

IRG Expert Group Report

Ref:

NL/2005/0247

Retail markets for the supply of free-to-air radio and television packages via cable transmission in the Netherlands

November 2005

Contents

Evaluation 2

Annex 1: Analysis in detail..... 7

 A 1.1 Existence of high and non-transitory entry barriers 7

 A 1.2 Structure of the market tends towards effective competition 9

 A 1.3 Sufficiency of competition law 13

Annex 2: Sources used 15

Annex 3: Procedural issues – Chronology of review 16

Evaluation

On November 9th, the European Commission (EC) sent a “serious doubt letter” (SG-Greffe (2005) D/205996) to OPTA referring to their draft decision on “retail markets for the supply of free-to-air radio- and television packages via cable transmission in the Netherlands”.

OPTA’s draft decision and the letter from the EC refers to the market analyses for the above mentioned services within the respective coverage areas of the three largest Dutch cable operators UPC, Essent and Casema. Each of these operators – according to OPTA’s draft decision – is deemed to hold significant market power (SMP) in its coverage area.

OPTA did not consider wholesale regulation¹ sufficient to ensure that effective competition emerges on the market for the supply of free-to-air radio and television (RTV) packages within the relevant time frame (three years). Therefore OPTA concluded that the above operators should be subject to the following retail obligations (referring to the transmission component of the free-to-air package only):²

- (i) to provide the free-to-air transmission package unbundled from other services;
- (ii) to make transparent for the end-user which tariff they pay for which services (i.e. differentiation between the end-user tariff for the *transmission* of free-to-air broadcasting content and *provision* of free-to-air broadcasting content);
- (iii) to provide the transmission of the free-to-air package on a cost oriented basis; and
- (iv) to request permission from OPTA prior to a change in retail tariffs regarding the supply of transmission of the free-to-air package.

OPTA noted that these remedies address the identified (potential) competition problems of excessive pricing of free-to-air transmission, the potential erection of strategic barriers to entry and leveraging of market power into adjacent markets.

The EC serious doubts on OPTA’s analyses is on the basis of the three relevance criteria which must be passed cumulatively according to the Recommendation on relevant markets³ (if an NRA deviates from the market definitions provided in this Recommendation). These three criteria are:

- (i) The existence of high and non-transitory entry barriers;
- (ii) the structure of the market does not tend towards effective competition within the relevant time horizon; and
- (iii) the application of competition law alone is not sufficient to address the market failure identified.

The serious doubts relate to the three criteria which, according to the EC Recommendation should be considered by the NRA in identifying the relevant market. Specifically, it appears that the EC does not agree with OPTA’s assessment of potential competition to emerge within the relevant time frame.

¹ OPTA has also proposed wholesale remedies on the vertically related markets (see notification from September 29). OPTA’s wholesale market definition and SMP designation has been accepted by the EC.

² The term “free-to-air package” refers to a package of approx. 35 TV and several radio channels which are provided by a cable operator as soon as the customer has purchased a connection.

³ Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (OJ L 114/45)

In December 2004 it was decided by the IRG Plenary to set up a new Art. 7 FD IRG-review process, that can be triggered by an individual NRA if its Art. 7 analysis is opposed by the European Commission (Plen (04) 48). On the basis of this procedure OPTA has asked the IRG secretary to establish an expert group consisting of experts from NRAs to analyse the case and to conclude in a report whether the arguments put forward by the Commission are justified on the basis of the facts of the case. This group consisted of experts from the NRAs AGCOM (Italy), ComReg (Ireland), NHH (Hungary), Ofcom (UK), and RTR (Austria).

The expert group remit is to consider the notification by OPTA of the retail market defined above and to form a view on the appropriateness of the serious doubts letter issued by the EC.

The key issue identified in OPTA's analysis according to the expert group appears to be that there will not be effective competitive constraints, either from alternative platforms or as a result of the wholesale remedy, in the case of free-to-air packages during the lifetime of this review (3 years). For the reasons discussed below, the Expert Group considers that OPTA has made a good case that this will be so.

The Commission, in its comments, has stressed the fact that there are platform competitors for cable. This is indeed the case but the Expert Group considers that there is little reason to expect that such competitors would have sufficient number of subscribers during the lifetime of the Review to undermine the positions of SMP enjoyed by the cable companies. Moreover, the Group notes that retail tariffs have increased very significantly in a short period, which suggests that a concern about the possibility of excessive pricing is far from hypothetical.

In the following the expert group provides a brief discussion of the main points raised by the EC, and how they were considered by the expert group.

