



Implementatiebesluiten WLR-C

Implementatiebesluit WLR-C: UPC, kenmerk OPTA/AM/2010/200747

Implementatiebesluit WLR-C: Ziggo, kenmerk OPTA/AM/2010/200748

Openbare versie van de in de Europese notificatie met de Europese Commissie gevoerde correspondentie

1. Zienswijze van de Europese Commissie d.d. 14 december 2009
2. Vragenbrief van de Europese Commissie d.d. 20 november 2009
3. Antwoordenbrief van OPTA d.d. 25 november 2009

OPTA, 10 maart 2010



EUROPESE COMMISSIE

Brussel, 14/12/2009
C(2009)10360

SG-Greffe (2009) D/11232

Onafhankelijke Post en
Telecommunicatie Autoriteit
(OPTA)

Zurichtoren - Muzenstraat 41
2511 WB Den Haag
Nederland

Ter attentie van:
De heer Chris A. Fonteijn
Voorzitter

Fax: +31 70 315 92 04

Geachte heer Fonteijn,

Betreft: Zaak NL/2009/1007: Ontwerp-implementatiebesluit inzake de aan UPC en Ziggo opgelegde WLR-C-verplichting op de wholesalemarkt voor omroeptransmissiediensten en de toegang tot het omroeptransmissieplatform van de individuele kabelexploitanten in Nederland

Opmerkingen overeenkomstig artikel 7, lid 3, van Richtlijn 2002/21/EG¹

I. PROCEDURE

Op 12 november 2009 heeft de Commissie een kennisgeving ontvangen van de Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA) betreffende de implementatie van de WLR-C-verplichting (Wholesale Line Rental Cable)² die is opgelegd aan de kabelexploitanten UPC en Ziggo, beiden aangewezen als hebbende aanmerkelijke markt macht (AMM), met betrekking tot de markt voor

¹ Richtlijn 2002/21/EG van het Europees Parlement en de Raad van 7 maart 2002 inzake een gemeenschappelijk regelgevingskader voor elektronische-communicatienetwerken en -diensten (Kaderrichtlijn), PB L 108 van 24.4.2002, blz. 33.

² Dankzij de WLR-C-verplichting kunnen analoge kabeldiensten voor radio en televisie (RTV) worden wederverkocht door alternatieve exploitanten (zaak NL/2009/0873).

omroeptransmissiediensten op wholesaleniveau³ in Nederland.

Overeenkomstig artikel 7 van de Kaderrichtlijn wordt de nationale raadpleging⁴ parallel met de EU-raadpleging gehouden. De uiterste termijn voor de EU-raadpleging is 14 december 2009.

Bij brief van 20 november 2009 heeft de Commissie OPTA een verzoek om inlichtingen⁵ toegezonden; het antwoord hierop werd op 25 november 2009 ontvangen.

Overeenkomstig artikel 7, lid 3, van de Kaderrichtlijn kunnen de nationale regelgevende instanties (NRI's) en de Commissie aan de betrokken NRI opmerkingen meedelen over ontwerpmaatregelen waarvan kennisgeving is gedaan.

II. BESCHRIJVING VAN DE ONTWERPMAATREGEL

II.1. Achtergrond

In januari 2009 heeft de Commissie de marktanalysebesluiten voor omroeptransmissiediensten en wholesaletoegang tot het omroeptransmissieplatform van de individuele kabelexploitanten Ziggo, UPC, Delta en CAIW van OPTA ontvangen en geëvalueerd (zaak NL/2009/0873)⁶. Hoewel OPTA de vier grootste AMM-kabelexploitanten heeft aangewezen, werd alleen aan Ziggo en UPC⁷ een WLR-C-verplichting opgelegd. Dankzij de WLR-C-verplichting kunnen potentiële alternatieve aanbieders van RTV-signalen het analoge RTV-aanbod van de kabelexploitant dupliceren en de klantenrelatie van de betrokken kabelexploitant overnemen. OPTA heeft ook bepaald dat WLR-C moet worden geleverd tegen een retail-minustarief (of tegen kostengeoriënteerde prijzen als geen retailequivalent beschikbaar is) en met een prijsplafond⁸.

II.2. De ter kennis gebrachte ontwerpmaatregel

De onderhavige kennisgeving omvat instructies voor UPC en Ziggo om hun referentieaanbiedingen in overeenstemming te brengen met de in het marktanalysebesluit vastgestelde WLR-C-verplichting. De ontwerpmaatregel voorziet ook in de procedure voor de uitvoering van de WLR-C-dienst door de twee kabelexploitanten, zodat aanvragers van toegang de dienst kunnen bestellen.

³ Dit komt overeen met markt 18 in Aanbeveling 2003/311/EG van de Commissie van 11 februari 2003 betreffende relevante producten- en dienstenmarkten in de elektronischecommunicatiesector die overeenkomstig de Kaderrichtlijn aan regelgeving ex ante kunnen worden onderworpen, PB L 114 van 8.5.2003, blz. 45.

⁴ Overeenkomstig artikel 6 van de Kaderrichtlijn.

⁵ Overeenkomstig artikel 5, lid 2, van de Kaderrichtlijn.

⁶ SG-Greffe (2009) D/723 van 9.2.2009.

⁷ OPTA heeft Delta en CAIW noch wederverkoop noch een specifieke prijsreguleringsverplichting opgelegd omdat zij over minder afnemers beschikken en een lage penetratiegraad hebben. OPTA is van oordeel dat een wederverkoopverplichting niet opweegt tegen de kosten. OPTA merkt op dat Delta en CAIW geen buitensporige wholesaletarieven kunnen blijven hanteren en legt hen non-discriminatieregels inzake prijsstelling op.

⁸ Met betrekking tot de aan UPC/Ziggo opgelegde WLR-C-tariefverplichting is OPTA voor de periode 26 november 2009 – 7 januari 2010 gestart met een nationale raadpleging over haar ontwerpbesluit. De EU-raadpleging wordt parallel met de nationale raadpleging gehouden (zaak NL/2009/1015).

Met betrekking tot de instructies voor de referentieaanbiedingen beoordeelt OPTA de voorstellen van UPC en Ziggo en stelt zij, rekening houdend met het standpunt van de belanghebbenden⁹, de wijzigingen en specificaties vast die UPC en Ziggo moeten invoeren in hun respectieve referentieaanbiedingen. Deze wijzigingen hebben onder andere betrekking op: de reikwijdte van het WLR-C-aanbod; de procedures voor wijzigingen in de analoge RTV-pakketten van UPC/Ziggo; de forecast- en orderprocedures en de relatie tussen de kabelexploitant, de potentiële alternatieve aanbieder en de eindgebruiker; de vereiste serviceniveaus; de openingstijden en voorwaarden voor de behandeling van aanvragen voor wholesalediensten. De definitieve referentieaanbiedingen moeten 6 weken na de bekendmaking van het onderhavige implementatiebesluit openbaar worden gemaakt.

