from YouCa, which have been discussed *supra*.

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47 See slides 27 and 28 of the Bain Report.

6.4 In its previous market analysis decision, OPTA decided to explicitly exclude resale obligations. As recently as February of this year, it confirmed that UPC is not under an obligation to enable others to resell its subscriptions (including what OPTA now calls 'access' to UPC's broadcasting platform). As set out *infra*, UPC opposes resale and does not believe this supports a feasible business model for the Dutch market, taking into account that three alternative digital broadcasting platforms have already been rolled out in the Netherlands, with a fourth one (FttH) steadily expanding. Their competitive power is only likely to increase as digitisation develops further. UPC's refusal to co-operate with resale requests therefore cannot be seen as indicative of a true competitive problem.

6.5 The next few paragraphs contain some more detailed comments on chapter 11 of OPTA's Decision.

B. Inadequate analysis of relevant wholesale-market

6.6 OPTA's description of potential abuses is flawed because it is based on an inadequate analysis of the wholesale market.

6.7 For example, OPTA expressly states that it excludes the market for broadcasting content from the scope of its review (paragraph 623). However, elsewhere it makes statements about exactly this side of the market (see for example paragraph 626, where it claims that UPC can increase its buyer power over programme providers), without having made even a preliminary analysis of this side of the market.

6.8 UPC is of the opinion that the role of programme/content providers is of key importance for a proper understanding of the wholesale market on which it operates. OPTA fails to appreciate that programme providers like RTL, SBS and the public broadcasters exert real buyer power over UPC. This is contrary to its previous market analysis decision where OPTA did recognise that these programme providers can exert real buyer power, and to the Dutch Competition Authority's assessment that cable operators are not in a position to exercise a gatekeeper's function.48 All programmes offered by these providers are 'must haves' and UPC cannot afford to exclude their programmes from its offerings. The fact of the matter is therefore that there is a large degree of interdependency between programme providers on the one hand, and UPC on the other, a fact which was confirmed by the Dutch Competition Authority in said decision.

6.9 For the same reason, UPC cannot afford to simply deny requests from these providers relating to new, innovative content. Because of the existing interdependency, UPC is not able to refuse access.

48 Decision of the Dutch Competition Authority NMa of 8 December 2006, caseno. 5796.

6.10 Besides, UPC has no incentive to do so. On the contrary, it has an incentive to offer attractive, differentiating content, in order to stop the ongoing churn of its customers to alternative platforms.

6.11 OPTA completely ignores this characteristic of the relevant wholesale-market, for instance where it considers (in paragraph 628) it unlikely that there are providers of television-signals whom UPC would not have an incentive to refuse, because they offer services which UPC does not already offer itself. UPC points to Canal+, which offered premium channels over UPC's infrastructure which UPC could not offer itself. Similarly, UPC will find it difficult to deny access to parties with unique, attractive content (e.g. a VoD library). This is especially so if UPC also depens on these parties for other 'must have' content (e.g. for UPC’s standard package).

6.12 In support of its statement that the risk of access refusal is real, OPTA offers a quote in paragraph 629 from its decision of 21 December 2007. It is unclear to which (category of) providers OPTA is referring in this quote. The reference that these providers already have large groups of potential customers seems to indicate that OPTA is referring to foreign broadcasters whose content is attractive to (segments of) the Dutch population. Such providers currently have the possibility to rely on UPC's existing wholesale obligations, which allow them to operate in accordance with the business model applied in the past by Canal+. No party has submitted any request for this with UPC. To the extent such programme providers wish to be distributed as part of a UPC programme package, they can rely on existing must-carry obligations (by asking Program Councils to include them in the statutory must-carry package). To the extent that the quote relates to resellers such as YouCa, it is not clear how OPTA can conclude that this provider (which has yet to become commercially active) already has a large group of potential customers.