The main points the EC raises and which are evaluated in this report are the following:

- (i) Is there sufficient (potential) competition to the three largest cable operators from alternative platforms?**
- (ii) Is wholesale regulation sufficient to address the identified competition problems?**
- (iii) Is general competition law sufficient to address the identified competition problems?**

At first sight, the EC's objections to retail controls in addition to the wholesale remedies appeared quite understandable, as under normal circumstances wholesale remedies are put in place precisely to enable an NRA to refrain from any intervention in retail markets. It is however, noted that the EC in its serious doubt letter put more emphasis on prospective competition from other networks than from suppliers using a cable wholesale service. The Expert Group also considers that the Commission raised a number of legitimate detailed concerns, for which however OPTA has been able to provide satisfactory explanations, as detailed below.

(i) Potential competition

In the view of the expert group, OPTA has given due consideration to potential competition from alternative platforms, in particular satellite, analogue terrestrial television, digital terrestrial television (DVB-T) and IP-TV for the relevant time frame of three years (until 2008).

The EC stated that there was a lack of clarity about the time frame considered by OPTA, as OPTA has looked up to five years into the future in some instances. And indeed the expert group believes that a timeframe of five years may be too long to make reliable predictions about the development of alternative platforms and hence about potential competition. However, as the Dutch law (article 6a.4 of the Telecommunications Act) requires market analysis to be conducted at least every three years, the relevant time frame for the decision in view of the expert group is as long as this period (until 2008).

Switching behaviour offers some evidence on the impact of potential competition. OPTA presents a report and forecast by the independent consultancy, *Dialogic*, which indicates that the four technologies mentioned above are unlikely to impose a sufficient competitive constraint on the three largest cable network operators. This is mainly due to the fact that the cable network coverage in the Netherlands is extremely high (approx. 95%) compared to other European countries and a very high percentage of households (more than 90%) are currently subscribers to cable networks. Amongst other things, this high level of cable penetration in the Netherlands is due to the relatively high population density and the way in which the roll-out of cable was originally funded, namely by municipalities on a non-profit basis. Cable networks therefore have a (legacy) first mover advantage as other technologies would have to persuade customers to switch, which is difficult in the presence of barriers to switching or switching costs respectively. Those barriers exist with regard to each of the alternative platforms:

Satellite:

- There are additional costs of connecting an extra TV set which do not accrue in the case of a cable RTV connection (48% of all households have two or more TV sets).
- Switching in the past has been rather limited despite significant price increases of cable.
- 30-40% of all households cannot install a dish due to line of sight restrictions.
- Although legislation against the installation of satellite dishes has been somewhat relaxed, some communities continue to run anti-dish campaigns, which put pressure on users not to install a dish.
- Installation of a dish is perceived as unattractive by many households.

DVB-T:

- This technology offers less channels than cable (27 instead of approx. 35). An increase of channels is unlikely due to capacity (spectrum) constraints.
- Due to the existing network architecture the quality is in many cases not comparable to cable RTV.
- There are additional costs of connecting an extra TV set (48% of all households have two or more TV sets).
- DVB-T is available since 2003. Switching in the past has been limited despite large advertising campaigns and significant price increases of cable RTV services.

Analogue terrestrial:

- The number of channels that can be received by means of analogue terrestrial television is very limited.
- Only a small (and declining) share of customers is using this platform (2005: 1.5%).
- Analogue terrestrial television is planned to be turned off in 2006 or 2007 at the latest.

IP-TV:

- A product comparable to cable RTV is not yet available. An introduction of such a product was announced by KPN for the end of 2005, however, given several delays in the past, the possibility of further delays cannot be excluded.
- The coverage will be limited to 60% of all households in the period under consideration.

- There are additional costs of connecting an extra TV set (48% of all households have two or more TV sets).
- A large number of broadband users already have high-speed internet from a cable company and would have to switch their current internet provider.

Having reviewed the evidence, the peer group has concluded that the findings and judgement of OPTA do not appear unreasonable given the particular circumstances of the cable industry in the Netherlands.

(ii) Why wholesale access regulation appears insufficient

Functioning wholesale access regulation would require that alternative operators could offer the same number of free-to-air channels as currently offered by the cable companies, i.e., approx. 35 channels via the cable infrastructure. In this context, it is relevant to note that, Article 82i of the Media Law obliges cable operators to transmit the basic package (comprised of 15 channels) uncut, unchanged and simultaneously to all customers connected. There is no direct commercial relation between the content provider of these channels and the customer.

As long as the cable networks are not 100% digitalised (which will not be the case within the coming years as pointed out by Dialogic),⁴ analogue transmission will have to be continued in parallel to digital transmission. On this basis there seems to be insufficient capacity available to allow for wholesale regulation of network access to work effectively in the coming years. Furthermore, the offering of parallel free-to-air packages over cable networks would imply inefficient use of analogue capacity as the same programs (any operator would have to offer the most popular channels) would have to be transmitted in parallel.

It thus appears to the expert group that spectrum scarcity in cable networks as well as the current legislation on must-carry free to air channels are and appear likely to remain major obstacles to effective wholesale regulation on its own over the time period relevant to this market review.

