[NL] Decision in the Dispute between Canal+ and UPC about Access to Cable

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The Dutch College van Beroep voor het Bedrijfsleven (Trade and Industry Appeals Tribunal CBB) took the next step towards the solution of the dispute between Canal+ and UPC over Canal+' s access to the cable network of UPC. In its decision of 3 December 2003, the CBB partly annulled a decision of the Dutch Court of Rotterdam of 26 February 2003 (see IRIS 2003-4: 10) concerning disputes between the Onafhankelijke Post en Telecommunicatie Autoriteit (Dutch Regulatory Authority for the telecommunications sector OPTA), UPC and Canal+. At the heart of this proceeding lies the interpretation of Article 8.7 of the Telecommunicatiewet (Dutch Telecommunications Act Tw) and the powers it entrusts to OPTA. Article 8.7 Tw provides rules for access of programme providers to cable networks. In the case that both the operator of the cable network and the programme provider cannot reach an agreement, OPTA is authorised to impose, at the request of the programme provider, binding orders on the operator of the cable network. On the basis of this provision, OPTA issued an order determining the preliminarily tariffs that UPC could charge Canal+ for the re-transmission of its programmes. In so doing, OPTA applied the principle of cost-orientation. This principle has so far been applied in the context of the regulation of access to telecommunications networks (the former ONP framework, did not cover questions of access to cable networks, but see the remark below).

The CBB did not share the opinion of the Rotterdam Court that OPTA's order was in conflict with Article 8.7 Tw. The Rotterdam Court argued that OPTA was not entitled to apply the principle of cost-orientation also in the context of cable networks as long as there was no formal statutory basis that would authorise it to do so. The CBB did not follow this line of argument. With reference to the history of Article 8.7 Tw, the CBB decided that Article 8.7 Tw is formulated as an open provision and that the legislator did not intend to exclude the possibility to interpret this provision in the light of the ONP provisions. However, as the CBB also postulated, in the case of a lack of explicit legal rules, OPTA was required to thoroughly motivate a decision to interfere on the basis of Article 8.7, and also to take into account the legitimate interests of UPC. According to the CBB, OPTA complied with this obligation. In particular, OTPA was entitled to commission an external account in preparation of its order, provided it took care that the advice was the result of a careful and sound proceeding. Large parts of the decision of the CBB deal with a discussion of when the advice of an external consultant can

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be considered in conformity with the requirement of a careful and sound proceeding.

The decision is also interesting insofar as it provides insight into how the CBB defines the notion of "programme provider". UPC argued that Canal+ was not entitled to claim access under Article 8.7 Tw because Canal+ did not act as a programme provider but as an operator of conditional access. By contrast, the College defended the view that the fact that programmes are provided on the basis of conditional access does not change their qualification as programmes in the sense of this provision.

It also should be noted that the former ONP framework was replaced by a new framework for the regulation of the communications market (see IRIS 2002-3: 4). The new framework no longer excludes cable networks from the regulation of access. Also, in Article 13 of the Access Directive it is stated explicitly that a national regulatory authority can be entitled to impose obligations to apply principles of cost-orientation. The new framework has not yet been implemented in the Netherlands.

College van Beroep voor het Bedrijfsleven 3 december 2003, AWB 03/406,03/418 and 03/452, 03.12.2003, 15300 Telecommunicatiewet, LJN-no. AO1112

http://www.rechtspraak.nl/

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