Met betrekking tot de auteursrechtelijke regelingen tussen de betrokken partijen merkt OPTA op dat de partijen geen akkoord hebben bereikt over doorgifrechten en dat OPTA krachtens het EU-regelgevingskader niet bevoegd is voor de regelgeving inzake inhoud. De partijen kunnen de rechtsvraag of WLR-C al dan niet afzonderlijke auteursrechtovereenkomsten vereist, die waren gesloten door alternatieve exploitanten die gebruik zouden willen maken van het WLR-C-aanbod ("aanvragers van toegang"), dan ook voorleggen aan een burgerlijke rechtbank. Mocht het gebruik van WLR-C een afzonderlijke auteursrechtovereenkomst tussen de aanvragers van toegang en de auteursrechthebbenden vereisen, dan is het aan de aanvragers van toegang om te onderhandelen over auteursrechten met houders van inhoudsrechten. Omgekeerd, mocht WLR-C niet als een afzonderlijke inhoudpresentatie worden aangemerkt en bijgevolg geen afzonderlijke auteursrechten voor de aanvragers van toegang vereisen, dan is het volgens OPTA aan UPC/Ziggo om te onderhandelen over de auteursrechten om het recht te verkrijgen sublicenties te verlenen aan aanvragers van toegang. OPTA stelt vast dat zolang geen duidelijkheid bestaat over de regeling van doorgifrechten, onderhandelingen moeten worden gevoerd tussen UPC/Ziggo en potentiële aanvragers van toegang, met de definitieve regeling van doorgifrechten als opschortende voorwaarde.

Met betrekking tot het implementatieproces stelt OPTA vast dat de implementatie van WLR-C in twee stappen moet gebeuren. Release 1, een rudimentaire versie van de WLR-C-dienst, moet uiterlijk 6 weken¹⁰ na de bekendmaking van het onderhavige ontwerpbesluit¹¹ beschikbaar worden gesteld. OPTA heeft bepaald dat release 1

⁹ Industry group WLR-C, zie bijlage 1 bij de kennisgeving. In haar antwoord op het verzoek om informatie herhaalt OPTA haar in zaak NL/2009/873 ingenomen standpunt met betrekking tot de mogelijkheid voor KPN om UPC en Ziggo te verzoeken om WLR-C. In deze zaak wijst OPTA erop dat KPN reeds in staat is UPC/Ziggo een vergelijkbaar aanbod te leveren zonder dat hiervoor wholesale-infrastructuurelementen van derden hoeven te worden aangekocht. Aangezien KPN ook een concurrerende triple play-dienst kan aanbieden, is OPTA van oordeel dat de levering van WLR-C aan KPN voor het bedrijf een stap achteruit op de investeringsladder zou betekenen en niet de juiste investeringsstimulansen zou geven. OPTA merkt evenwel op dat zij in geval van geschillenbeslechting een toegangsverzoek zal moeten beoordelen, aangezien zij een uitkomst waarbij KPN WLR-C-toegang wordt toegekend, onwaarschijnlijk acht.

¹⁰ Waarbij de afnemersspecifieke implementatie binnen de 2 onmiddellijk daaropvolgende weken moet plaatsvinden.

¹¹ Ter ondersteuning van haar besluit heeft OPTA verzocht om een onafhankelijk deskundigenadvies van een ICT-bureau (Ordina). Ordina merkt op dat de projecten van 8 en 10 maanden die respectievelijk door Ziggo en UPC zijn voorgesteld voor een volledige WLR-C-implementatie, gerechtvaardigd zijn, aangezien een procedure in twee stappen de implementatieperiode zou verkorten.

(i) gericht moet zijn op het nog steeds aanzienlijke aantal afnemers dat alleen beschikt over een abonnement op het analoge RTV-pakket van UPC/Ziggo en niet op aanvullende diensten zoals breedbandinternet; (ii) moet resulteren in een zo snel mogelijke orderbaarheid van WLR-C; (iii) tot zo min mogelijk (extra) kosten dient te leiden; (iv) voldoende ordercapaciteit moet bieden en (v) zo veel mogelijk de basis moet bieden voor de uiteindelijke volledige implementatie van de WLR-C-dienst, in die zin dat release 2 kan voortbouwen op release 1. Release 2 bestaat in de volledige implementatie van WLR-C. Het moet potentiële alternatieve aanbieders in de mogelijkheid stellen te migreren van release 1 naar release 2, of de volledige WLR-C-dienst te bestellen zoals bepaald in het definitieve referentieaanbod. Release 2 moet uiterlijk 20 weken na release 1 beschikbaar zijn. De volledige implementatie van WLR-C mag dus niet meer dan 26 weken bestrijken¹².

In haar antwoord op het verzoek om informatie verklaart OPTA dat zij de voorgestelde stapsgewijze implementatie proportioneel acht, aangezien deze een evenwicht tot stand brengt tussen de wens om zo snel mogelijk over een operationele WLR-C-dienst te beschikken en de volledige implementatie van WLR-C, ten gunste van het eerste. In dit verband verwijst OPTA naar de opmerkingen van de Commissie in zaak NL/2009/873¹³ en naar de door haar ontvangen informatie dat potentiële alternatieve aanbieders zich in hun marketingplan specifiek richten op de afnemers van uitsluitend analoge pakketten. OPTA is derhalve van oordeel dat de ordering van release 1 de doeltreffendste optie is om de dynamiek in de markt zo snel mogelijk te verhogen.

III. OPMERKINGEN

De Commissie heeft de volgende opmerking bij de kennisgeving en de aanvullende informatie van OPTA¹⁴:

Proportionaliteit van het voorgestelde implementatieproces voor WLR-C

De Commissie merkt op dat OPTA met de stapsgewijze operationalisering van de WLR-C-dienst tracht WLR-C zo snel mogelijk operationeel te maken en de volledige implementatie uit te stellen tot een later stadium. Rekening houdend met de aanbevelingen van het ICT-bureau Ordina bij de voorbereiding van de ter kennis gebrachte maatregel verplicht OPTA UPC en Ziggo een eerste WLR-C-release binnen 6 weken uit te brengen. OPTA heeft bepaald dat release 1 voldoende ordercapaciteit moet bieden, een basis moet bieden voor release 2 en tot zo min mogelijk extra kosten dient te leiden.

De Commissie wijst er echter ook op dat OPTA in de ter kennis gebrachte

¹² Met het oog op een doeltreffende implementatie binnen de gestelde tijdslimieten behoudt OPTA zich het recht voor om tijdens de implementatieperiode verdere bindende operationele richtsnoeren bij de ter kennis gebrachte instructies te verschaffen. Deze instructies, die over het geheel genomen geen significante gevolgen zullen hebben voor de markt in kwestie, zullen openbaar worden gemaakt op de website van OPTA.

¹³ De Commissie heeft de toezichthouder ook verzocht de wederverkoopverplichting, inclusief de bijzondere voorwaarden, zo spoedig mogelijk op te leggen, zodat snel een marktstructuur tot stand komt die zich beter leent voor concurrentiedynamiek. Nadat deze structuur tot stand is gebracht, moet OPTA de voorgestelde WLR-C-verplichting zo spoedig mogelijk intrekken om de belangrijke positie van de doorgifte van analoge RTV-signalen niet onnodig in stand te houden en investeringen in en de ontwikkeling van digitale diensten en infrastructuur niet te belemmeren.