(iii) Why competition law appears insufficient

The expert group recognises that the standards of proof for excessive pricing under general competition law are very high and that even margins of 100% or more might not suffice to intervene. The Dutch competition authority NMa has conducted two investigations into retail tariffs in this sector in the past three years on the basis of complaints from consumers and consumer groups. In a recent decision the NMa concluded that the prices of UPC and Casema have not been excessive in the years 2000-2004. This does not automatically mean, however, that no competition problem exists at all, in particular in light of further price increases in 2005. The standard of proof in ex-ante market reviews is establishment of dominance, i.e., the potential for excessive prices, and not the standard set out in the EC's serious doubts letter which implies NRAs need to prove excessive prices in a market prior to intervention. The NMa – consistent with Art. 3 of the Framework Directive – pointed out that sector-specific regulation would be more appropriate to deal with the risk of excessive pricing and supported OPTA's draft decision.

As it is the case with telecommunications fixed networks in most countries, cable operators possess legacy infrastructure, which is not easily replicable. In view of the high and non-transitory entry barriers and the lack of a trend towards effective competition, general

⁴ According to the Dialogic report about 6% of customers in the Netherlands currently receive digital cable programmes. Between 2005 and 2008 this is considered to increase to about 40%.

competition law clearly does not seem appropriate to deal with the identified (potential) competition problems.

According to Article 8(1) of the Framework Directive, NRAs must take “all reasonable measures” aimed at achieving the objectives in paragraphs 8(2), (3) and (4). Article 8(4) records that the NRAs “shall promote the interests of the citizens of the European Union by inter alia: ... (b) ensuring a high level of protection for consumers in their dealings with suppliers ...”. One important form of protection which consumers need is from exploitation via excessive pricing. It follows that if the market conditions (taking into account the effect of any remedies put in place at the wholesale level) are such that market players have the ability to price excessively at the retail level, an NRA would be failing in its duty under Article 8(1) if it did not take reasonable steps to prevent such exploitation. The Group notes that retail tariffs have increased significantly in the past years, which suggests that a concern about the possibility of excessive pricing is far from hypothetical.

The expert group also debated the valid point made by the EC that retail price caps may run the risk of discouraging competitive entry. The Group considers that OPTA needs to take a balanced view regarding the exact level of such price caps not to damage the prospects of efficient future entry. Further, the retail remedy needs to be designed to reflect this concern and applied only to those retail products for which the wholesale remedy is insufficient. On this basis, OPTA’s views appear to be reasonable, in particular as OPTA considered that as regards pay-TV channels retail regulation was not required and that wholesale regulation was indeed sufficient for those channels.

Conclusion: On the basis of the evidence provided by OPTA, in particular with regard to the special circumstances in the Netherlands the expert group notes that OPTA’s conclusion in the present case appears reasonable. In particular, on the basis of the evidence reviewed, it appears to the expert group that wholesale remedies are called for (as already confirmed by the EC), but that they do not appear effective on a stand-alone basis in the specific case at hand.

It appears to the Group that the EC’s comments in this area may have more relevance to the period of the next Review than to the present one. The Expert Group notes that OPTA would be expected to reconsider the justification for continuation of retail remedies at the next review in the light of market circumstances prevailing at that time.

The document is supplemented by three Annexes: Annex 1 discusses in detail the arguments in the letter of serious doubt, Annex 2 lists the sources the expert group has taken into account, and Annex 3 is related to procedural issues.

Annex 1: Analysis in detail

The structure of this section closely follows the structure of the EC's serious doubts letter and will review the comments made by the EC on the existence of high and non-transitory entry barriers, the question whether the structure of the market tends towards effective competition within the relevant time horizon, and the (in-) sufficiency of competition law.

A 1.1 Existence of high and non-transitory entry barriers

With regard to high and non-transitory entry barriers, the EC makes the following comments (summarised):

EC Comment: *OPTA seems to focus on the replicability of the existing cable infrastructure. However, in innovation-driven markets competitive constraints often come from potential competitors that are currently not in the market. Their offers may become a substitute. Cable operators seem to face potential competition from alternative platforms and will lose costumers to these platforms in the future. Even if alternative offers market share is only 24% in 2009 this is not an indication for the existence of non-transitory entry barriers.*

Evaluation: OPTA has – in the view of the expert group correctly – analysed the potential for replicability of cable networks and found that they were difficult to replicate mainly due to sunk costs. OPTA has further given due consideration to the impact of existing alternative and emerging technologies, in particular to satellite, analogue terrestrial television, digital terrestrial television (DVB-T) and IP-TV. OPTA has commissioned a report by *Dialogic*⁵ in which the impact of those technologies, within the next three years, is analysed. The outcome – which can be relied upon as the best estimate in this case – was that the alternative technologies mentioned above taken together would increase their share in total TV households from currently 13.9% (2005) to 20.5% in 2008. This is an increase of 6.6% in three years or 2.2% per year. This increase does not seem to be enough to provide a sufficient competitive constraint to cable network operators. Such a slow increase furthermore suggests that significant barriers to switching and therefore barriers to entry exist at the retail level.

