

NETHERLANDS

INTRODUCTION

Widespread broadband access, with a large choice among providers, for affordable prices and at increasing speeds, often combined in interesting multiple-play packages: these are the benefits that consumers derive from strong competition in the Netherlands. Take-up of voice over broadband telephony and digital television continues at a fast pace and the mobile market is still very competitive. Several consumer protection measures have been implemented, in particular in the field of premium rate numbers and the use of broadband services.

These positive developments have not prevented the regulator from acting in favour of investments and competition, through the imposition of remedies on fibre networks. The mobile market would also need further remedies with regard to termination rates. While operators have started upgrading their network, some uncertainty has however arisen, in particular as a consequence of lasting court proceedings.

REGULATORY ENVIRONMENT

Main regulatory developments

After the adoption in December 2008 of new market decisions in almost all relevant markets, with a validity of three years, OPTA has been implementing the obligations imposed. This led to the consultation and approval of policy rules, tariff decisions and reference offers. The NRA had also decided to define and analyse the broadcasting transmission market, taking into account the specificities of the Dutch broadcasting networks, with extensive cable coverage and a sustained provision of analogue television signals. Decisions were adopted in March 2009 and concerned the four largest cable operators. Further implementation should lead, from early 2010, to enhanced competition, with consumers being able to switch operator and avail themselves of bundled services from different providers. For the wholesale market for voice call termination on mobile networks, OPTA has started preparing a new market decision, envisaging a combined market analysis for fixed and mobile termination.

As to the promotion of the citizens' interests, OPTA has been actively monitoring a series of new consumer protection rules, which entered into force in 2009 (transparency of tariffs, correct use of premium rate numbers, correct application of contractual arrangements, protection against telemarketing abuses, ban on spamming to businesses, etc.).

Organisation of the NRA

At the beginning of the year, OPTA published its priorities: stimulating competition in the business markets, encouraging investments in fibre networks, consumer protection in the field of tariffs, and Internet security, were identified as key objectives. Prevention of infringements was again earmarked as an important task. In that respect, the fixed incumbent, the first operator to have concluded a compliance charter with the NRA in 2008, is regularly reporting on its performances. The NRA is expected to publish its first annual report on the compliance achievements in early 2010.

As provided for by the OPTA Statute law, the board was reappointed for a four-year term on 1 August 2009. After an extensive external assessment of the past term of office, the evaluation report was presented to the Ministry in December 2009 and sent to the Parliament for further discussion. OPTA's activity as a whole was positively assessed. Recommendations were provided to the NRA regarding further improvement of consultation mechanisms, further reduction of administrative charges, active exploration of monitoring strategies and the benchmarking of management costs.

The NRA further strengthened its cooperation, for knowledge sharing and exchange of information, with other regulatory bodies having monitoring competences in the field of market regulation.

Decision-making

By the adoption of new decisions, at the end of 2008, in the wholesale markets for telephony (access and origination), the wholesale market for physical network infrastructure access (LLU) and wholesale broadband access, and in the wholesale leased lines markets, OPTA had initiated the second round of market analyses. It maintained regulatory measures for most wholesale markets or even extended them in some of these markets, for example introducing regulation for copper networks in the low-quality bitstream market and extending the wholesale line rental (WLR) obligation to business high-capacity telephone lines. Special emphasis was given to the renewal of obligations that were already in force during the previous regulatory period, such as WLR and WPC (wholesale price cap, as part of multiannual tariff regulation).

New regulation was introduced for fibre access in the wholesale markets for physical network infrastructure access (LLU) and for broadband access. Striking a correct balance between encouraging fibre investments and fostering competition via open access to these networks was indeed another concern of the NRA. This was also reflected in the business market where fibre access was imposed for the high-quality bitstream market. As to the access obligation of the optical distribution frame (ODF access) in the unbundling market, a distinction was made between tariffs for fibre-to-the-home and fibre-to-the-business networks. In accordance with its policy rules on the principles of tariff regulation (adopted in December 2008), the NRA imposed cost-oriented price caps on a multi-annual basis for the fibre connection and associated facilities (co-location and backhaul).