¹⁴ Overeenkomstig artikel 7, lid 3, van de Kaderrichtlijn.

maatregel geen beoordeling van de proportionaliteit verstrekt met betrekking tot het voorgestelde tijdschema voor release 1 en release 2 en niet toelicht waarom zij 6 en 20 weken toereikend acht om de vooropgestelde doelstellingen te bereiken. OPTA geeft evenmin technische of praktische details over hoe release 1 een basis zou moeten bieden waarop release 2 kan voortbouwen. De Commissie neemt nota van het Ordina-model voor release 1, waarnaar door OPTA wordt verwezen en waarin de ontwikkeling van een centrale database wordt aanbevolen met een eenvoudige webinterface die WLR-C-afnemers toegang geeft tot de database. Volgens het Ordina-model dient de orderverwerking in eerste instantie handmatig te gebeuren.

De Commissie wijst OPTA erop dat overeenkomstig de Toegangsrichtlijn opgelegde verplichtingen gebaseerd moeten zijn op de aard van het geconstateerde probleem en in het licht van de doelstellingen van artikel 8 van de kaderrichtlijn proportioneel moeten worden toegepast en gerechtvaardigd. In dit verband is de Commissie niet overtuigd van de proportionaliteit van de voorgestelde tijdschema's voor de implementatie van de WLR-C-verplichtingen, en is zij met name niet zeker of de periode van 6 weken voor de implementatie van de tussentijdse toegang tot WLR-C door de invoering van release 1 geen al te grote belasting vormt voor UPC en Ziggo. Opdat release 1 een basis kan vormen waarop release 2 kan voortbouwen, dienen UPC en Ziggo de vereiste IT-instrumenten te ontwikkelen. Deze instrumenten moeten vervolgens worden getest om te garanderen dat er voldoende ordercapaciteit is en om onnodige risico's op fouten in de orderverwerking te voorkomen. Het WLR-C-implementatieproces zal organisatorische aanpassingen vergen op het vlak van de (her)toewijzing van zowel personele als financiële middelen. De Commissie merkt op dat UPC en Ziggo niet over een speciale wholesalestructuur lijken te beschikken, terwijl KPN hier wel over beschikte toen het WLR voor telefonie kreeg opgelegd.

De Commissie dringt er bij OPTA dan ook op aan in haar definitieve maatregel alle technische en praktische details te geven over hoe release 1 als basis voor release 2 kan worden beschouwd. Voorts zou de Commissie OPTA eraan willen herinneren dat zij in haar definitieve maatregel beoordeelt en vaststelt in welke mate het tijdschema voor de implementatie van release 1 en release 2, waarvoor Ziggo en UPC nieuwe procedures moeten invoeren, adequaat en realistisch is.

Overeenkomstig artikel 7, lid 5, van de Kaderrichtlijn dient OPTA zoveel mogelijk rekening te houden met de opmerkingen van andere NRI's en de Commissie, kan zij de uiteindelijke ontwerpmaatregel goedkeuren en dient zij die in voorkomend geval aan de Commissie mee te delen.

Het standpunt van de Commissie over deze kennisgeving loopt niet vooruit op standpunten die zij zou kunnen innemen ten aanzien van andere ontwerpmaatregelen waarvan kennisgeving wordt gedaan.

Overeenkomstig punt 15 van Aanbeveling 2008/850/EG¹⁵ zal de Commissie dit document op haar website publiceren. De Commissie beschouwt de daarin vervatte

¹⁵ Aanbeveling 2008/850/EG van de Commissie van 15 oktober 2008 betreffende kennisgevingen, termijnen en raadplegingen als bedoeld in artikel 7 van Richtlijn 2002/21/EG van het Europees Parlement en de Raad van 7 maart 2002 inzake een gemeenschappelijk regelgevingskader voor elektronische-communicatienetwerken en -diensten, PB L 301 van 12.11.2008, blz. 23.

informatie niet als vertrouwelijk. Als u vindt dat dit document overeenkomstig de communautaire en nationale regels inzake de vertrouwelijkheid van bedrijfsinformatie vertrouwelijke informatie bevat die u voorafgaand aan de publicatie¹⁶ wil laten schrappen, gelieve dit dan binnen drie dagen na ontvangst van deze brief aan de Commissie¹⁷ te laten weten. U moet daarbij vermelden om welke redenen u daarom vraagt.

Hoogachtend,
Voor de Commissie,
Namens de voorzitter,
Fabio Colasanti
Directeur-generaal

¹⁶ Dit verzoek dient per e-mail te worden gericht aan: INFSO-COMP-ARTICLE7@ec.europa.eu of per faxbericht: +32 2 298 87 82.

¹⁷ De Commissie kan het publiek aan het eind van deze periode van drie dagen in kennis stellen van het resultaat van haar beoordeling.



EUROPEAN COMMISSION

Information Society Directorate-General – Communication services: Policy and regulatory Framework
Competition Directorate-General – Information, communication and multimedia

Procedures related to National Regulatory Measures

Brussels, 20 November 2009
INFSO B5
eCCTF/RK/MW/kw D (2009) 150659

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Zurichtoren - Muzenstraat 41
2511 WB Den Haag
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Dear Ms Bakker,

Subject: Case NL/2009/1007 – Draft implementation decisions of the WLR-C remedy imposed on UPC and Ziggo on the wholesale market for broadcasting transmission services and wholesale access to the broadcasting transmission platform of the individual cable operators.

Request for information pursuant to Article 5(2) of Directive 2002/21/EC¹

On 12 November 2009, your notification of the above-mentioned draft measures was registered. This letter is a request for information, pursuant to Article 5(2) of the Framework Directive and Point 13 of Commission Recommendation 2008/850/EC².

1. INFORMATION REQUIRED

The purpose of this request is to provide the Commission with information that will allow it to make its assessment of the notified draft measures in full knowledge of the facts and the economic context. The Commission therefore requests OPTA to provide as complete a response as possible to the questions posed herein.

¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (“Framework Directive”), OJ L 108, 24.4.2002, p. 33.

² Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of the Framework Directive (“Procedural Recommendation”), OJ L 301, 12.11.2008, p. 23.

Please submit to the Commission the information requested in the annex, which forms an integral part of this letter. We would appreciate it if you could provide these submissions as soon as possible, and, in any event, no later than **Wednesday, 25 November 2009**³.

Please send your reply by email to
fax⁴ to +32-2-

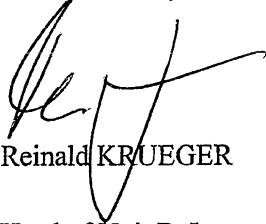
@ec.europa.eu or by

2. CONFIDENTIAL INFORMATION

Provided that you substantiate in writing that your submissions are confidential in accordance with Community and national law on business confidentiality, the Commission will ensure such confidentiality⁵.

Should you have any queries relating to the information requested, please do not hesitate to contact us.