These barriers appear to be non-transitory in the timeframe relevant to the market review on the basis of the evidence provided by OPTA in its analysis. In the following paragraphs, these barriers are described further.

Firstly, cable network coverage in the Netherlands is extremely high (approx. 95%) compared to other European countries and a very high percentage of households (more than 90%) are currently subscribed to cable networks. Amongst other things, this high level of cable penetration in the Netherlands is due to the relatively high population density and the way in which roll-out of cable was originally funded, namely by municipalities on a non-profit basis. Cable networks therefore have a first mover advantage as other technologies would have to persuade customers to switch, which is difficult in the presence of barriers to switching or switching costs respectively. Those barriers exist with regard to each of the alternative platforms:

Satellite: Satellite RTV has been available in the Netherlands for a number of years already, however, the number of subscribers has remained limited even though the large cable operators have significantly increased prices in the past. This is most likely due to difficulties associated with installing a dish in the Netherlands and additional costs for a second TV.

⁵ Dialogic is an independent agency. The report is based amongst others on the market expectation expressed in four industry standard studies.

Although, as pointed out by the EC, bans on the installation of satellite dishes have now been somewhat relaxed by municipalities, difficulties to install a dish due to line of sight restrictions remain for 30-40% of households. In addition, the installation of a dish is frequently regarded as unattractive and some districts are conducting anti-dish campaigns. Additional costs for a second TV are due to additional facilities (decoder) which have to be installed in case of satellite reception but not in case of cable reception, where many TV sets can be connected simultaneously without additional costs. This is relevant as currently 48% of all TV households own two or more TV sets.

Analogue terrestrial television: The number of channels which can be received by means of analogue terrestrial television is very limited, and only a small (and declining) share of customers is using this platform (2005: 1.5%). Analogue terrestrial television is planned to be turned off in 2006 or 2007 at the latest and therefore can clearly not be considered as a substitute within the coming years.

Digital terrestrial television (DVB-T) is available on a commercial basis in the Netherlands since 2003, currently (2005) has a coverage of 38% which is expected to increase to almost 100% until 2007. The largest DVB-T operator Digitenne offers a somewhat smaller package of channels than cable operators (27 compared to approx. 35)⁶ at slightly lower prices. KPN and Scarlet are reselling Digitenne's package, often in bundle with their own services and with a discount. Switching barriers mainly result from additional costs of a second TV (described above) and problems with reception quality. Quality problems are mainly due to the network architecture (many low masts instead of fewer tall ones) and are unlikely to be completely removed in the medium term. Although, according to Dialogic, forecasts are not entirely the same, all of the studies indicate that the number of subscribers will total less than 5% as of 2008. Furthermore, Digitenne only has a limited frequency spectrum available and therefore is constrained in its capacity to transmit a more comprehensive (and more competitive) set of channels.

IP-TV does currently not offer comparable products to cable RTV, but an introduction of a similar product is announced for the end of 2005 by KPN. However, there have been several postponements due to technical difficulties in the past the possibility of further delays cannot be excluded. KPN's IP-TV will comprise a comparable number of channels as cable RTV and will be, according to KPN – in combination with a broadband internet connection – more expensive than comparable cable offerings. It is generally recognised that IP-TV requires a network upgrade to ADSL2+ and the potential coverage of KPN is expected to be 30% in 2006 and 60% from 2007 onwards (the remaining 40% live too far from the local switch to achieve speeds higher than that of regular ADSL). Given the high broadband internet penetration in the Netherlands and the additional services offered (electronic program guide, etc.), there appears to be some potential for IP-TV. Taking into account the technical difficulties in the past, limited current and forecast future coverage, and the switching costs (like for the other alternative platforms, there are additional costs for a second TV)⁷ the expert group does not see a reason to cast doubt on the Dialogic forecast of a penetration of only 3.4% in 2008.

Given this evidence, the expert group does not think that alternative platforms taken together will impose a sufficient competitive constraint to cable operators in the coming years; entry barriers into the markets as they were defined by OPTA can definitely be considered as high. As there are no significant differences with regard to the coverage of competing platforms between the areas of the three cable operators (existing differences with regard to the

⁶ Although both platforms are offering the most popular channels, according to the Dialogic report users place great store in an extensive service portfolio which makes Digitenne's service not entirely similar to the cable services in terms of product features.

⁷ In addition, a large number of broadband users already have high-speed internet from a cable company and would have to switch their current internet provider.

coverage of DVB-T will largely disappear in 2007), this conclusion holds for all three operators.

