[NL] Limitation of the Competence of the Telecommunications Regulator Concerning Access of Broadcasters to Cable Networks

IRIS 2003-4:1/22

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On 26 February 2003, the district court of Rotterdam (the specialised court for telecommunications) issued a judgment that limits the judicial competence of the Onafhankelijke Post en Telecommunicatie Autoriteit (Independent Post and Telecommunications Authority - OPTA), the Dutch telecommunications regulator, concerning the access of broadcasters to cable networks.

Article 8.7 Telecommunicatiewet 1998 (1998 Telecommunications Act - Tw) states that in the case where a broadcasting organisation and a cable network provider fail to reach an agreement on the access of the broadcaster's programmes to the cable network, OPTA can, at the broadcaster's request, give a binding judgment concerning the conditions of access.

In 1998, the broadcasting organisation Canal+ asked OPTA to give a binding judgment in relation to Article 8.7 Tw concerning digital transmission of its programmes on the network of the cable provider UPC and the reasonable fee for this service. To clarify the meaning of Article 8.7, OPTA published guidelines (see IRIS 1999-9: 11), in which it gave an interpretation of the Article that followed the regulation of access to telecommunications networks as imposed by the European regulatory framework for telecommunications: A cable network provider having a dominant position in the local cable market, should give access to its network according to ONP (Open Network Provisions) principles, i.e. objective, transparent and non-discriminatory conditions. Furthermore, OPTA stated that the transmission fee should be cost-based.

In 1999, OPTA concluded, in a preliminary decision, that UPC did not give access on ONP-conditions and that the transmission fee was not cost-based. At that time OPTA could not determine the cost-based fee because UPC's cost structure was not transparent and it was awaiting an accountant's report. Because UPC was still in the process of digitalising its network, it did not, at that stage, have to give Canal+ digital access.

In 2000, OPTA gave its final judgment, in which it confirmed its earlier judgment and determined the cost-based fee that UPC could charge Canal+. Both UPC and Canal+ raised objections against this judgment, which were rejected by OPTA.

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Meanwhile, UPC had made its network suitable for digital transmission and given a daughter company digital access without charging it. Canal+ requested OPTA to uphold its earlier judgment, in which it had also stated that when the network was suitable for digital access, UPC had to give non-discriminatory access. Because UPC did not comply, OPTA ruled that no fee was to be charged on Canal+, as a sanction.

Both parties appealed the judgment in accordance with the objections procedure. On appeal, the Court of Rotterdam held that, in principle, the judicial competence of OPTA includes the right to determine a reasonable fee. However, the Court set two limitations on the extent of OPTA's competence. The first limitation is that OPTA cannot determine the fee as a form of sanction. According to the Court, the competence of article 8.7 Tw does not include the power to impose sanctions.

The second limitation is that OPTA cannot oblige cable network providers to use cost-oriented or non-discriminatory fees when granting access for broadcasters. Article 6.6 Tw prescribes that in other sectors of telecommunications these conditions should be used to determine the fees. Since the Telecommunications Act does not provide explicitly for the possibility to impose such conditions on cable networks with regard to broadcasters' access, OPTA cannot use these conditions to determine the fees for access to cable networks for broadcasters.

Rechtbank Rotterdam 26-02-2003 (UPC v. OPTA) Zaaknr: AF5123

http://www.rechtspraak.nl/uitspraak/frameset.asp?ljn=AF5123

District Court of Rotterdam, 26 February 2003 (UPC v. OPTA) case no. AF5123

OPTA/IBT/99.6546, 9 juli 1999

http://www.opta.nl/download/IBT996546.pdf

OPTA decision of 9 July 1999

BESLISSING OP BEZWAAR OPTA/JUZ/99/8050, 4 november 1999

http://www.opta.nl/download/BCanal+KTA.pdf

OPTA decision of 4 November 1999

Beslissing op bezwaar OPTA/IBT/2000/202197, 31 juli 2000

http://www.opta.nl/download/beslissingbezwaar.pdf

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OPTA decision of 31 July 2000

BESLUIT inzake geschil Canal+ - UPC IV, OPTA/IBT/2002/200696, 20 maart 2002

http://www.opta.nl/download/besl_canal_upc_210302.pdf

OPTA decision of 20 March 2002

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