[NL] Governmental Control over Provision of Cable Services Restricted

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UPC (a Dutch cable operator) exploits the cable television network in Wageningen and is bound by a contract with the municipality that was set up by its legal predecessor. The contract provided for the municipality of Wageningen to have a certain degree of control over the provision of cable services in the municipality.

Since 1997, the Mediawet (Dutch Media Act) states that the minimum set of programmes offered by a cable provider must include a must-carry package of programmes that is defined in the Media Act and an additional may-carry package. In principle, the cable provider is free to transmit more programmes on top of this statutory minimum set. The 1997 Mediawet also provides for municipalities to set up a council in charge of advising on the composition of the statutory may-carry package. The municipality of Wageningen and UPC agree on the fact that their contract has to be adjusted to the new Mediawet, but the municipality also wishes to maintain its right to have influence over the additional non-statutory package, as well as over the price of a cable subscription. This led to legal action, in which the municipality demanded changes to the contract, to enter into force with retroactive effect. A striking verdict followed.

The Court ruled that Article 7 subsection 2 of the Grondwet (the Dutch Constitution), which regulates the fundamental right of freedom of broadcasting, requires a determined basis in an Act of Parliament if the government wants to impose restrictions on the transmission of television channels on cable. According to the Court, on the basis of this article, any form of governmental interference with the regulation of television requires a determined basis in an Act of Parliament. The municipality is of a different opinion, and claims that this only applies to regulation of the content of television programmes.

The contract between UPC and Wageningen sets restrictions to a fundamental right and given the lack of a statutory provision as a basis for this at the time that the parties entered into the contract, the District Court declared that the municipality's interference with UPC' s channels' offer is incompatible with public order. The municipality was not authorized to stipulate provisions relating to the exploitation of cable and the Court therefore declared the contract between the parties void (based on article 3:40 subsection 1, of the BW (Dutch Civil Code)).

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Up until this verdict, municipalities have always had control over cable operators. If this verdict is upheld on appeal, it could have far-reaching implications. A consequence of this verdict would be that municipalities would not be authorised to exercise control over the selection of programmes in the cable package in any way. Municipalities would not be able to control directly or indirectly (via the subscription tariff) what is being transmitted as part of the standard cable subscription. Currently, several municipalities are engaged in civil law procedures, because cable providers have unilaterally announced their intention to raise cable subscription tariffs in violation of their existing contractual obligations. Since most municipalities have similar contracts with cable providers, these contracts would follow the same fate.

Decision of the District Court of Amsterdam of 28 January 2004, LJN no. AO2528, Case no. H 02.0678

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