EC comment: *The digitalisation of cable networks over the next years will substantially increase the available capacity on the cable networks so that current capacity constraints – to which OPTA refers in its analysis – may be removed. Voluntarily provided or regulated wholesale access to the cable networks may then become yet an alternative manner for third parties to enter the retail market.*

Evaluation: The expert group notes that it appears unlikely that the digitalisation of cable networks will offer the possibility of effective wholesale access regulation, which is sufficient on its own to address the identified competition problems within the coming years. Effective wholesale access regulation would require that alternative operators could offer the same amount of channels as currently offered by the cable companies, i.e., approx. 35 channels. As long as the cable networks are not 100% digitalised (which is highly unlikely to be the case within the coming years), analogue transmission will have to be continued in addition to digital transmission. Therefore, there does not seem to be sufficient capacity available to allow for wholesale regulation capable of addressing all of the identified competition problems in the coming years. Furthermore a question arises with regard to the efficiency of capacity use if the same programs (any operator would have to offer the most popular channels) are transmitted in parallel over the network. Finally, Article 82i of the Media Law obliges cable operators to transmit the basic package (comprised of 15 channels) uncut, unchanged and simultaneously to all those connected. This further limits the space for alternative providers.

The expert group therefore believes that spectrum scarcity in cable networks as well as the current legal context in which free-to-air television channels are provided in the Netherlands will be major obstacles so that wholesale regulation on its own will remain insufficient to address all of the identified competition problems within the coming years.

A 1.2 Structure of the market tends towards effective competition

With regard to the tendency towards effective competition within the relevant time horizon, the EC makes the following comments (summarised):

Comments related to the relevant time frame

EC comment: *There is a certain lack of clarity in the notification as to the precise timeframe that OPTA takes into account, but in a position paper submitted to the Commission OPTA specifies the relevant timeframe as being 3-5 years.*

Evaluation: As OPTA has conducted an analysis for the coming three years (until 2008) but has looked beyond this timeframe in some instances, there is indeed some confusion. However, as the Dutch law (article 6a.4 of the Telecommunications Act) requires market analysis to be conducted at least every three years, the relevant time frame for the decision is as long as this period (until 2008).⁸ In fact a timeframe of up to 5 years may be too long to make reliable predictions although even for a period until end 2009 forecasts according to Dialogic seem not to indicate a significant increase in potential competition from alternative platforms (total share of 22.4% in 2009 as compared to 13.9% 2005).

⁸ A new market analysis can even be made earlier if unforeseen developments occur.

Comments related to potential competition from alternative platforms

With regard to these comments, the expert group notes that such issues are more appropriately discussed under the first criterion (high and non-transitory barriers to entry) as the second criterion focuses on the state of competition in the market (i.e., behind the barriers to entry) as it has been defined by OPTA. Nevertheless, as the issue of potential competition is key to this market, some comments seem to be warranted in the context of a separate heading.

EC comment: *A competitive constraint can be exerted by potential entrants. As OPTA itself admits, (at least) potential competition exists and has developed without retail regulation.*

Evaluation: Although OPTA states that potential competition does in fact exist and will increase somewhat over the coming years, the expert group notes that within the time frame of this market review it appears unlikely that competitive pressure will be sufficient to prevent UPC, Casema and Essent from further raising the price of the “standard package”. The reasons for this are barriers to entry and switching which have been dealt with in section A 1.1.

EC comment: *Although switching between platforms at the retail level has been limited in the past, this must be considered in the light of the fact that two of the alternative platforms (IP-TV and DVB-T) have only appeared recently and are still being rolled out and the fact that regulatory restraints on satellite have recently be eased.*

Evaluation: OPTA has taken due consideration of this point (see section A 1.1).

EC comment: *OPTA does not examine to what extent the alternative infrastructures are already available in each of the areas provided by the three cable operators.*

Evaluation: According to information provided by OPTA, there are no major differences in the availability of alternative platforms between the coverage areas of the three cable operators considered (differences with regard to the coverage of DVB-T will largely disappear in 2007; with regard to IP-TV one can expect an equal distribution across the coverage areas of the three operators considered).

EC comment: *OPTA does not examine the actual churn to recently launched platforms. Certain cable operators indicate that the digital terrestrial offer of KPN introduced at the end of 2004 has led to a significant decrease in the amount of cable subscribers.*

Evaluation: OPTA has considered the development of the number of subscribers on all existing platforms (cable, satellite, DVB-T, IP-TV) which did not provide evidence for extensive switching despite substantial price increases by cable operators in the time period investigated by OPTA. It appeared to the expert group that the EC quoted information from cable operators, which were taken out of context, as no mention was made of significant retail cable TV price rises during the same period.

EC comment: *OPTA submitted a position paper from KPN regarding its plans to take over Nozema in which it is indicated that the entry of KPN in the RTV market has had an effect on the behaviour of cable operators, who have expanded their services and decreased the costs for end users to switch to digital cable offers. Cable operators also seem to subsidise (at*

least partly) the costs for retail customers (modem) to migrate from the analogue to the digital cable subscription, which in absence of any pricing constraint would be unlikely.