6.13 Another example of OPTA's flawed understanding of the wholesale-market may be found in paragraph 624. In this paragraph OPTA writes that competing platforms do not offer a substitute for cable to alternative television-providers, because these platforms do not reach a sufficient number of 'eyeballs'. Here, OPTA seems to get caught in its own artificial market definitions. While its reasoning might hold true for programme-providers (especially commercial programmers who want to see their programmes distributed to the maximum level of eyeballs), it does not make sense for providers of television signals. In OPTA's definitions, these providers are seeking to distribute their own programmes or programme-packages separately from UPC's offering. As these providers will need to acquire their own customers, the number of UPC customers is irrelevant. To such providers, the only relevant factor should be the reach or footprint of a broadcasting platform, which is indicative of the number of potential customers it can acquire. In that respect, UPC's reach is significantly smaller than that of DTT, satellite or IP-TV.

C. No real risk of further retail price increases

6.14 In chapter 11.5.1 OPTA addresses the issue of excessive retail prices. The reason for doing so, is that in OPTA's opinion this risk arises from the problems it has identified on the wholesale market.

6.15 The chapter confirms where OPTA's true interests lie in this matter: in imposing some form of retail price regulation, while stopping short of simply again proposing the same retail price regulation that it withdrew following the Commission's serious doubts in 2005.

6.16 OPTA's arguments why there is a risk that UPC will substantially increase its prices are even more unconvincing now than in 2005.

6.17 OPTA's first argument (that current competitors cannot prevent a price increase by UPC) is not supported by facts, nor by an economic analysis. The Dutch Competition Authority NMa has carried out an extensive investigation into UPC's prices, only to conclude in 2005 that these are not excessive.49 UPC's prices have been stable since and throughout the regulatory period, having only been increased to reflect inflation and rising costs. Compared to other European countries, UPC's prices are low.[50][51] Moreover, as RBB's critical loss analysis shows, a price increase of the standard subscription would already be unprofitable to UPC at relatively small volume losses ([CONFIDENTIAL] %).[52] [CONFIDENTIAL], it would not be rational for UPC to increase its prices more than it has done over the last regulatory period, especially as competition is likely to only increase in the future, due to further NGN ('All-IP') and FttH developments.

6.18 OPTA again refers to price increases by UPC in the period 2002 – 2005 to support its position. This is in spite of the fact that its own advisor Lexonomics confirmed the position taken earlier by UPC (as well as the Dutch Competition Authority and the Commission in its Serious Doubts letter) that these price increases were necessary to undo the effects of municipal price regulation and to raise prices to competitive levels. OPTA's statement in this context that UPC would not have been able to do so in competitive market makes no sense from an economic perspective, for the reasons already set out by the Commission in its Serious Doubts letter. The opposite is true: the artificially low cable prices which were the result of municipal contracts, made it impossible for competitors to enter the market, thus preventing the development of a competitive market. UPC therefore maintains that these

49 Decisions of the Dutch Competition Authority NMa of 27 December 2005, caseno. 3588 and 3528.
50 See slide 61of the Bain Report.
51 See paragraph 6.3.2 of the VKA Report ("Marktontwikkelingen 2007 – 2010") for OPTA.
52 See paragraph 2.2.3 of the RBB Report.

developments cannot support OPTA's position that UPC has the ability and the incentive to raise its retailprices.

6.19 OPTA's last argument in support of this position, i.e. that the stable price trend over the last regulatory period is solely attributable to (the threat of regulation) has already been refuted in paragraph 2.77, *supra*.

D. Consumer choice already ensured through competition

6.20 OPTA also states that – in absence of regulation – consumer choice will deteriorate.

6.21 UPC is of the opinion that consumer choice is already realised through the increase in competition which has taken place over the last regulatory period, and which is likely to further intensify over the next regulatory period. As the Commission observed in the context of its current Recommendation on the relevant markets, digitisation has resulted in more broadcasting platforms becoming available to the average household. The choice available to Dutch households is among the broadest in Europe. Consumers therefore already are offered a rich choice of alternative service providers.

6.22 Besides, it is difficult to see how consumer choice will deteriorate in absence of an alternative which has until now never existed (and exists nowhere else in the world), and of which it is even uncertain if it will be feasible following OPTA's proposed regulatory intervention.