Yours sincerely



Reinald KRUEGER

Head of Unit B-5
Information Society and Media DG



Joachim LUECKING

Head of Unit C-1
Competition DG

Enclosures:

(1) Annex with requested information

³ In accordance with Point 11 of the Procedural Recommendation, the reply to the request for information should be submitted within three working days.

⁴ This fax number is dedicated to Article 7 notifications only.

⁵ Article 5(3) of the Framework Directive.

ANNEX

Case NL/2009/1007 – Draft implementation decisions of the WLR-C remedy imposed on UPC and Ziggo on the wholesale market for broadcasting transmission services and wholesale access to the broadcasting transmission platform of the individual cable operators

- 1) In its draft decisions, OPTA refers to the obligation of the parties to come to an agreement with regard to copyright arrangements, as established in its regulatory decision on the wholesale market for broadcasting transmission services and wholesale access to the broadcasting transmission platform of the individual cable operators (case NL2009/0873). OPTA comes to the conclusion that no agreements on the responsibility of either the cable operator or the WLR-C provider with regard to copyright issues were achieved and will thus have to be sought for via other means. Consequently, OPTA stipulates that neither UPC nor Ziggo may refer to copyright responsibilities in their reference offer so as not to prejudice the final outcome.
 - *Please explain how OPTA intends to tackle the copyright responsibility issue inherent to the proper implementation of the WLR-C offer?*
- 2) With regard to the implementation of the WLR-C obligation (part B of the notified draft decisions), OPTA reserves the right to provide further binding instructions to UPC and Ziggo to ensure effective implementation within the set time limits.
 - *Could you please clarify (i) what legal form is envisaged for such binding instructions (e.g. an administrative decision), (ii) whether OPTA envisages making the binding instructions public and/or will consult stakeholders on them, and (iii) whether OPTA intends to notify these binding instructions under the Community consultation procedure?*
- 3) When describing the two-steps implementation procedure of the WLR-C obligation, OPTA sets out that WLR-C Release 1 concerns only those situations where the end-user exclusively takes analogue RTV services from UPC or Ziggo. OPTA also stipulates with regard to Release 1, that when an end-user switches from either UPC or Ziggo to a WLR-C provider, it can not choose to take additional services (e.g. broadband internet) from the cable operator which it is leaving since the latter is required to route the end-users subscription invoice to the WLR-C provider.
 - *Could you please clarify if this means that the end-user is obliged to take, besides the analogue RTV package, broadband internet or any other additional services from the WLR-C provider it switches to? Should this be the case, please set out why this is necessary as it seems that the envisaged regulatory measure also affects competition in the retail broadband and possibly also other retail markets.*
 - *If this is not the case, would this procedure require the end-user to again provide all its subscriber details to the cable operator it wishes to take, for example, a broadband internet subscription from?*
 - *With regard to the routing of the subscription invoice, can it be envisaged that the cable operator maintains the subscriber's invoicing data to provide the additional services when requested at the time of the switching procedure, whereas the*

WLR-C provider recovers only the invoicing details for the provision of the analogue RTV package to its end-user?

- 4) With regard to WLR-C Release 1, OPTA also allows for derogation to the non-discriminatory character of the order processing service level. In this regard, OPTA sets out that in the light of the temporary and rudimentary character of Release 1, Ziggo and UPC must comply with an order processing service level of 90% in 3 working days. Thereafter, the cable operators must apply a service level which allows the WLR-C providers to achieve at retail level at least the same performance as the cable operators provide to their own customers.
 - *Could you please indicate what service level that would be in terms of percentage and working days?*
- 5) In its regulatory decision on the wholesale market for broadcasting transmission services and wholesale access to the broadcasting transmission platform of the individual cable operators (case NL/2009/0873), OPTA noted that KPN is able to make an offer that is comparable with UPC/Ziggo in the operating field of UPC/Ziggo via the various (almost nationally covering) transmission platforms that KPN operates, without purchasing underlying wholesale infrastructure elements from third parties. KPN thus can largely overcome the competition advantage that UPC/Ziggo has with the capability to supply analogue RTV signals, and also make a competitive triple-play offer. OPTA considered the positions of KPN and UPC/Ziggo, compared to the other providers of RTV signals, therefore to be unique. OPTA thus considered that the provision of such access to KPN would be a step back for KPN on the investment ladder and not provide the correct investment incentives. We note in the currently notified draft decisions, however, that KPN took part in the Industry Group WLR-C (Annex 1) and is a member of the so-called "Group of Potential Buyers" (footnote 16).
 - *Could you please clarify OPTA's position with regard to the possibility for KPN to benefit from the WLR-C offers?*
- 6) The draft WLR-C reference offer implementation decisions notified by OPTA lay down on the one hand the changes that UPC and Ziggo must introduce in their proposed reference offers and on the other hand establishes the WLR-C implementation process and time-line. The regulatory framework requires regulatory measures to be proportionate with regard to the market failure identified. In its draft decisions, OPTA does not provide a proportionality assessment of the proposed WLR-C reference offer implementation decisions. Instead, it foresees to provide a proportionality assessment at the time of the forthcoming tariff decision.
 - *Could you please explain, in the frame of the current notification, why you consider the proposed directions proportionate, in particular with regard to the (i) two-phase implementation process, (ii) the use of the so-called "assurance model", (iii) the implementation time-lines and (iv) the cost and benefits of a two-phase versus a so-called "big bang" procedure?*
- 7) When OPTA notified its regulatory measure with regard to the wholesale market for broadcasting transmission services and wholesale access to the broadcasting transmission platform of the individual cable operators (case NL/2009/0873), the Commission invited OPTA to closely monitor and re-assess the developments in the

markets in terms of infrastructure and services competition. If broadcasting transmission services provided over different platforms would develop to the extent that they become viable substitutes, so that the cable platform would not constitute a market on its own, and therefore enable competitive pressure on the retail market absent regulation so that the first and/or second criteria of the three criteria test are no longer met, then OPTA should review the market and withdraw regulatory obligations even before the end of the foreseen regulatory period.

- *Could you please provide us with an update on the developments in the Dutch wholesale broadcasting transmission services market since OPTA last carried out and notified its market analysis? In particular, could you provide us with an update on (i) market shares of all broadcasting transmission infrastructure operators in the Netherlands, both in absolute and in relative terms, (ii) the penetration rate of cable, (iii) switching behaviours and numbers, and (iv) the number of households taking exclusively analogue cable RTV services?*



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Mr. R. Krüger
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BELGIË

Contact	Our reference	Your reference	Direct line
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Date	Subject	Enclosure(s)	
25 November 2009	09.0042.23 Case NL/2009/1007 – requested information		

Case NL/2009/1007 – Draft implementation decisions of the WLR-C remedy imposed on UPC and Ziggo on the wholesale market for broadcasting transmission services and wholesale access to the broadcasting platform of the individual cable operators

Dear Mr. Krüger, Mr. Lücking,

With this letter the commission of the Independent Post and Telecoms Authority (hereafter: OPTA) responds to the Commission's request for information based on Article 5(2) of Directive 2002/21/EC dated 20 November 2009.