Evaluation: An expansion of services and a stimulation of switching to digital services is not necessarily driven by competitive pressure. It appears likely to be in a (profit maximising) cable operator's interest to expand the number and quality of its services.

Comments related to pricing

EC comment: *The presence of an external constraint on the pricing behaviour of the three cable operators seems to be illustrated further by indications that the upward trend of prices has slowed down or stopped.*

Evaluation: A halt in the upward trend does not necessarily imply an external competitive constraint, as also a pure monopolist would raise prices only up to a certain level. Furthermore, the upward trend appears to have "stabilised" only recently (mid 2005) after political pressure (including the proceedings of OPTA and NMa) has been exerted on the large cable companies.

EC comment: *The three cable operators apply similar prices which could suggest that a common external price constraint exists.*

Evaluation: A common pricing constraint might be one interpretation, however it is unlikely, as many other cable operators have lower prices than the three operators under consideration. The EC would have to explain why these operators are not affected by the common pricing constraint. Furthermore, the observed behaviour is consistent with the interpretation that all three operators are exercising market power (to roughly the same extent) which is reinforced by the fact that they increased prices in the past while smaller operators did not. The additional costs for digitalisation in the large networks do not seem to justify price increases of the magnitude observed (the tariff of UPC, e.g., has risen from € 8.61 per month in 2002 to €15.53 per month in 2005, which corresponds to an increase of 80%).

EC comment: *Due to contractual agreements between the municipalities and the cable operators, prices in the past may have been below the competitive level.*

Evaluation: The expert group has not seen any evidence that prices have been below costs in the past. Rather, the large cable operators have been (and are) highly profitable – which is confirmed by statements ("very high margins") of the CEO of UPC's parent company Liberty Media, John Malone.

EC comment: *Dialogic concludes that one of the main reasons for the relatively limited growth of alternative infrastructures in the past is the competitive offering of cable operators (offers are still generally perceived as qualitatively good and low priced).*

Evaluation: Although this may be one interpretation of the facts, it appears to the expert group that the information provided by OPTA suggests that the price increase of the three large cable operators in the past did not result in significant amount of switching due to the barriers to switching identified by OPTA (dealt with in section A 1.1). Furthermore it has to be mentioned that a proceeding of the Dutch competition authority (NMa) against excessive pricing of UPC and Casema (see section A 1.3) has been triggered by complaints of consumers and consumer associations.

EC comment: *In the wholesale cable transmission market, cable operators are increasingly paying broadcasters to get their content in order to provide more attractive RTV packages in the retail broadcasting market which is a sign of increasing competitive constraints at the wholesale level. The increased cost of content may also have been one of the reasons behind the price increases observed in the past in the retail markets.*

Evaluation: OPTA has confirmed that the trend is that fewer broadcast content providers pay cable companies for transmission than in the past. Furthermore, there are some thematic channels that receive payments from cable companies. Therefore, OPTA is, as explained in the draft decision, of the opinion that there is some countervailing buying power. The expert group notes, however, that it appears unlikely that price increases of the magnitude observed are due to increased cost of content on this basis, in particular as it is unlikely that content providers may be in a position to refuse to supply on the basis of reaching a sufficient number of households via an alternative technology.

EC comment: *In a market characterised by large fixed costs even a small level of churn may result in the cable operator not being able to cover its largely fixed cost base. This element has not been addressed by OPTA.*

Evaluation: This point has indeed not been addressed in OPTA's draft decision. However, given the current profitability of the three large cable operators, it seems unlikely that after switching of the magnitude forecasted by OPTA these cable operators would be unable to cover their fixed costs.

EC comment: *Trend towards more competition is confirmed by NMa concerning the alleged excessive pricing of UPC and Casema in which the NMa stated that the retail pricing of cable operators will be under increasing pressure (both from competing platforms and from developments of multiplay bundles).*

Evaluation: The decision of the NMa is discussed in section A 1.3.

Comments related to the evidence provided by OPTA

EC comment: *OPTA does not substantiate why IP-TV offers could not act as a competitive constraint on cable operators within the timeframe of the review, in the light of the increasing ADSL broadband penetration and the limited switching costs from cable to IP-TV in case of customers already having an ADSL broadband connection.*

Evaluation: The barriers to switching to IP-TV have been dealt with above (section A 1.1).

EC comment: *With regard to terrestrial RTV, the fact that Digitenne currently offers 27 TV channels (as opposed to the standard package offered by CA-TV operators with 35) is not as such a lack of competitive constraints. The most popular channels (top 10) are available on both platforms.*

Evaluation: As mentioned above, according to the Dialogic report users place great store in an extensive service portfolio which makes Digitenne's service not entirely similar to the cable services in terms of product features.