7. REMEDIES IMPOSED

A. Introduction

7.1 The access obligation imposed by OPTA encompasses resale of the analogue package distributed by UPC in combination with resale of 'access' to the transmission platform (i.e. taking over the full basic subscription relation), transmission of television-signals (whether analogue or digital), and access to UPC's conditional access system, pursuant to article 8.5 of the Telecommunications Act (which implements article 6 of the Access Directive). These access obligations are aimed at enabling alternative provider of television signals to offer their own programmes or programme packages instead of and/or in addition to those offered by UPC. Additionally, OPTA is proposing various other remedies to support this access regulation, i.e. non-discrimination, transparency and publication of a standard reference offer, as well as price regulation.

7.2 UPC opposes these remedies. Its main objections will be explained below.

B. Insufficient statutory basis for access remedy

7.3 As OPTA observed in its previous market analysis decision (see e.g. paragraph 13 on p. 122), UPC's basic subscription service consists of two elements: broadcasting content and transmission. OPTA correctly recognised that it is only authorised to regulate the latter, not the former.

7.4 The access obligations imposed by OPTA force UPC to allow third parties to resell the programme package that UPC has aggregated and transmits in analogue format over its network. This cannot be considered a true transmission service. OPTA seems to acknowledge this by stating that the transmission is only 'virtual in nature' (paragraph 781). The true nature of UPC's obligation is to allow resale by third parties of the programme package that UPC has aggregated and is transmitting over its network. Because the Regulatory Framework as implemented in the Telecommunications Act only applies only to transmission of content, but not to the provision of content or content aggregating services, UPC believes that this resale obligations is beyond the scope of the Regulatory Framework, and in particular, of article 6a.6 of the Telecommunications Act.

7.5 Whereas this provision does allow a measure like wholesale line rental to be imposed for fixed telephony networks, the same cannot be said for the access remedies imposed in the Decision. In the broadcasting transmission market today, there is no real market of alternative service providers who offer television services over infrastructures of others, and no such providers are offering services on UPC's network. The rationale of allowing these providers to take over the entire billing relation therefore does not apply. Moreover, unlike the connection to the PSTN, a connection to a cable network is inherently bundled with a service, i.e. the reception of the standard analogue program package.

7.6 Another legal issue which OPTA fails to properly address, is the fact that the current Media Act imposes on the provider of the network infrastructure (i.e. UPC) the obligation to transmit at least fifteen television and twenty-five radio programmes. UPC complies with this obligation by offering every subscriber its standard package. In view of these statutory must-carry obligations, UPC must continue to make its standard package available to all connected households, regardless of a resale obligation being imposed on UPC at the wholesale level.

7.7 OPTA's resale obligations are irreconcilable with these economic, technical and legal realities.

C. Practical objections to analogue resale

7.8 Aside from this, as various reports written for OPTA have confirmed (e.g. TNO's inquiry into resale obligations for cable operators of 14 August 2007), resale is a measure which is surrounded by other commercial and operational issues, of which it is uncertain whether they can be resolved. For one, it is unclear if resellers will be able to obtain the required consent from rights holders for all programmes transmitted by UPC.

D. Economic arguments for resale are flawed

7.9 While OPTA's premise that resale of the analogue subscription is a necessary first step towards infrastructure competition may have been true for telephony, it certainly does not hold true for broadcasting and has already been disproven by the fact that various competing infrastructures have in fact been rolled out and are successful on the market.

7.10 OPTA's decision to promote service-based competition by the proposed resale obligation goes against its own policy objectives. As OPTA recalls in paragraph 696, the promotion of service based competition may only take place if the infrastructure used to offer competing services cannot be replicated within the term of the market review (three years). This condition is obviously not met, as infrastructures offering competing services have already been replicated.

7.11 Moreover, in its market analysis decision of 2006, OPTA explictly decided not to impose any resale obligation, which is deemed dispropotionate and undesirable in view of its objective to promote infrastructure competition.53

7.12 Resale will add nothing to the ongoing trend of increasing competition between various platforms, and may in fact discourage further investment in competing infrastructures.[54] OPTA's argument that for KPN resale would be a step down on the ladder of investment, applies equally to a party like Tele2, which has made significant investments in its own DSL-based IP-TV platform. There is no reason why it should not continue on this path, in view of the new opportunities that are likely to arise over the next regulatory period (e.g. KPN's NGN and its increased obligations with respect to wholesale broadband access and unbundling of the local loop, including subloop unbundling and access to the optical distribution frame).