OPTA kindly requests the Commission to take account of the information marked **[CONFIDENTIAL]** and to conceal this information, if the Commission intends to publish OPTA's response.

Question 1)

In its draft decisions, OPTA refers to the obligation of the parties to come to an agreement with regard to copyright arrangements, as established in its regulatory decision on the wholesale market for broadcasting transmission services and wholesale access to the broadcasting platform of the individual cable operators (case NL/2009/0873). OPTA comes to the conclusion that no agreements on the responsibility of either the cable company or the WLR-C provider with regard to copyright issues were achieved and will thus have to be sought for via other means. Consequently, OPTA stipulates that neither UPC nor Ziggo may refer to copyright responsibilities in their reference offer so as not to prejudice the final outcome.

- *Please explain how OPTA intends to tackle the copyright responsibility issue inherent to the proper implementation of the WLR-C offer?*

Answer:

In its regulatory decisions on the wholesale market for broadcasting transmission services and wholesale access to the broadcasting platform of the individual cable operators (case NL/2009/0873) (hereafter: the market analysis decisions), OPTA has indicated that it is not in the position to rule whether or not the imposed remedy WLR-C legally qualifies as a new 'presentation' within the meaning of copyright law. As a result, OPTA could only state that copyrights should not be violated in the process of implementing WLR-C, and that (commercial) parties involved should make arrangements to secure that this is not the case. The same line of reasoning has been upheld in the draft implementation decision.

The competence of OPTA with regard to content is limited by the boundaries set in the regulatory framework. As a result, OPTA cannot impose remedies that solely seek to regulate content. Nevertheless, content issues undoubtedly have their impact on the effectuation of remedies imposed for 'network purposes', as the case of WLR-C shows.

Due to this lacuna in the regulatory framework, OPTA is dependent on the behaviour and willingness to cooperate of all the parties involved (cable operators UPC and Ziggo, content rights holders and WLR-C providers) in the process of implementation of WLR-C. Parties can put the legal question whether or not WLR-C requires separate copyright arrangements made by WLR-C providers before a civil court. If these separate arrangements turn out to be necessary, WLR-C providers could negotiate with content rights holders to come to an agreeable solution to ensure that their WLR-C service does not violate copyrights. Another possibility would be for cable operators Ziggo and UPC to negotiate the possibility of sublicensing acquired content rights to WLR-C providers. However, it is also possible that WLR-C does not qualify as a separate 'presentation' and hence does not require separate negotiations for copyrights with rights holders, in which case the arrangements that already exist between UPC and Ziggo and the content rights holders are sufficient.

Question 2)

With regard to the implementation of the WLR-C obligation (part B of the notified draft decisions), OPTA reserves the right to provide further binding instructions to UPC and Ziggo to ensure effective implementation within the set time limits.

Could you please clarify (i) what legal form is envisaged for such binding instructions (e.g. an administrative decision), (ii) whether OPTA envisages making the binding instructions public and/or will consult stakeholders on them, and (iii) whether OPTA intends to notify these binding instructions under the Community consultation procedure?

Answer:

With the possibility to provide further binding instructions during the process of actual implementation, OPTA aims to make sure that it can react to eventualities that pop up during that phase. Such eventualities cannot always be foreseen in the present phase of the process of implementing the WLR-C remedy, by OPTA, UPC, Ziggo nor the WLR-C providers. The nature of the instructions will be that they provide further detail and guidance to the instructions already given in the market analysis decisions and in the currently notified implementation decisions. As such, the possible further binding

instructions can best be characterized as being detailed and operational.

The possibility to provide further binding instructions during the process of actual implementation of a wholesale remedy was already introduced by OPTA in the process of implementing Wholesale line rental for KPN (Case NL/2006/0409).

Since the further binding instructions would define further detail and guidance to a remedy imposed based on article 6a.2 of the Dutch Telecommunications Act (hereafter: TA), an instruction would qualify as a implementation decision based on that same article. However, taking into account the nature of the instructions, OPTA expects not every instruction to have significant impact on the market at hand. This has the consequence that OPTA would not have to prepare all such instructions following the 'openbare voorbereidingsprocedure' as defined in the Dutch 'Algemene wet bestuursrecht'. In those cases, OPTA would not be obliged to make the instructions subject to national consultation. However, whenever possible and relevant, OPTA will consult relevant stakeholders (UPC/Ziggo, WLR-C providers) also on such instructions. With regard to the Community consultation procedure, OPTA expects that the further binding instructions would, generally speaking, not affect trade between Member States. All instructions will be made public via OPTA's website. For stakeholders it is possible to file appeal against these administrative decisions at the Dutch 'College van Beroep voor het bedrijfsleven'.

Question 3)

When describing the two-steps implementation procedure of the WLR-obligation, OPTA sets out that WLR-C Release 1 concerns only those situations where the end-user exclusively takes analogue RTV services from UPC or Ziggo. OPTA also stipulates with regard to Release 1, that when an end-user switches from either UPC or Ziggo to a WLR-C provider, it can not choose to take additional services (e.g. broadband internet) from the cable operator which it is leaving since the latter is required to route the end-users subscription invoice to the WLR-C provider.

- *Could you please clarify if this means that the end-user is obliged to take, besides the analogue RTV package, broadband internet or any other additional services from the WLR-C provider it switches to? Should this be the case, please set out why this is necessary as it seems that the envisaged regulatory measure also affects competition in the retail broadband and possibly also other retail markets.*
- *If this is not the case, would this procedure require the end-user to again provide all its subscriber details to the cable operator it wishes to take, for example, a broadband internet subscription from?*
- *With regard to the routing of the subscription invoice, can it be envisaged that the cable operator maintains the subscriber's invoicing data to provide the additional services when requested at the time of the switching procedure, whereas the WLR-C provider recovers only the invoicing details for the provision of the analogue RTV package to its end-user?*

Answer:

Release 1 concerns the provisional and rudimentary implementation of WLR-C, aimed at introducing a stepwise implementation that focuses at making WLR-C operational as soon as possible. By introducing Release 1 OPTA has struck the balance between, on the one hand, the desirability to have

WLR-C operational as soon as possible, and, on the other hand, the advantages of having WLR-C fully implemented, in favor of the first. By doing so, OPTA answers to the requests of WLR-C providers and also to the Commissions explicit invitation to OPTA to implement this resale obligation as well as the detailed terms and conditions thereof in the shortest possible delay so as to swiftly generate a market structure that is more prone to competitive dynamics (EC comment in case NL/2009/0873). According to the notified draft implementation decisions the effective duration of Release 1 is limited to a period of 20 weeks; following that period Release 2 (i.e. WLR-C in its fully-implemented state) will have to be operational.

The rudimentary character of Release 1 implies that during the period in which Release 1 is operational the WLR-C offer will not cover all possibilities that the service will need to cover in Release 2. One important element in this is that Release 1 comprises the re-addressing of the retail bill, resulting in the situation that no longer the end-user receives this bill, but in stead the WLR-C provider. Since WLR-C is limited to analogue RTV, this effectively restrains the scope of Release 1 to those end-users that are subscribed only to the analogue RTV service of UPC/Ziggo. This simple re-addressing of the retail bill is one of the elements within Release 1 that make it possible to have WLR-C operational as soon as possible, since it requires a minimum of adaptations within the operational environment (in terms of processes and systems) within UPC/Ziggo.

