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Onafhankelijke Post en  
Telecommunicatie Autoriteit  
(OPTA)

Zurichtoren - Muzenstraat 41  
2511 WB Den Haag  
Netherlands

For the attention of:  
Mr. Chris A. Fonteijn  
Chairman

Fax: +31 70 315 92 04

Dear Mr Fonteijn,

**Subject: Commission decision concerning Case NL/2011/1267: Retail Market for TV Services**

**Article 7(3) of Directive 2002/21/EC:<sup>1</sup> No comments**

## **I. PROCEDURE**

On 10 November 2011, the Commission registered a short notification from the Dutch national regulatory authority, the Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA). The notified measure concerns OPTA's assessment<sup>2</sup> of the retail market for TV services<sup>3</sup> in the Netherlands.

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<sup>1</sup> 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, OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC (Better Regulation Directive), OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12 (Framework Directive).

<sup>2</sup> OPTA considers that its review can not be considered a regulatory decision in the sense of Article 1:3 of the General Administrative Law Act as the assessment does not have a legal effect; it does not alter the existing situation of law.

<sup>3</sup> Market not listed in the Commission Recommendation 2007/879/EC 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 (the Recommendation), OJ L 344, 28.12.2007, p. 65.

The national consultation<sup>4</sup> ran from 23 June 2011 to 18 August 2011. The deadline for the EU consultation under Article 7 of the Framework Directive is 12 December 2011.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), BEREC and the Commission may make comments on notified draft measures to the NRA concerned.

## **II. DESCRIPTION OF THE DRAFT MEASURES**

### **II.1. Background**

OPTA carried out its second round analysis of the retail and wholesale broadcasting markets in 2009.<sup>5</sup> OPTA found the market for wholesale broadcasting transmission services and access to the transmission platform of the individual cable operators to be relevant for *ex ante* regulation. The geographic scope of the markets was limited to the individual coverage areas of these cable operators. The four largest cable operators (Ziggo, UPC, Delta and CAIW) were found to have significant market power (SMP) and were made subject to non-discrimination, transparency and access obligations including the provision of wholesale analogue and digital transmission at cost-oriented prices. Ziggo and UPC, the two largest cable operators, were also subject to the obligation to provide analogue RTV-signals including access to the cable broadcasting transmission platform for the purpose of resale (WLR-C) at a retail-minus tariff with a price cap.<sup>6</sup>

On 18 August 2010, the Dutch court<sup>7</sup> annulled OPTA's broadcasting regulation on grounds of insufficient substantiation of the geographic delineation of the markets (i.e. cable coverage areas). There is currently no regulation imposed in the wholesale broadcasting markets.

### **II.2. The draft measure notified by way of a short form**

#### *II.2.1 The retail market definition*

OPTA includes in the product market analogue and digital TV services<sup>8</sup> provided over cable, DSL, fibre, satellite and digital terrestrial (DVB-T) networks.<sup>9</sup> TV services provided over mobile networks as well as internet TV/ over-the-top services (OTT services)<sup>10</sup> are excluded from the relevant market<sup>11</sup>.

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<sup>4</sup> In accordance with Article 6 of the Framework Directive.

<sup>5</sup> Case NL/2009/0873. SG-Greffe (2009) D/723.

<sup>6</sup> OPTA further consulted the Commission on two decisions concerning the implementation/pricing of the WLR-C obligation (cases NL/2009/1007 and NL/2009/1015).

<sup>7</sup> The Trade and Industry Appeals Tribunal.

<sup>8</sup> I.e. TV services provided in standard packages, both stand alone or in combination with theme packages, TV services on demand and TV services offered in bundles with other electronic communications services.

<sup>9</sup> Substitutability between services provided over these different infrastructures is demonstrated, in OPTA's view, by the functional characteristics of the services and their intended use in the next three years, the absence of significant price differences and customer churn between the TV infrastructures.

<sup>10</sup> Television via internet enables the customers to watch TV services, via an internet connection, directly on their TV sets.

<sup>11</sup> Mobile TV services are excluded due to the lack of demand side substitution stemming from the

OPTA refrains from defining the exact geographic scope of the relevant market. It sustains, in this regard, that the conclusions of the three criteria test apply irrespective of whether national or regional markets (i.e. corresponding to the footprints of the cable operators<sup>12</sup>) were defined.

### II.2.2. *The three criteria test*

Since the identified retail market is not included in the Recommendation, OPTA carries out the three criteria test in order to assess whether the market warrants *ex ante* regulation and concludes that this is not the case.

OPTA starts by analysing the *first criterion* and assesses whether the market is characterised by high entry barriers of a non-transitory nature. OPTA sustains, in this regard, that significant investments, spanned over time, are required to enable operators to enter the market. OPTA finds, however, that entry barriers have significantly decreased since its latest review of the wholesale broadcasting markets and that the development of OTT television, a potential substitute for TV broadcasting services, could further lower the entry barriers. Since OPTA could not reach a conclusion as to whether the entry barriers are of a non-transitory nature and therefore that the first criterion is no longer met, OPTA carries out the assessment of the *second criterion*.