Following the second round of market analyses, OPTA was also able to withdraw regulation in the wholesale market of transit services in the fixed public telephone network and in the retail market of leased lines. While deregulation in the retail telephony markets started for the consumer market in January 2009, and was due to be completed for the business market in January 2010, the risk of price squeeze for alternative operators remains. In the framework of the wholesale non-discrimination obligation, the NRA imposed, in all market decisions, a certain number of conduct rules regarding selective price undercutting, fidelity rebates and tariff differentiation. The incumbent is not allowed to apply tariff differentiation, insofar as this would favour its own downstream undertakings. For this specific conduct rule, policy rules were specified as to the cost-calculation method that is used when assessing the price of downstream services in respect of margin squeeze: in cases where the offered services would not be replicable in its price-technicalities, thereby preventing operators from replicating these services, corrective measures have to be taken by the incumbent.

Alternative operators generally assess OPTA's activity as rather satisfactory but point to the specific approach needed for the business market since tariffs for access to Ethernet-based leased lines and broadband access would not allow reasonable competition. While the commercial phasing-out of interconnect leased lines seems to cast a shadow on the market, the NRA is expected to speed up the process of drafting reference offers and setting regulated tariffs. In that respect, the incumbent was ordered, in December 2009, to amend its reference offer for wholesale Ethernet access. OPTA's choice for cost-orientation models based on the costs of the incumbent operator is not seen, moreover, as a sufficient remedy.

In the meantime, all market decisions have been challenged before the court. While some uncertainty is spreading in the market as a consequence of unexpected delays in judicial rulings, a first decision was rendered by the Dutch Appeal Court in October 2009. It entailed partial annulment of the unbundling market decision and obliged the NRA to reconsider its conclusions.

MARKET AND REGULATORY DEVELOPMENTS

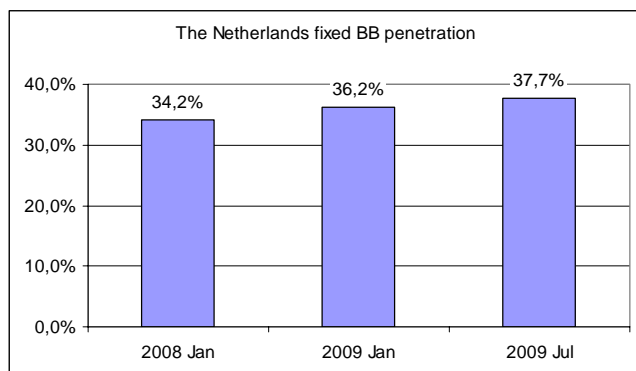
The total turnover of the telecommunications sector in the Netherlands grew in 2008 by 7.7% and amounted to €13.02 billion as of 31 December 2008. The revenues from fixed markets were €6.37 billion, and the revenues from mobile markets were €6.66 billion. Data on investments in the telecommunications sector is not available.

New developments in the choice of technologies and in the regulatory approach are taking place and affect the behaviour of the operators in the market. On the one hand, there is regulation in place that should stimulate investments through the rollout of NGN networks while allowing operators to compete. The joint venture for the rollout of fibre, in which the incumbent has been participating since December 2008 (approved by the competition authority, subject to certain conditions), concluded a new joint venture with the municipality of Amsterdam, and this under the same regulatory conditions. Fibre initiatives extend their reach, mainly at local or municipal level, but are not yet determining competition at a larger scale. On the other hand, the incumbent has been carrying out pilots of network rollout with fibre and/or VDSL technology and has drawn the first conclusions. These decisions should result in the short term in a speedy upgrading of its existing network using VDSL technology, while the rollout of fibre would be achieved step by step and on a regional basis, reaching by this way the double or more of households by the end of 2012.