Release 1 does not mean that an end-user is obliged to take (besides analogue RTV) broadband internet or any other additional services from the WLR-C provider it switches to. However, Release 1 does exclude the possibility that an end-user is subscribed to additional services of UPC/Ziggo; otherwise, it would not be possible to re-address the retail bill.¹ End-users can still choose to subscribe to the additional services provided by other providers not being the WLR-C provider. As such, Release 1 is first and foremost targeted at the still significant customer-base that is now only subscribed to UPC/Ziggo's analogue RTV service. Potential WLR-C providers have informed OPTA that in their marketing plans it is this specific customer-base that is likely to be targeted first, making this customer-base not only the least complicated to make WLR-C operationally available to first, but also the most effective choice to increase dynamics in the market as soon as possible.

An argument could be that Release 1 – by excluding the possibility that an end-user combines a subscription to the analogue RTV offer of a WLR-C provider with a subscription to an additional service from UPC/Ziggo – in some way affects the retail broadband or telephony markets. However, it should be noted that in this Release 1 does not really alter the present situation in which UPC/Ziggo offer their additional services only in combination with their analogue RTV package.

After implementation of Release 2 it will be possible for an end-user that is subscribed to the RTV offer of a WLR-C provider to choose to subscribe to e.g. the telephony offer from UPC/Ziggo (if UPC/Ziggo choose to offer that service 'stand alone' for WLR-C end-users instead of only tied to their analogue rtv

¹ If UPC/Ziggo would choose to implement Release 1 in such a way that re-addressing the retail bill would be possible even if end-users would still be subscribed to additional services provided by UPC/Ziggo, this would be compatible with the currently notified decisions. In fact, OPTA would welcome any initiative on the part of UPC/Ziggo to implement a more full wholesale service faster than Release 2, but has come to the rudimentary Release 1 as a bare minimum for UPC/Ziggo to comply with in a short time span.

package as they do up to now). Since the end-user would then be a new customer of UPC/Ziggo retail, it is expected that the end-user will need to inform UPC/Ziggo (retail) of all of his subscriber details, as the wholesale non-discrimination obligation means, among other non-discriminatory treatments, specifically that UPC/Ziggo (wholesale) may not use a wholesale client's information on active customers for their own retail purposes (such as win-back campaigns).

Question 4)

With regard to WLR-C Release 1, OPTA also allows for derogation to the non-discriminatory character of the order processing service level. In this regard, OPTA sets out that in the light of the temporary and rudimentary character of Release 1, Ziggo and UPC must comply with an order processing service level of 90% in 3 working days. Thereafter, the cable operators must apply a service level which allows the WLR-C provider to achieve at retail level at least the same performance as the cable operators provide their own customers.

- *Could you please indicate what service level that would mean in terms of percentage and working days?*

Answer:

With regard to the service levels relevant in Release 1 the draft decisions state that UPC and Ziggo have to realise service levels that are at least those as defined in their reference offers. However, taking into account the temporary nature and rudimentary character of Release 1, OPTA has also ruled that with regard to the order process initially (i.e. during the first three months in which Release 1 is operational) a service level of 90% in 3 working days suffices. Following this initial period the non-discriminatory character of the order processing service level applies, implying that the cable operators must adhere to a service level which allows the WLR-C provider to achieve at retail level at least the same performance as the cable operators provide their own customers.

This non-discriminatory character of the service level is in itself one of the directions that OPTA has given in part A of the draft decisions (section A.21.4 for UPC; section A.19.4 for Ziggo). Following the publication of the final decisions (and subject to possible changes to this direction following national consultation and notification) UPC and Ziggo will have to adapt their reference offers in order to fulfill the required non-discriminatory character of the service level. At that time it will become transparent in which service level – in terms of percentage and working days – OPTA's direction results. OPTA expects this service level to be significantly higher than 90% in 3 working days.

Question 5)

In its regulatory decision on the wholesale market for broadcasting transmission services and wholesale access to the broadcasting transmission platform of the individual cable operators (case NL/2009/0873), OPTA noted that KPN is able to make an offer that is comparable with UPC/Ziggo in the operating field of UPC/Ziggo via the various (almost nationally covering) transmission platforms that KPN operates, without purchasing underlying wholesale infrastructure elements from third parties. KPN thus can largely overcome the competition advantage that UPC/Ziggo has with the capability to supply analogue RTV signals, and also make a competitive triple-play offer. OPTA considered the positions of KPN and UPC/Ziggo, compared to the other providers of RTV-signals, therefore to be unique. OPTA

thus considered that the provision of such access to KPN would be a step back for KPN on the investment ladder and not provide the correct investment incentives. We note in the currently notified draft decisions, however, that KPN took part in the Industry Group WLR-C (Annex 1) and is a member of the so-called "Group of Potential Buyers" (footnote 16).

- *Could you please clarify OPTA's position with regard to the possibility for KPN to benefit from the WLR-C offers?*

Answer:

OPTA's position with regard to the possibility for KPN to benefit from the WLR-C offers has not changed since the publication of the market analysis decisions of 5 March 2009. In those decisions this position has been given effect in the elements that OPTA will take into account in determining whether UPC or Ziggo refusal of access is based on objective arguments.² With regard to the possibility for KPN to benefit from the WLR-C offers this means that OPTA will have to come to a final decision in a dispute between KPN and UPC and/or Ziggo. In the settlement of such a dispute, OPTA will have to take into account all relevant information and arguments brought forward by both parties in the dispute. This implies that an outcome in which KPN has to be granted access cannot be ruled out beforehand, even though OPTA considers such an outcome unlikely.

In considering KPN's request to join the Industry Group WLR-C, OPTA has concluded that denying KPN to join the IG WLR-C would anticipate an outcome of a dispute settlement in which KPN would be denied access, where it cannot be ruled out beforehand that the outcome is otherwise. This has led OPTA to the decision to accept KPN as a member of the IG. In communicating this decision to KPN, KPN has been made clear that this decision does in no way preempt the outcome of a possible future dispute between KPN and UPC and/or Ziggo.³

Question 6)

The draft WLR-C reference offer implementation decisions notified by OPTA lay down on the one hand the changes that UPC and Ziggo must introduce in their proposed reference offers and on the other hand establishes the WLR-C implementation process and time-line. The regulatory framework requires regulatory measures to be proportionate with regard to the market failure identified. In its draft decisions, OPTA does not provide a proportionality assessment of the proposed WLR-C reference offer implementation decisions. Instead, it foresees to provide a proportionality assessment at the time of the forthcoming tariff decision.

- *Could you please explain, in the frame of the current notification, why you consider the proposed directions proportionate, in particular with regard to the (i) two-phase implementation process, (ii) the use of the so-called "assurance model", (iii) the implementation time-lines and (iv) the cost and*

² Section 838 of the Market analysis decision UPC (OPTA/AM/2009/200374, 5 March 2009); Section 837 of the Market analysis decision Ziggo (OPTA/AM/2009/200373, 5 March 2009).