EC comment: *OPTA does not substantiate how the costs of connecting an extra TV would be prohibitive of switching from cable to digital terrestrial RTV or whether the alleged reception problems of digital terrestrial RTV would concern a significant number of customers to an extent that significantly limits switching.*

Evaluation: The additional costs of connecting an extra TV and the reception problems certainly can be regarded as substantial barriers to switching. The fact that switching to DVB-T has remained limited despite large advertising campaigns (for DVB-T) and significant price increases by the cable operators under consideration leads to the conclusion that these barriers to switching together with other barriers discussed above (section A 1.1) are substantial.

EC comment: *The higher one-off costs (for digital terrestrial and satellite) are not as such an indication of high switching costs in the presence of lower monthly tariffs compared to cable.*

Evaluation: The expert group agrees with the EC to some extent, however, this is not a key argument. Other, substantial barriers to switching (discussed above) remain.

EC comment: *With respect to satellite OPTA does not substantiate whether a significant number of households would in fact be concerned by prohibitions to install satellite dishes (bans on the installation of satellite have been lifted by municipalities and a corresponding European Communication). Furthermore, OPTA does not substantiate how the costs of connecting an extra television would be prohibitive of switching from cable to satellite.*

Evaluation: It is true that OPTA does not state the number or share of households which are and will be concerned by prohibitions to install satellite dishes. However, the point here is not so much about the number of households which are concerned by prohibitions (which, however, still exist according to information provided by OPTA) but the number of households which cannot install a dish due to line of sight restrictions (30-40%) or which are reluctant to do so due to the unattractiveness of an outdoor dish or pressure from the community or the landlord. The expert group does not see a reason to cast doubt on OPTA's conclusion that this share of households is large enough so that – together with the costs of connecting an extra TV – satellite will not provide a sufficient competitive constraint to cable in the coming three years.

A 1.3 Sufficiency of competition law

With regard to the sufficiency of competition law to address the market failure identified, the EC makes the following comments (summarised):

EC comment: *The Dutch competition authority (NMa) has recently concluded that the retail tariffs levied by two of the three cable operators are not excessive in the sense of the Dutch antitrust rules. NMa has demonstrated the ability to assess the prices of the cable operators against their costs.*

Evaluation: The NMa indeed found that the tariffs charged by the cable operators did not fulfil the standard of excessive prices according to Dutch general competition law. This conclusion was based on the current developments in the RTV (radio and television) sector (development of alternative platforms) as well as an assumption on OPTA's power to intervene if there was a risk of excessive prices. Furthermore, the period investigated by the NMa ended in 2004 and prices have further increased significantly since then. The expert group recognises that the standards of proof for excessive pricing under general competition

law are very high and that even margins of 100% or more might not suffice to intervene. The inability to prove excessive pricing of NMa therefore does not automatically mean that no competition problem can be identified in an ex ante analysis. On the contrary, NMa – consistent with Art. 3 of the Framework Directive – pointed out that sector-specific regulation would be more appropriate to deal with the risk of excessive pricing and supported OPTA's draft decision. As it is the case with telecommunications fixed networks in most countries, cable operators dispose of legacy, not easily replicable infrastructure. In view of the high and non-transitory entry barriers and the lack of a trend towards effective competition, general competition law does not seem appropriate to deal with the identified competition problems.

EC comment: *Regulation of retail prices for cable transmission may in itself have counterproductive effects and create a barrier to entry which may slow down or render more difficult the development of alternative infrastructures on the Dutch retail market and the digitalisation of cable. Hence retail regulation may hamper infrastructure competition.*

Evaluation: OPTA has given due consideration to this point in its analyses. If effective competition could be expected to emerge within the coming years, one would not have to take any action to deal with the risk of excessive prices. As OPTA has demonstrated, this appears highly unlikely absent the proposed remedies. As a result, there is a need to protect consumers against exploitative abuses by cable operators and to prevent cable operators from leveraging their market power into adjacent markets. The expert group also debated the valid point made by the EC that retail price caps may run the risk of discouraging competitive entry. The Group considers that OPTA needs to take a balanced view regarding the exact level of such price caps not to change the prospects of efficient future entry. Further, the retail remedy needs to be designed to reflect this concern and applied only to those retail products for which the wholesale remedy is insufficient. On this basis, OPTA's views appear to be reasonable, in particular as OPTA considered that as regards pay-TV channels retail regulation was not required and that wholesale regulation was indeed sufficient for those channels.

Annex 2: Sources used

When drafting this report the IRG expert group has taken into account the relevant provisions of the Regulatory Framework 2002 and the following specific sources, which were either publicly available or provided by OPTA:

EC (08.11.2005): Website notice on the Initiation of second phase examination of notified draft measures under Art. 7(4) of Directive 2002/21/EC. Case NL/2005/0247: Retail markets for the supply of free-to-air radio- and television packages via cable transmission in the Netherlands.

EC (03.11.2005): "Serious doubt letter" on Case NL/2005/0247: Retail markets for the supply of free-to-air radio- and television packages via cable transmission in the Netherlands.

