

Management Summary

1 RTV Broadcasting in the coverage area of UPC

1.1 Introduction

1. Once every three years the Commission of the Independent Post and Telecommunications Authority of the Netherlands (referred to throughout as the “Commission”) is required to study and analyse the electronic communication markets. This is stipulated in Chapter 6a of the Telecommunications Act [*Telecommunicatiewet*]. A determination must be made as to whether there is effective competition in them or whether any business holds significant market power. The Commission may impose remedies on any such business in order to end the disruption of market forces and to encourage competition. The Commission’s market analyses focus on the future and are valid for a period of three years.

2. A market analysis decision is proposed for the broadcasting markets. On 15 July 2008 the Commission published similar proposed decisions based on analyses of the fixed telephony, broadband and leased line markets. These proposals are now being presented to stakeholders for consultation and they may respond to the proposed decisions. A draft decision will then be presented to the European Commission, following which the Commission expects to be able to make a final decision by the end of 2008.

3. The broadcasting market analysis covers the retail and wholesale broadcasting markets. In the retail market end users receive radio and television signals (RTV signals) and access to a broadcasting transmission platform, such as UPC’s cable network (access). The wholesale broadcasting market involves the transmission of these RTV signals and the provision to other providers to offer end-users access to broadcasting transmission platforms. The market for broadcasting content, the purchases of programmes, such as RTL4, Nederland1 or SBS6, for incorporation into UPC’s standard package, for example, is not covered by the Telecommunications Act and therefore does not constitute part of this market analysis.

4. As part of this broadcasting decision the Commission has identified UPC Nederland B.V. as a company which holds significant market power under the terms of the Telecommunications Act.

5. As part of this decision the Commission will render it mandatory for UPC to accommodate reasonable requests for the wholesale transmission of radio and television signals and the wholesale provision of access to its cable network. This will make it possible for alternative providers to offer RTV signals (or packages containing them) to end users through UPC’s cable network. In this respect these alternative providers may also offer the same standard package and, as such, acquire comprehensive customer relations in the same way that CPS providers are also able to take over telephone connections in the case of KPN.

Management Summary

1.2 Main points of the decision

6. The Commission sees a trend towards digitisation in the TV markets but notes that end users and providers are going through a transitional period, during which analogue RTV is still of great significance. This is due to the unique circumstances prevailing in the Netherlands. The vast majority of Dutch end users are connected to cable and only receive an extensive analogue standard package. In this respect many digital viewers are still also using analogue RTV alongside their digital services. In addition, 81% of Dutch analogue television viewers are satisfied with the range of television services that are currently available, with the result that they are not readily switching to a digital supply. The Commission has therefore concluded that the analogue transmission of RTV signals will continue to be the dominant modality for the time being.

7. At present UPC's share of the retail market is currently more than 70% to 80%. It is anticipated that its market share will drop to between 60% to 70% and 70% to 80% by the end of this regulatory period (2011), which is still considerable. Moreover, UPC's position is bolstered by additional circumstances, such as the difficulties involved in duplicating its (analogue) infrastructure, the switching costs involved for end users, a rather extensive range of products and the benefits of economies of scale. The Commission notes that the obstacles to entering the broadcasting market are not of a temporary nature. Digtienne, IP-TV via DSL, satellite and fibre optic cable are still incapable of exerting sufficient pressure on cable tariffs and have not produced a greater choice of cable packages. Consequently, the Commission has concluded that UPC holds significant market power in the retail market for the provision of RTV packages and access to a broadcasting transmission platform.

8. The Commission believes that a situation of sustainable competition can best be achieved by according preference to measures which are conducive to infrastructure competition where possible when selecting any remedies. It is for this reason that it accords preference to access services which still offer market parties an incentive to invest in their own infrastructure as far as possible.

9. Because infrastructure competition will not develop sufficiently in the absence of regulation to have an appropriate disciplinary impact in the regulatory period ahead, the Commission is also encouraging services competition. Consequently, the aim of regulation specific to broadcasting is to promote services competition on UPC's broadcasting transmission platform in so far as this will accommodate the potential for the development of infrastructure competition.

10. The Commission has concluded that end users are increasingly opting for the procurement of a bundle of Internet, telephony and television services from a single provider. To ensure that we are not left with only two dominant networks from which end users can choose – KPN or a cable company – the Commission envisages the need for alternative providers to compete. If KPN is to have an incentive to proceed with innovation and to invest in its own network, it is not self-evident that KPN should be allowed to insist on the resale of access to UPC's cable network. Simultaneous with this decision the Commission has decided as part of its fixed telephony market analysis, that cable companies should not simply be allowed to exploit opportunities for WLR in their area of coverage.