Competition as to price and quality of broadband connections increasingly seems to take place between DSL networks and cable networks. The latter network operators, through the introduction of the EuroDocsis 3.0 technology and enjoying at the same time an excellent national coverage, are able to make interesting offerings (with speeds up to 50-100 Mbps for broadband connections). Dual-play and triple-play packages are being offered by an increasing number of operators, also by VDSL 2 technology, and enjoy a huge success (by respectively 16% and almost 12% of population, December 2008).

Broadband

Market situation



With 37.7%¹⁷³ penetration, the Netherlands is keeping its frontrunner position in the European broadband ranking, together with Denmark. Growth has been steady but is now slowing down. According to Eurostat, 90% of Dutch households have access to Internet, which is again a top position.

Market shares, which were rather stable in the last years – both the fixed incumbent and the alternative operators had 50% of the market – seem to shift: the alternative operators' market share of 52.4% in July 2009 compares positively to 48.8% a year before. DSL remains the dominant technology, besides the cable networks, which account for 36.2% of all retail broadband lines. Within DSL retail lines on the other hand, alternative DSL operators seem to enlarge their market share (26.3% in July 2009). Full unbundling remains the most important means of access. Fibre to the home remains limited (2.2%).

Market shares, which were rather stable in the last years – both the fixed

Regulatory issues

OPTA's decisions for the wholesale market for physical network infrastructure access (LLU) and broadband access market, which entered into force at the beginning of the year, were further implemented in 2009. As part of the price-control remedy, wholesale price caps, to be applied to the incumbent's regulated services, were consulted with the market and notified to the Commission. Draft decisions setting cost-oriented price caps for Sub Distribution Frame (SDF) backhaul, high-quality wholesale broadband access (WBA) and Wholesale Ethernet Access (WEA) should follow later.

Two decisions for unbundled ODF access to FTTH and non-FTTH networks were adopted in June 2009 as part of NGA access regulation. The first provides for a multi-annual price cap for FTTH networks, based on the Internal Rate of Return (IRR) methodology. The second identifies the Embedded Direct Costs (EDC) methodology as the proportionate tariff regulation system for non-FTTH networks.

On 28 October, the Appeal Court rendered a judgment on the appeal against the wholesale unbundled access decision. The judge ruled that the NRA had not provided sufficient economic data to substantiate the inclusion of ODF access to non-FTTH networks (fibre networks to business parks). As the potential specificity of the market with regard to these networks had not been sufficiently taken into account, the judge only nullified regulation as far as it concerns access to fibre networks to business parks. Regulation for FTTH as well as for copper networks was left intact by the judicial injunction, but OPTA was ordered to adopt a new decision within six months.

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Data as of July 2009.

Mobile

Market situation

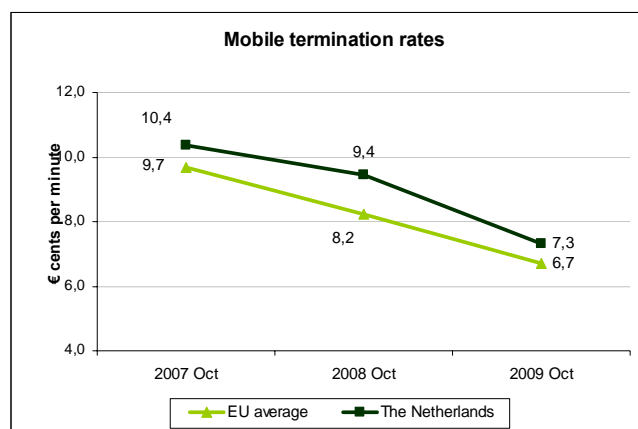
With 21 million subscribers and more than 1 million new connections, mobile penetration increased further from 122.8% to 128.5%, this is above the European average of 121.9%. The growing proportion of post-paid connections of the last years is further confirmed (almost 54% of all mobile connections).