IRG: Article 7 Process – NRA review of serious doubts cases; document adopted by the IRG Plenary Meeting on 2nd of December 2004 (Plen (04) 48).

Nederlandse Mededingingsautoriteit (NMA): Besluit Nummer 3528/199. Decision on complained excessive of UPC.

Nederlandse Mededingingsautoriteit (NMA): De markten voor de doorgifte en ontvangst van omroepsignalen; Differentiatie Tusen Kabelexploitanten. Afstemmingsdocument.

OPTA (28.09.2005): The markets for the transmission and reception of broadcasting signals: Draft decision related to the coverage area of UPC Nederland B.V.; (unofficial translation).

OPTA (28.09.2005): The markets for the transmission and reception of broadcasting signals: Draft decision related to the coverage area of CASEMA; (unofficial translation).

OPTA (28.09.2005): De markten voor de doorgifte en verzorging van omroepsignalen. Verzorgingsgebied ESSENT KABELCOM B.V. Ontwerpbesluit.

OPTA (29.09.2005): Summary Notification Form, The Hague.

OPTA (10/2005): Broadcasting via cable in the Netherlands. Summary of OPTA's draft decisions.

OPTA (10/2005): The markets for the transmission and reception of broadcasting signals: Differentiation between Cable Operators, a coordination document (unofficial translation).

OPTA (18.11.2005): "Markets for Broadcast Transmission Services in the Netherlands" (Presentation given by OPTA to the expert group on occasion of the first hearing on November 18th)

OPTA (22.11.2005): Letter submitted to the European Commission on the case on November 18th; (unofficial translation)

OPTA (22.11.2005): Answers from OPTA to the Group of experts on a list of questions submitted to OPTA on the case.

OPTA (18.11.2005; 24.11.2005): Hearings with the expert group.

Annex 3: Procedural issues – Chronology of review

Serious doubt letter: On the 8th of November, the Commission uploaded a document in which it announced the initiation of second phase examination on Case NL/2005/0247: Retail markets for the supply of free-to-the air radio and television packages via cable transmission in the Netherlands. Subsequently, on November 9th, the Commission uploaded the serious doubt letter (dated November 3rd) on this case.

Request from OPTA to setup an expert group: With reference to IRG Plenary decision on document Plen (04) 48, OPTA asked on November 9th the IRG secretary to establish an ad-hoc project team (expert group) to reach rapid conclusion on OPTA's analysis for market 19 on retail broadcasting (particularly retail cable). RTR (Paul Pisiak) was asked to act as a Rapporteur of the expert group and confirmed RTR's willingness to cooperate on this case.

Selection of Members of the expert group: On November 10th, Guido Pouillon - the responsible IRG Co-ordinator on these activities - contacted the Rapporteur with an up-dated list of experts and a preliminary list of NRAs out of which the expert group could be founded. Prime Criteria for selecting experts out of the pool of IRG experts for the small ad-hoc group (as stated in Plen (04) 48) was whether a particular NRA has already made a notification on the relevant market (this case broadcasting transmission) or is at least on the way to do so within the near future. Against this background the IRG Co-ordinator suggested to set up a group consisting of AGCOM, COMREG, NHH, OFCOM and RTR, from which it was known that these NRAs were working on respective market analyses.

Information provided by OPTA: On 10th of November the Rapporteur contacted OPTA in order to get access to all relevant documents to review the case. These documents and any further request that was put forward to OPTA were promptly submitted/answered.

First expert group Meeting: The expert group met the first time on November 18th in Brussels. At this meeting the major problems and arguments of the case were identified and discussed, a list of questions for OPTA was specified and the further schedule was fixed. In an extra block the expert group had a hearing with representatives from OPTA which served to gain a better understanding on the case.

Schedule: Given the uncertainty whether the case would be already on the agenda of the CoCom Meeting on December 7th, the expert group, in agreement with OPTA, decided to plan its work on the assumption that the case will be discussed on this date. This assumption given, the expert group setup its schedule, according to which a first internal draft was available on 22nd of November, and the final draft (to be submitted to OPTA for comments) on 28th of November. A short time of reaction for OPTA allowed the submission of the expert group's final report to the IRG on December 1st, leaving some time to discuss the report internally and to approach the representatives of the Member States to the CoCom, if appropriate.

Second expert group Meeting: The second expert group Meeting took place in Brussels on Thursday, 24th of November and focused on the discussion and finalisation of the draft report. In order to clarify remaining issues, OPTA again was invited to join the expert group for a session in the afternoon in order to clarify remaining open issues and to answer questions.

The Rapporteur (Paul Pisiak) wants to thank all the participating NRAs and OPTA for the very constructive and efficient discussions which made it possible to evaluate the case within the short period of time given.

In case of requests on the report you may contact paul.pisiak@rtr.at (+43/1/58058-600) or anton.schwarz@rtr.at (+43/1/58058-609)