[NL] Two Articles of Dutch Law Incompatible with the New European Regulatory Framework for Electronic Communications

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On 29 January 2014, the District Court of The Hague found that Dutch law is not allowed to force cable operators to offer their channel packages for sale to third parties. The Court found article 6.14a of the Dutch Media Act (MA) and article 6a.21a of the Dutch Telecommunications Act (TA) to be incompatible with the new European regulatory framework for electronic communications. The new regulatory framework aims to provide a harmonised structure for the regulation of electronic communication services and networks.

Following the ruling of the European Court of Justice of 7 November 2013, three Dutch cable operators UPC Nederland, Ziggo and Zeelandnet asked the District Court to declare articles 6.14a MA and 6a.21a TA nonbinding under Dutch law, due to their incompatibility with the new regulatory framework and the Treaty on the Functioning of the European Union (TFEU) (see IRIS 2014-3/37). The Court of Justice ruled that article 2(c) of the Framework Directive must be interpreted as meaning that a service consisting of the supply of a basic package of radio and television programmes via cable, the charge for which includes transmission costs as well as payments to broadcasters and royalties paid to copyright collecting societies in connection with the transmission of programme content, falls within the definition of an ‘electronic communications service’ and consequently, within the substantive scope of the new regulatory framework. Article 6.14a MA regulates the resale of channel packages to third parties. Article 6a.21a TA allows the Authoriteit Consument en Markt (Authority Consumers and Market - ACM), the Dutch national regulatory authority, to obligate companies having a significant market power in the provision of programme services to offer programme services and associated facilities for resale at wholesale level to end users.

The District Court ruled that the contested provisions cannot be regarded as audiovisual policy, considering that the provisions are intended to force cable operators to offer standard packages for resale. Therefore, the Dutch State cannot rely on the exception in Article 1 (3) of the Framework Directive, which states that the Framework Directive as well as the Specific Directives are without prejudice to measures taken at community or national level to pursue general interest objectives, in particular relating to content regulation and audiovisual policy. According to the Court, this forced resale will not result in greater choice

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regarding content for the consumer.

The Court stated that the State seeks to encourage competition of the cable operators with these provisions, while the European competition law framework is created to promote competition and serve consumer interests. According to the Court, there is no place for a separate role for the national legislator next to the ACM under the new regulatory framework. The Court noted that the national regulatory authority saw no reason to intervene in the Dutch television market and the Trade and Industry Appeals Tribunal confirmed this position.

The Court concluded that the contested provisions were in contravention of the new regulatory framework. The obligations imposed by the contested provisions should be imposed in accordance with the new regulatory framework by the national regulatory authority and not by the national legislator. Pursuant the contested provisions, the ACM may not decide whether the obligation that is to be imposed is appropriate. According to the Court, this is also in conflict with the provisions of the new regulatory framework.

Rechtbank Den Haag, 29 januari 2014, ECLI:NL:RBDHA:2014:1004, UPC Nederland & Zeelandnet/Staat der Nederlanden & Tele2

http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:1004

District Court The Hague, 29 January 2014, ECLI:NL:RBDHA:2014:1004, UPC Nederland & Zeelandnet/Dutch State & Tele2

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