³ The "Group of potential buyers" was an initiative of a subset of the participants in the IG WLR-C. The fact that KPN decided to contribute to this initiative has no relation to OPTA's position with regard to the possibility for KPN to benefit from the WLR-C offers.

benefits of a two-phase versus a so-called "big bang" procedure?

Answer:

By introducing the two-step implementation including the implementation of WLR-C in a provisional and rudimentary state (Release 1), OPTA has struck the balance between, on the one hand, the desirability to have WLR-C operational as soon as possible, and, on the other hand, the advantages of having WLR-C fully implemented, in favor of the first. By doing so, OPTA answers to the requests of WLR-C providers and also to the Commissions explicit invitation to OPTA to implement this resale obligation as well as the detailed terms and conditions thereof in the shortest possible delay so as to swiftly generate a market structure that is more prone to competitive dynamics (EC comment in case NL/2009/0873). Release 1 will ensure that WLR-C can be effective in addressing the assessed competition problems as soon as possible, even taking into account that Release 1 does not cover all possibilities that the service will need to cover in its final state. In designing Release 1 it has been ensured that the two-step implementation does not go at too high a cost. Two important requirements in this respect have been that Release 1 needs to be as simple as possible and that it should lead to a minimal (extra) cost, and that Release 1 should as much as possible be 're-usable' as building block for Release 2. Combining the desirability of a timely implementation and the specific design of Release 1, OPTA considers the two-step implementation process to be proportionate.

With regard to the time-lines set in the notified draft decision and the costs and benefits of a two-step implementation versus a 'big-bang' implementation, the proportionality assessment is comparable to that of the two-step implementation itself. That the measure is proportional is in all three respects the outcome of balancing the desirability to have WLR-C operational as soon as possible and the advantages of having WLR-C fully implemented. Important to note is that time-lines are set explicitly taking into account the implementation effort required: the 6 (+ 2) week time line in case of Release 1 is matched to the rudimentary character of Release 1, and the additional 20 week time line in case of Release 2 is matched amongst others to the fact that Release 2 builds further on Release 1. Relevant in terms of the costs and benefits of 'two-step' versus 'big-bang' are the design rules underlying Release 1, amongst others requiring Release 1 to lead to as few (extra) costs as possible and to be as much as possible 're-usable' as building block for Release 2.

The so-called "assurance model" implies that in implementing WLR-C UPC/Ziggo will have to accept the approach in which a WLR-C order is to be accepted based on that wholesale order, and thus without requiring further notice from the end-user or from another WLR-C provider; the wholesale order itself should be accepted by UPC/Ziggo as sufficient proof of the fact that the order is 'real'. In the notified decisions it is explained that the end-user interest is already served, for instance because the WLR-C provider that orders the migration of an end-user is legally bound to be able to show the explicit consent of the end-user. In this perspective, UPC/Ziggo are not to position themselves as 'guardians' of end-user interests, requiring notice from the end-user or from another WLR-C provider should therefore be qualified as an unnecessary complexity in the ordering process, frustrating the effectiveness of the remedy. Also, the assurance model is common practice in the migration process for other services, like broadband internet, health care insurance and energy provisioning. Thus, balancing the end-user interest and the effectiveness of the remedy, OPTA considers the assurance model proportionate.

Furthermore, OPTA presented a cost-benefit analysis of the full set of remedies and expected static and dynamic market effects in chapter 14 of the individual market analysis decisions in March 2009 (Case NL/2009/0873).

Question 7)

When OPTA notified its regulatory measure with regard to the wholesale market for broadcasting transmission services and wholesale access to the broadcasting transmission platform of the individual cable operators (case NL/2009/0873), the Commission invited OPTA to closely monitor and re-assess the developments in the markets in terms of infrastructure and services competition. If broadcasting transmission services provided over different platforms would develop to the extent that they become viable substitutes, so that the cable platform would not constitute a market on its own, and therefore enable competitive pressure on the retail market absent regulation so that the first and/or second criteria of the three criteria test are no longer met, then OPTA should review the market and withdraw regulatory obligations even before the end of the foreseen regulatory period.

Could you please provide us with an update on the developments in the Dutch wholesale broadcasting transmission services market since OPTA last carried out and notified its market analysis? In particular, could you provide us with an update on (i) market shares of all broadcasting transmission infrastructure operators in the Netherlands, both in absolute and relative terms, (ii) the penetration rate of cable, (iii) switching behaviours and numbers, and (iv) the number of households taking exclusively analogue cable RTV services?

Answer:

In response to this question, OPTA presents the requested most recent monitoring results for RTV subscriptions below. OPTA monitors operators' data for all regulated markets periodically to be able to follow trends and changes. With regard to broadcasting services, OPTA monitors the number of retail RTV-subscriptions, turnover, churn and homes passed. As explained in the market analysis decisions, the two-sided market nature of broadcasting platforms lead OPTA to use retail market power and position as best indicator for the importance and position of wholesale broadcasting markets. Although the Commission asks for data regarding the wholesale broadcasting market, the aspects mentioned in your question and portrayed below are monitored on the retail level. However, these recent retail monitoring results are not analyzed and compared with other consumer, technology and prospective scenario research to the full extent as is done for the tri-annual market analysis procedures. For instance, the results below concern the national level and have not been analyzed in the separate cable regions based on postal code information as was done a year ago. OPTA is continuously improving its monitoring and analysis methods to capture the developments on the regulated markets even better periodically.

In short, OPTA concludes that developments and trends in retail RTV distribution are in line with developments which were analyzed in the market analysis decisions and prospective analyses OPTA had done in 2008 and continue to reinforce OPTA's decisions and remedies dated March 2009 regarding the wholesale broadcasting transmission markets.

Regarding an update of market shares of all broadcasting transmission infrastructure operators in the

Netherlands, both in absolute and relative terms, please see the next detailed four figures. These figures are all confidential, as they portray developments, absolute numbers and market shares of individual operators who do not all publish these figures themselves. OPTA is legally prohibited to publish these figures if confidential operator data can be deducted.

[CONFIDENTIAL Figure 1: Number of subscriptions per infrastructure, on a national level (source: OPTA's monitoring).^{4 5}]

Figure 1 shows the total number of retail RTV-subscriptions and the number of subscriptions for cable, DVB-T, satellite, IPTV over DSL and analogue FttH infrastructures on a national level (all monitored operators accumulated). The total number of RTV-subscriptions (7.6mln) is more than the number of households (7.3mln) and continues to grow. Out of cable, 3.3 mln are 'analogue only' subscriptions while 2.2mln cable subscribers (also) receive a digital package. The cable operators [CONFIDENTIAL] together lose less subscribers than alternative platforms gain. Growth of DVB-T, while still significant, has slowed down in 2009. IPTV as a platform is still quite small, but starting to grow more, possibly due to combination proposition with DVB-T by KPN. (Analogue) FttH RTV subscriptions are also still limited in absolute numbers and depend on roll-out of FttH networks for growth. [CONFIDENTIAL]. It is apparent from published data by KPN and data gained in monitoring that KPN's IPTV and DVB-T products are being used complementary to each other more and more, in accordance with their proposition and our predictions. OPTA is adjusting its questionnaire and reports to correct this development, but what can be said in advance is that KPN's current number of subscribers and market share in our monitoring results presented here are slightly overestimated. Instead of having the [CONFIDENTIAL] subscribers that DVB-T and IPTV added up to mid 2009, KPN's own data shows they had 886.000 TV-subscribers.⁶

[CONFIDENTIAL Figure 2: Number of subscriptions per operator, on a national level (source: OPTA's monitoring).⁷]

Figure 2 shows the development of absolute numbers of retail RTV subscriptions per individually monitored operator, per platform, on a national level.