7.13 OPTA’s reasoning that an operator like Tele2 will need analogue resale to effectively compete, overestimates the importance of analogue to consumers during the

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53 “*Bedenkingen*”, paragraph 163, Annex 2 to OPTA's market analysis decision of 17 March 2006.

54 See page 27 of the RBB Report.

coming regulatory period (paragraph 2.33) and its significance in triple-play bundles (paragraph 2.60), and underestimates Tele2's existing ability to compete on the market for triple play bundles without analogue television. UPC notes that the Decision lacks a proper analysis of Tele2 ability to offer competitive bundles in absence of the proposed resale measure, and the effect that All-IP will have on this over the next regulatory period.

7.14 While OPTA rightfully observes that providers of television-signals with their own alternative infrastructure should not be able to use resale, it states that this only applies to providers whose offering does not rely on infrastructure which is (in part) purchased wholesale from third parties. This exception apparently refers to ADSL-IPTV of parties other than KPN. UPC fails to see why this should make a difference. The fact that a provider chooses to buy (some) infrastructure-based wholesale services (e.g. wholesale broadband access), rather than to invest in building its own infrastructure (e.g. FttH or its own xDSL-platform), should not necessarily make it vulnerable. Indeed, the opposite may be true, as it is likely to result in lower fixed costs and lower initial risk and investments. If the decision to buy wholesale service does put it at a disadvantage, this is an indication that there is a competitive problem on the relevant wholesale market where it is buying these infrastructure-based wholesale services, and OPTA should act to remedy the problem there.

E. No basis in OPTA's market analysis for increased digital regulation

7.15 OPTA favours increased regulation in the digital domain, which is apparent from its reference to article 8.5 to the Telecommunications Act in the operative part of its decision. As a consequence, the other proposed obligations of price regulation and transparency (which includes the obligation to prepare a reference offer) also appear to relate to UPC's conditional access obligation pursuant to article 8.5 of the Telecommunications Act.

7.16 OPTA fails to justify this increased regulation in the digital domain. UPC faces strong competition from other digital platforms who serve similar or even higher numbers of digital customers. KPN DTT already serves more digital customers than UPC,[55] and is still growing strongly whereas UPC's digital rollout is slowing down. Digital platforms are competing with each other to attract interesting content. In view of these developments, it is far from evident why access in the digital domain should be regulated, and even less so, why this regulation should be substantially heavier than is currently the case.

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55 See slide 59 of the Bain Report.

F. Supporting obligations (non-discrimination, transparency, price regulation)

7.17 In addition to imposing farreaching access obligations, OPTA is also proposing related remedies with respect to non-discrimination, transparency and pricing.

7.18 These obligations are as unfounded as the access remedies they are intended to support. Moreover, as will be explained in the next paragraph they only compound the disproportionate nature of OPTA's remedies.

G. Imposed remedies are not proportionate

7.19 Finally, serious doubts can be raised about the proportionality of OPTA's proposed measures. The principle of proportionality which is recognised in Community law, is implemented in article 1.3 lid 4 of the Telecommunications Act. OPTA applies this provision by weighing the expected benefits of its proposed market intervention against its estimated costs.

7.20 OPTA claims that its measures will prevent a price increase of some 10 %. Not only does this again show OPTA's true intent with this measure (i.e. to regulate UPC's retail prices), it also reveals a flimsy economic case. Firstly, as already set out *supra*, critical loss analysis show that UPC cannot expect to profitably raise its prices by such amounts, making the supposed gains from OPTA's measure highly uncertain. Secondly, even assuming that such price increases are indeed prevented, these gains barely outweigh the costs as calculated by OPTA itself. In fact, when the financial impact of the proposed measures is compared to that of the – much lighter – regulation proposed for smaller cable operators, it appears from OPTA's own figures that the net gain is effectively negative.[56] This is already clear evidence that OPTA is overregulating by imposing disproportionate measures.