Three large network operators and a virtual operator are active in the Dutch mobile market, together with a large number of resellers. The second and the third operator each hold a market share between 20 and 30%, while the virtual operators have gained a considerable presence.

Regulatory issues

The decision on mobile termination rates, which was adopted in 2007, will expire in July 2010. Termination rates, subject to a price-control obligation and following a glide path, further decreased in May and July 2009. They are currently set between 7.00 €-cents and 8.10 €-cents, with an average of 7.32 €-cents, which is slightly above the European average.

Following the interim decision of the Court for Business Affairs of July 2008, not annulling the NRA decision on mobile termination, but reopening the investigation, the NRA had adopted a complementary decision substantiating again its original reasoning (December 2008). The latter decision is still pending before the Court.



Envisaging a combined market analysis for fixed and mobile termination, OPTA has started working, together with market players, on the development of bottom-up long run incremental cost (BULRIC) models.

Roaming Regulation

The Dutch operators are complying with the requirements of the Roaming Regulation. Some network operators are offering voice roaming at lower tariffs.

Fixed

Market situation

The telephony market in the Netherlands is characterised by a sharp uptake of bundles: more than 3.7 million double-play or triple-play subscriptions include at least a fixed voice telephony service.

While the number of traditional PSTN lines and the volume of fixed telephony traffic further decreased, the share of voice-over-broadband (VoB) connections rose to almost 40%. The wholesale line rental operators' share slightly rose to 5.4%. Within VoB telephony, the market share of DSL providers, including the incumbent, further increased.¹⁷⁴

For direct access to fixed telephony services, the incumbent still remains the main provider (approximately 70% of all subscribers). It is mainly for international calls that the use of alternative providers has further increased (approximately 50% of subscribers).

Regulatory issues

Following the latest market decision of December 2008, retail markets are deregulated, as a first step for the consumer market since beginning 2009, and as a second step for the business markets as from 1 January 2010.

Implementation of the price-control obligation would be achieved by a Wholesale Price Cap (WPC), to be applied to the incumbent's regulated wholesale telephony services for the timeframe 2009-2011. The adjusted top-down cost model based on the embedded direct costs of the incumbent would lead to new increasing termination rates at the local and regional level. In its comments on the notified measure, the Commission invited the regulator to reconsider the cost allocation system and to align it with the approach outlined in the Commission's Recommendation on the Regulatory Treatment of termination rates.

Broadcasting

Market situation

While the number of broadcasting connections steadily grows, the market share of cable, the most used platform for broadcasting reception in the Netherlands, slightly decreased from 81% to approximately 80% (data Q1 2009 from Ministry market report). Digital TV penetration sharply increased with around 10 percent points in one year and amounts to 48% (2008). Digital cable shows the strongest growth and achieves a 52% share of digital television. Other platforms, namely terrestrial and DSL television, also extend their market share (almost 20% for DVB-T and between 5 and 10% for IP-TV).

Analogue cable transmission, in many cases combined with a digital subscription, remains very significant: More than 60% of digital cable end-users maintain their analogue subscription, while approximately 20% of the DVB-T end-users combine their subscription with the reception of the analogue cable signal.

¹⁷⁴ Source: OPTA.

A very large number of Dutch households are using triple or quadruple bundled packages, including (analogue or digital) broadcasting services.

Regulatory issues

New decisions for the wholesale market for broadcasting transmission services were adopted in March 2009. While these markets are no longer listed in the Recommendation on relevant markets, OPTA defined four cable broadcasting markets, corresponding to the service areas of the four largest cable operators, as relevant markets. The operators were found to have SMP within their coverage areas and were imposed the obligation to provide wholesale transmission at a cost-oriented tariff. The two largest of them were imposed the additional obligation to provide analogue signals, including access to the transmission platform for the purpose of resale ("WLR-C"; wholesale line rental for cable), at a retail minus tariff complemented by a price cap or, in case no retail equivalent is available, at a cost-oriented price.