Management Summary

11. Through the Commission's imposition of remedies UPC will be required to allow its competitors to have access to its network. As a result this will give consumers a greater choice of analogue and digital cable packages in the future. UPC will lose its monopoly on the provision of analogue television services in its coverage area. In this way the Commission will promote the interests of end users in terms of choice, price and quality, and it will give rise to sustainable competition in the retail broadcasting market. Through its regulatory activities the Commission also envisages being able to offer other providers that are active on other broadcasting transmission platforms the opportunity to develop comprehensive customer relations with end users, so that they will be more readily capable of guiding end users to their own digital platform. By doing this the Commission is seeking to promote infrastructure competition in the longer term.

1.3 Remedies in the wholesale market

12. To a large extent UPC owes its position in the wholesale broadcasting market to its position in the retail broadcasting market. It holds a significant share of those markets at present and will also do so at the end of the regulatory period. RTV signal providers do not have enough buying power to prevent UPC from acting independently. It is for this reason that UPC holds significant power in the wholesale broadcasting market.

13. Because of its dominant position, UPC is able to deny access to competing providers of RTV signals (or packages of these services). In addition, UPC has the ability to cause problems that disrupt competition in relation to access, such as the discriminatory use and concealment of information, the improper use of information about its competitors, delaying tactics, unfair terms and conditions, quality discrimination, strategic product design, and bundled or linked sales. UPC is also capable of denying access to those of its competitors wishing to use its network by means of price discrimination and excessively high tariffs.

14. In line with European legislation, which stipulates that problems relating to competition should preferably be resolved by adopting wholesale measures, the Commission will impose the following obligations on UPC:

- a duty to accede to reasonable requests for the transmission of RTV signals (digital or otherwise), which will enable RTV signal providers to offer RTV packages. In addition, UPC will have a duty to permit the resale of analogue RTV signals and to provide resale of retail access to its broadcasting transmission platform on the wholesale market (also known as WLR-C). Nevertheless, alternative providers will need to make their own arrangements concerning the broadcasting rights for the programmes constituting part of the standard package, if they wish to resell analogue RTV signals. This duty also entails that UPC will also have to ensure that RTV signal providers are able to take over relations with end users;
- a duty to ensure non-discrimination – the obligation to allow the transmission of RTV signals, and to provide WLR-C, and related services and facilities in identical circumstances subject to the same terms and conditions. This obligation also entails that UPC must ensure supply to

Management Summary

external customers in identical circumstances subject to the same terms and conditions governing supply to itself;

- a duty to publish a so-called reference offer, which must include all of the services that UPC is required to provide to its competitors. UPC will also have to state in it what tariffs it will charge its wholesale customers and any other terms and conditions it will impose in this respect;
- a duty to submit to tariff regulation – UPC will be required to charge tariffs for the transmission of RTV signals which are based on its expenses (cost-oriented tariff regulation). The Commission will set maximum tariffs (so-called retail minus tariffs) for access (WLR-C) and the resale of analogue packages based on information to be provided by UPC concerning its retail tariffs and expenditure.

1.4 Different outcomes from those of 2006

15. The most important differences between this decision and the broadcasting market decision of 2006 are as follows:

- more extensive retail and wholesale markets have been defined, with the result that the broadcasting transmission platforms of satellite, digital terrestrial transmission, IPTV via DSL and fibre optic networks have now become part of the relevant markets;
- a distinction is no longer being made between free-to-air and paid RTV packages. All of the various RTV services provided through UPC's cable network now constitute part of the same market;
- in addition to the transmission of RTV signals, the wholesale market also includes the wholesale provision of access (for retail purposes or otherwise) to a broadcasting transmission platform. This differs from the 2006 broadcast marketing decision as part of which the Commission had initially intended to regulate access at the retail level. The Commission ultimately abandoned this approach following objections from the European Commission;
- the remedies addressing access, transparency, non-discrimination and tariffs have been extended to include more detailed implementation, for example, in the form of a code of conduct governing the non-discriminatory treatment of customers.

Regulation anyway

16. Based on the European regulatory framework, which is partly reflected in the Telecommunications Act, there is no need for the Commission to analyse the broadcasting markets. Nevertheless, the Commission feels that regulation is required because of the unique competitive situation prevailing in the Dutch broadcasting market, which also causes specific problems in relation to competition. After all, there are barriers to entry which are not of a temporary nature, amongst other things, because it is not easy to duplicate the requisite infrastructure. In addition, the broadcasting market is not moving towards effective competition, because the transmission of analogue RTV signals remains the dominant modality for the time being and UPC has an enormous customer base, with the result that RTV package providers require access, if they are to reach a group of end users that is large enough. Finally, competition law and the Media Act [*Mediawet*] (the so-called 'must carry'



Management Summary

rules) are not adequate to address the problems that have been found to exist in relation to competition.

1.5 Advice from NMa

17. The NMa [Netherlands Competition Authority] Board shares the Commission's conclusion that there is a relevant wholesale market for the transmission of RTV signals and the wholesale provision of access to a broadcasting transmission platform within UPC's area of coverage. In addition, NMa shares the Commission's conclusion that UPC holds significant market power in these markets.