[CONFIDENTIAL Figure 3: Market share per technical infrastructure, on a national level (source: OPTA's monitoring).^{8 9}]

Figure 3 shows retail market shares on a national level. This shows the market shares belonging to trends already mentioned under Figure 1.

Also, Figure 3 shows that out of all separate subscriptions, the share of 'analogue only' subscriptions

⁴ Please note these figures are excluding approximately 230.000 additional cable subscriptions with small cable operators.

⁵ Please note that data for IPTV, satellite and analogue FttH are confidential.

⁶ <http://www.kpn.com/corporate/nl-1/Investor-Relations-1/3e-kwartaalcijfers-2009-1.htm>

⁷ Please note these figures are excluding approximately 230.000 additional cable subscriptions with small cable operators.

⁸ Please note these figures are excluding approximately 230.000 additional cable subscriptions with small cable operators.

⁹ Please note that data for IPTV, satellite and analogue FttH are confidential.

has dropped to 45,1% cable and [CONFIDENTIAL]% FttH. The drop in analogue only cable is due largely to Ziggo, the largest cable operator, who is successfully migrating customers from analogue only to its analogue plus digital cable proposition, for the same monthly subscription price. [CONFIDENTIAL].

Data from operators on subscriptions does not at this time show how many television sets per household use a subscription and how many television sets a consumer has and therefore this data lacks the necessary information to portray how much analogue cable is used in addition to digital cable by consumers with a digital cable subscription. OPTA gained this information from extensive consumer research and other research done for the market analysis decisions in 2008. It seems unlikely, however, that Ziggo's fast growth in digital, with an affordable deal for one set top box, is matched by the necessary investment by its customers in set top boxes for secondary and tertiary television sets.

[CONFIDENTIAL Figure 4: Market share per operator, on a national level (source: OPTA's monitoring).
10 5]

As analyzed in 2008 and expected in 2009, (some) cable companies are losing market share on both a national level and the geographic relevant wholesale market OPTA defined; a cable operator's own network is the relevant geographic market (their penetration rate equals their market share on that market, see below). These figures and developments are within the range given by OPTA in the prospective analyses in the market analysis decisions notified to the Commission early 2009. [CONFIDENTIAL].

The figure below represent the results of OPTA's monitoring with regard to the penetration rates of the largest five cable operators over the last two years. OPTA uses these penetrations rates as indicator for their regional market shares, as OPTA defined the relevant geographic markets to be the locations reached by the four largest cable operators' networks.

[CONFIDENTIAL Figure 5: Penetration rates of cable operators (indicator for their regional market share) (source: OPTA's monitoring).]

In line with developments in 2007 and 2008, UPC has the lowest penetration rate out of all the cable companies and is losing market share faster than other cable companies. It still well above the [60-70%] OPTA expected at the end of the regulatory period, without regulation, as stated in the market analysis decision, while Ziggo's market share is still above [CONFIDENTIAL]% and Delta, CAIW and Cogas all [CONFIDENTIAL].

With regards to switching behaviour and numbers, OPTA does not have recently updated consumer research on switching intentions. OPTA can briefly conclude from the positive and negative churn data from operators in OPTA's monitoring, that the *ratio* of new connections versus lost connections is relatively stable for most platforms, as would be expected when trends continue. There are several other types of analysis possible on churn data, OPTA does not all have ready at this time. An indicator for total dynamics on the retail level could be for instance that in the first half of 2009, in a market with

¹⁰ Please note these figures are excluding approximately 230.000 additional cable subscriptions with small cable operators.

7.3 mln (monitored) connections, 397.000 subscriptions were ended, giving an indication that 5,4% of the market switched platform. However, as the data operators give OPTA is not all free of customers moving house but staying with the same operator, sometimes also counted as new connections by operators, this is likely an overestimation of market dynamics.

(iv) Based on subscription data OPTA receives from operators, the number of cable subscriptions for only analogue cable RTV services was 3.3 mln mid 2009, down from 4.0 mln mid 2008, or 45,1% of all (monitored) subscriptions ([CONFIDENTIAL]% including analogue FttH), down from 55,2% mid 2008. The percentage has dropped relatively more, besides Ziggo's success in getting customers to digital cable mentioned before, due to slight growth of the total number of subscriptions. The trend recognized in the market analysis decision that the number of subscriptions to non-cable platforms is growing significantly faster than the number of cable subscriptions is declining, still continues. Also, as OPTA does not monitor the 42 very small cable operators, the number 3.3mln is excluding approximately 160.000 additional households with only analogue cable (approximately 70% of 230.000 subscriptions with small cable operators in total).

However, an update on the current number of households using *exclusively* analogue cable RTV services, on all television sets in the household and without possible complementary use of (other) digital broadcasting transmission infrastructures by the same household, is not fully possible based on only the data OPTA requests periodically from operators. A detailed update would require a second field research query of the extensive consumer research OPTA had done by Veldkamp in November 2008, to gain insight into how households use and combine their RTV-subscriptions for their (multiple) television sets inside their households as well as any television set(s) outside their households.¹¹ OPTA does not have an update of this research at this time. However, it is not likely that the consumer preferences and perceptions on digitalization, use of different infrastructures and maintaining their analogue cable subscription for their second and third televisions and for the analogue radio, teletext and video recorder functions will have changed dramatically in the course of one year. OPTA estimates that complementary use of analogue and digital cable remains quite high.

Also, research done by Stratix for OPTA in July 2008 provided OPTA with insights into various other factors contributing to the importance of analogue cable transmission, such as sales figures for televisions with built-in digital decoders. The research included a prospective analysis focused on developments in the next 3-5 years. Both Stratix and Veldkamp did extensive research for OPTA specifically for the in-depth market analysis decisions. This research is not updated annually.

Concluding

With this letter we trust to have sufficiently answered the Commission's request for information. If the Commission has any other questions, or if these answers lead to further questions, please let us know.

¹¹ Veldkamp (november 2008), *Inzicht in de vraagzijde van de televisiemarkt. Productafname, keuze voor infrastructuur en overstapgeneigdheid.* (Available in Dutch on www.opta.nl).

Yours sincerely,

The commission of the Netherlands Independent Post and Telecommunications Authority (OPTA)

On behalf of the commission,

signed

drs. J.G.J. Keetelaar