In its comments letter, the Commission noted the specificities of the Dutch transmission market (sustained provision of analogue RTV) and insisted on a swift implementation of the resale obligation so as to quickly generate a market structure that is more prone to competitive dynamics. It further commented that once such a structure has been achieved, OPTA should promptly withdraw the proposed WLR-C obligation so as not to unnecessarily prolong the importance of transmission of analogue RTV signals and hamper the investment in, and the development of, digital services and infrastructures.

Two further decisions, setting out the implementation process and the regulated tariffs of the resale obligation, were consulted with the market and notified to the Commission in November 2009. The resale offers are expected to be made available to alternative providers in two steps: a rudimentary version of the wholesale service should be available shortly after the entry into force of the measure while a second fully-fledged version, built on the first, should be available a few months later. The Commission, in its comments letter, indicated that it was not convinced about the proportionality of the proposed timing for the implementation of in particular the first WLR-C release, and invited OPTA to provide the necessary technical and practical details in the final measure, in order to ensure an adequate and realistic implementation procedure.

Horizontal regulation

Spectrum management

An auction for mobile electronic communications services in the 2.6 GHz band is expected to take place in 2010 and would allow newcomers to enter the market. Following the Parliament's request to allocate a part of the spectrum to new entrants, the auction process has been delayed. The auction decision and rules were reviewed and published in October 2009. Spectrum will be assigned under the principle of neutrality as to technology used and services offered.

In October 2009, a consultation with operators was launched with regard to the GSM1800 licences. Reattribution of this spectrum band in 2013, when the licences expire, in combination with the GSM900 frequencies, would allow rearrangement of the whole GSM spectrum, offering equal chances to existing and new providers.

A policy proposal to reallocate the upper part of the UHF frequency band, as part of the digital dividend, to electronic communications networks, was put to public consultation in June 2009. A definitive decision will be subject to further research on expected interference problems and the possible solutions to this issue. As the Netherlands was the first EU country to switch over to digital terrestrial broadcasting in 2006, licences to broadcasters were granted with a duration until 2017.

By decision of the Telecoms Agency, two mobile network operators, which were found not to have made efficient use of the assigned spectrum, were imposed considerable provisional penalty payments. The mobile operators, which had acquired these frequencies through mergers, had been reminded of their obligation to comply separately with the conditions of every UMTS licence. In one case, the unused frequencies were given back to the authorities.

In December 2009, the Ministry decided to amend the national frequency plan, in order to allow the use of other technologies than GSM and UMTS in the 900 MHz, 1800 MHz and 2100 MHz bands. After publication of this measure, mobile operators would be able to apply for amendment of their licence.

Implementation of spectrum decisions

According to the Dutch authorities, the Netherlands have implemented the majority of spectrum harmonisation Decisions adopted by the Commission, except Decision 2008/411/EC on the 3.4-3.8 GHz band.

Rights of way

With the introduction in 2006 of amendments to the Dutch rules regarding rights of way, the requirements regarding structural separation between ownership and decision powers within municipalities were further specified. The provision of electronic communications networks and services by municipalities, or their participation in these undertakings, in principle forbidden, became subject to checks and conditions. These restraints would, however, be partially lifted by a bill containing legal measures for economic recovery. It would be further clarified that the municipality must promote open and non-discriminatory access to that network.

THE CONSUMER INTEREST

Tariff transparency and quality of service

OPTA has started enforcing the obligation of service providers to indicate maximum tariffs for certain categories of expensive premium rate calls (introduced in October 2008). Several checks were carried out and after warnings, most providers complied with the obligation. Two mobile operators were fined in December 2009 for breaching the more general obligation to provide transparent tariff information. OPTA also monitored the correct use of premium rate numbers and withdrew several numbers on the suspicion of abuse.