7.21 This is compounded by the fact that OPTA seems to seriously underestimate the costs of regulation. The following factors contribute to this:

i) OPTA calculates costs of compliance on the basis of a rough, unsubstantiated rule-of-thumb;

ii) OPTA does not appear to take into account any costs relating to digital access;

iii) OPTA's estimate of costs of (judicial) appeal (six months worth of one person's time at 160 hours a month at EUR 100 per hour) seem on the low side, given the fact that further implementation decisions are likely to follow and that OPTA relies on outside counsel in appeal proceedings;

[56] See page 30 of the RBB Report.

iv) OPTA is basing UPC's implementation costs on KPN's cost of implementing WLR, ignoring the fact that WLR was an additional wholesale service for KPN, whereas UPC has no existing wholesale service offering.

7.22 What OPTA should have done (as suggested by TNO in its – critical – report on resale[57]) before reaching a conclusion on the proportionality of its measures, is to conduct its own investigation into the actual costs which UPC is likely to have to make to be able to comply. UPC notes that in the WLR decision of 2005, OPTA explicitly reserved its decision on the proportionality of the proposed measures until after the finalisation of the implementation planning (in the Industry Group).

7.23 Moreover, OPTA completely ignores the negative market effects in its dynamic outlook. Introduction of service-based competition may have substantial negative effects on investments in other broadcasting platforms, threatening the further development of infrastructure-based competition and digitisation. OPTA's increased regulation in the digital domain is likely to discourage competitors of UPC in investing in their own conditional access systems. The importance of digitisation and infrastructure-based competition has been recognised by OPTA, the Minister of Economic Affairs (*inter alia* in his Policy-rules on this topic) and the European Commission. The supposed advantage that the new access obligations will have the benefit of offering certainty to potential service providers, should be weighed against the uncertainty that it causes to alternative infrastructure-providers already active on the market. None of these negative dynamic effects is explicitly taken into account by OPTA.

7.24 This is all the more remarkable as OPTA's own advisor Lexonomics has explicitly stressed the negative effects of resale on infrastructure-based competition, stating that regulation will probably slow down the development of alternative platforms.[58] This negative dynamic effect may be aggravated by the experience that access measures – once in force and relied upon by service providers – lead to regulatory dependency and have a tendency to be extended, as RBB notes.

7.25 Because of its slanted perspective, OPTA has overstated the supposed benefits of its regulatory intervention, while understating the costs. This raises serious doubts about the proportionality of its remedies, given the fact that the net positive effect is already limited in its own calculations. UPC refers to the RBB note for a more detailed discussion of this criticism.

7.26 OPTA's tendency to overregulate is also evident in many of the detailed regulations proposed by OPTA.

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57 TNO, "*Verkenning wederverkoopverplichting kabelexploitanten*", p. 24.

58 Lexonomics, "*In welke mate disciplineren alternatieve televisieplatformen retailtarieven van de kabel*", 6 July 2007, paragraph 4.5.

i) For instance, OPTA’s proposed price regulation would restrict UPC's freedom to price bundles, limiting its freedom to compete on the markets for telephony and broadband, where KPN is the dominant provider.

ii) Its determination of the retailminus is wrong, as it includes in this minus total retail costs rather than only avoidable retailcosts. OPTA considers that alternative providers would not be able to develop a sustainable business case if the minus were set on the basis of UPC’s avoidable retail costs. This line of reasoning is inconsistent with OPTA’s general approach behind its proposed obligation to re-sell the analogue offering to rivals. To the extent the proposed obligation to re-sell the analogue package is intended to be a temporary measure enabling alternative operators to build a sufficient customer base that they can subsequently migrate to their own infrastructure, there is no need for them to create a sustainable business case on the basis of the analogue offering only. Efficient entrants will in any event be able to cover their fixed retail costs from other services. To the extent the analogue offering of UPC is made available to them in order to enhance the attractiveness of their offering, it is thus appropriate that they should only be able to cover the incremental costs associated with offering analogue television services from the retail margin available to them.

iii) Also, OPTA proposes to allocate wholesale specific costs to UPC, thus making UPC pay for provisions and facilities which it will have to build exclusively for others, and at no benefit to itself. OPTA has failed to show that this is proportionate.

iv) OPTA imposes various administrative burdens on UPC, which appear to be disproportionate. For example, UPC must submit a full cost report, even though OPTA only requires insight into UPC's retail costs. Also, UPC must prepare a standard reference offer, although it is unclear if any party will be interested in the services UPC must offer, and is able to meet the demands that OPTA puts on it (i.e. to obtain the approval of all programme providers).