

## Management summary

### 1 Radio transmission

#### 1.1 Introduction

1. Under the terms of Chapter 6a of the Telecommunications Act *Telecommunicatiewet* (referred to throughout as "Tw") the Commission of the Dutch Independent Post and Telecommunications Authority (referred to throughout as the "Commission") is required to analyse specific relevant markets in the electronic communications sector in order to determine whether there is effective competition on these markets or whether any market party holds significant market power (referred to throughout as SMP) in them based on a forward looking analysis covering the period until the end of 2011. The Commission may impose appropriate remedies on any market party which holds SMP.

2. The decision concerns the relevant wholesale markets for radio services and covers the terrestrial transmission of radio signals.

#### 1.2 Main points of the decision

3. The Commission has decided not to proceed with *ex ante* regulation in accordance with the provisions of Chapter 6a of the Telecommunications Act (Tw) and has arrived at this decision for three reasons.

4. First of all, in response to a ruling handed down by the Trade and Industry Appeals Tribunal<sup>1</sup> the OPTA Commission has cited additional grounds for its previous market analysis decision not to proceed with *ex ante* regulation in connection with the existence of adequate legal provision in the form of Section 3.11 of the Tw.

5. In addition, the Commission has come to the conclusion that these wholesale markets no longer feature on the list of the markets that are to be investigated, which the European Commission has included in its Recommendation and which it feels may qualify for *ex ante* regulation following an investigation by the national regulatory authorities.<sup>2</sup>

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<sup>1</sup> The previous market analysis decision was quashed by a judgment handed down on 25 September 2007 (AWB 06/076, LJN: BB 4167).

<sup>2</sup> Commission Recommendation of 17 December 2007 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 communications networks and services (OJ L 344 of 26 December 2007).

## Management summary

6. In accordance with the provisions of the Tw, the Commission has the power to define markets other than those specified for products and services in the Recommendation, if it is of the opinion that there are grounds for doing so. In this respect the Commission is required to have regard to the Recommendation as far as possible, which stipulates that when analysing markets other than those included in its annex, a national regulatory authority should ensure that the following three cumulative criteria are met:

- a) there are high and non-transitory barriers to entry;
- b) the market structure does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition "behind" the barriers to entry;
- c) competition law alone would not adequately address the market failure(s) concerned.

7. The Commission is of the opinion that the wholesale markets for the provision of radio transmission services fail to meet all three criteria.

8. Because the wholesalem markets concerned do not meet the three criteria test the Commission is not authorized to examine whether effective competition occurs in the relevant markets nor to proceed with *ex ante* regulation under the terms of Section 6a of the Tw. For the record, the Commission has also explained in its draft decision that, if it had decided to impose remedies in these markets based on a comprehensive analysis of them, they would not have been proportionate.