A new provision of the Telecommunications Act, containing sector-specific contractual arrangements, entered into force on 1 July 2009: contracts of indefinite duration, as well as contracts with a definite duration prolonged after automatic renewal, may always be terminated with one month's notice.

Consumers have the right to oppose further reception of commercial calls by registering in a "do not call me" register, which became operational from October 2009. Any company using telemarketing has to check whether the consumers concerned have registered with this service. In all telemarketing calls, a company has to actively offer the possibility to register for this service.

Users' access to the Internet and network management

Some net neutrality issues have been reported in the Netherlands in 2009. Traffic was "squeezed" from heavy Internet users on certain broadband networks while some mobile 3G network operators blocked the use of particular Internet services. Although these consumer problems seem to have been provisionally solved by the market, the national consumer association requested more transparency from network operators as to the actual download capacity of the broadband service.

Number portability

4.6 million fixed numbers were ported numbers on 30 September 2009, while 2.7 million mobile numbers were reported. The wholesale price for fixed porting is €2 and varies for mobile porting between €0 and €5. The time for porting mobile and fixed numbers has been further reduced to three days.

Consumer complaints

Since July 2009, premium rate number holders are obliged to be affiliated to the new dispute committee for premium rate services. This is especially relevant since number holders as well as telephony providers are obliged to inform users about maximum tariffs for expensive premium rate calls.

As a result of self-regulation by Internet service providers, switching between broadband services has become faster and easier for the user. The target that 95% of the migrations are performed within one day, was not met however.

Emergency services (112)

112 is also the national emergency number in the Netherlands. While Dutch people are thus familiar with this number, only 45% appear to be familiar with 112 as the number to call in case of emergency anywhere in the EU.¹⁷⁵

According to the Court's October 2008 judgment, the Netherlands had not fulfilled its obligations under the Universal Service Directive with regard to caller location information. The Dutch authorities took measures to ensure, as from 30 March 2009, that the three mobile operators are providing caller location information for mobile calls to 112 to the national police exchange. This exchange is now able to process these calls and to forward them, together with the information on the location of the caller (by means of a "pull system") to the regional emergency services. This allowed the Commission to close the corresponding infringement proceeding in October 2009.

¹⁷⁵ Eurobarometer Flash survey on the European emergency number 112 (February 2010).

For one of the three mobile network operators however, it recently appeared that caller location information was not available for users of international roaming services. The Commission services are looking into this issue.

Harmonised numbers for harmonised services of social value (116)

Number 116000 has been assigned to and is made operational by the Centrum Internationale Kinderontvoering (International Centre Child Abductions). Number 116123 has been assigned to the Kindertelefoon while number 16111 has been assigned for future use.

Must-carry

New provisions of the December 2008 Media Act applicable to digital broadcasting further reduced the scope of the must-carry obligations. The Commission closed the ongoing infringement case in June 2009.

Data protection

The 2008 extension of the spamming prohibition to legal persons entered into force as from October 2009. OPTA's website for the lodging of complaints against spamming is now also available for businesses. In addition to the imposition of fines for traditional forms of spam, OPTA has also started fining natural persons who send spam through social network sites.

OPTA requests an active contribution from Internet service providers towards raising consumer awareness about the security risks posed by the Internet. In accordance with this obligation imposed by the Telecommunications Act, it issued policy rules about the information efforts to be delivered by providers (e.g. provision of information about spamming, botnets, phishing, spyware, accessibility and clarity of information). OPTA also urged providers to reach an agreement to detect botnets (networks of so-called zombie computers, often used for sending out spam) and to remove them from their networks.

The Telecommunications Data Retention Act of July 2009 finally entered into force in September 2009. Data must be kept for a period of 12 months in general. A reduced retention period of 6 months for Internet data is expected to be introduced by amendment to the law. The task of monitoring these obligations has been attributed to the Telecoms Agency of the Ministry.