OPTA recognises that competition is developing faster than it had expected in its 2009 analysis and that, absent *ex ante* regulation, the retail TV market will develop towards effective competition. OPTA bases its assessment on the following main developments/reasons:

- (i) *decline of the importance of analogue TV due to a quicker transition from analogue to digital TV services* - the advantages of cable operators linked to the provision of analogue television have been significantly reduced, with digitalisation developing faster than expected<sup>13</sup>;
- (ii) *increased competition stemming from investments in copper and fibre networks* – there are five infrastructures included in the relevant market over which TV services are provided (cable, copper, fibre, digital ether and satellite). KPN and other competitors are investing in copper and fibre, which allows for the provision of IPTV<sup>14</sup>;

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different intended use, absence of customer churn, and differences in scope and pricing of the offers. OTT services are as yet excluded from the relevant market on the basis of the different product characteristics, the lack of consumer churn (complement rather than substitute), the absence of market offers and the uncertainty regarding product developments.

<sup>12</sup> OPTA's assessment is limited to the question whether UPC and Ziggo, the two largest cable operators and TV providers in the Netherlands by far, require *ex ante* regulation.

<sup>13</sup> Whereas the percentage of households purchasing only an analogue TV service has decreased from 55% (mid-2008) to 33% (end 2010), the percentage of households purchasing digital TV services has increased from 45% (mid-2008) to 67% (end 2010) and is expected to further increase to 88%-96% by end-2014. Digitalisation is expected to continue to grow with further penetration of HD TV-sets and TV-sets with build-in decoders. An increasing number of consumers are also subscribing to digital TV-services for two or three TV-sets.

<sup>14</sup> In light of the investments in copper and fibre, IPTV is showing stronger growth than previously expected. KPN and alternative operators investing in fibre or making use of KPN's and Reggefibre's wholesale offers (e.g. Tele2) are able to offer TV services that are comparable to those of Ziggo and UPC. According to estimates by AT Kearney & Telecompaper, fibre coverage will increase, in terms of coverage of Dutch households, from 9% in end-2010 to 16%-24% in end-2014. KPN's investments

(iii) *the expansion of TV products offered by the competitors* – KPN, Tele2 and GlashartMedia have expanded their TV offers (which now incorporate the most important TV channels), are providing additional services (e.g. theme channels, video on demand), and sell TV services in bundles; and

(iv) *the potential competitive pressure exerted by the development of OTT television.*<sup>15</sup>

OPTA points to the fact that these developments have resulted in a reduction of the market shares of the cable operators.<sup>16</sup> OPTA also considers that digitalisation could be slowed down if analogue resale obligations were imposed and that regulated access to cable networks could reduce the incentive for other parties to invest in copper and fibre networks.

OPTA therefore concludes that the second criterion is not fulfilled and therefore does not assess the third criterion.

OPTA recognises, however, that UPC and Ziggo still constitute strong players in their own market areas and thus have a good starting position to offer bundles. OPTA therefore commits to closely follow the developments of the TV market, in particular the potential development of a separate market for bundles. If deemed appropriate, OPTA will re-analyse the need to re-introduce *ex ante* regulation.

in the copper network are likely to lead to the availability of HD TV via DSL-IPTV on at least one TV set in around 80% to 85% of the Netherlands (according to respectively KPN and AT Kearney & Telecompaper data).

<sup>15</sup> According to a study by AT Kearney & Telecompaper, OTT is expected to reach a market share of 0-15% by the end of 2014. According to the study, the development of OTT is regarded as one of the 3 developments with the highest impact on the TV market in terms of market shares/barriers to entry. OPTA notes that Google TV, new Dutch players such as YourTV and Iphion but also established television providers (Ziggo and Tele2) as well as content providers indicated their intention to develop OTT.

<sup>16</sup>

	National retail market shares		Regional retail market shares	
	Q2 2008	Mid-2011	Q2 2008	Q4 2010
UPC	[...]%	[...]%	[...]%	[...]%
Ziggo	[...]%	[...]%	[...]%	[...]%
KPN	[...]%	[...]%	UPC area [...]%	UPC area [...]%
			Ziggo area [...]%	Ziggo area [...]%

### III. NO COMMENTS

The Commission has examined the notification and has no comments.<sup>17</sup>

Pursuant to Article 7(7) of the Framework Directive, OPTA may adopt the draft measure and, where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC<sup>18</sup> the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission<sup>19</sup> within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication<sup>20</sup>. You should give reasons for any such request.

Yours sincerely,  
For the Commission,  
Robert Madelin  
Director-General

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<sup>17</sup> In accordance with Article 7(3) of the Framework Directive.

<sup>18</sup> Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of 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 301, 12.11.2008, p. 23.

<sup>19</sup> Your request should be sent either by email: [INFSO-COMP-ARTICLE7@ec.europa.eu](mailto:INFSO-COMP-ARTICLE7@ec.europa.eu) or by fax: +32 2 298 87 82.

<sup>20</sup> The Commission may inform the public of the result of its assessment before the end of this three-day period.