NETHERLANDS

INTRODUCTION

The Netherlands kept their top position in the European ranking for broadband penetration. Infrastructure competition between DSL and cable operators remains vigorous and has brought major benefits to consumers, who are increasingly choosing multiple-play packages. Fixed telephony traffic continues to decrease but competition remains intense, thanks to the bundling of services and the remarkable growth of voice-over-broadband telephony.

The national regulatory authority has carried out the second round of market analyses, rolling back regulation in retail markets. New regulation is being introduced for fibre access. In its daily practice, the national regulatory authority has been very attentive to the enforcement of remedies, being lenient where possible but intervening firmly with fines in the event of infringement. Consumer concerns have also been addressed, especially with regard to switching between providers.

REGULATORY ENVIRONMENT

Main regulatory developments

By the beginning of 2008 attention had shifted away from the incumbent's "All IP" plans and the migration issues related to the roll-out of this next-generation network (NGN). The possibility of self-regulation by means of agreements between the incumbent and the competitors resulted notably in a public offer of the incumbent regarding migration conditions and tariff caps for collocation. The Dutch national regulatory authority, Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA), started analyses of almost all relevant markets and submitted them to national public consultation in August 2008. One of the new regulatory responses to the challenges of NGN would be the obligation imposed on the SMP operator to provide access to the fibre network, including migration rules for phasing out main distribution frame (MDF) access. Taking into account the ubiquity of cable networks in the country, further new regulation is to be expected for the markets of broadcasting transmission services.

Several initiatives for new legislation, or for self-regulation among providers, have led to better protection of consumers in the fields of tariff transparency and switching between providers.

Organisation of the NRA

In spite of structural re-organisation, which was implemented in January 2008, the NRA was able to carry out its fundamental tasks. Changes involved reduction and re-organisation of staff, fewer managers, and only three departments left, in order to increase flexibility. Market developments are systematically monitored in the structural market monitor, a process that aims to increase OPTA’s insight into developments and to reduce workload on operators through predefined, periodical questionnaires.

Enforcement of the existing obligations was identified as a key objective for 2008. New tasks in the field of telemarketing and the use of premium rate numbers were integrated into OPTA's work programme. In other domains, operators were encouraged, or indeed requested, to adhere to the existing dispute resolution committee for electronic communications. Taking its cue from consumer complaints, OPTA wrote to several operators to remind them of their obligations, in particular as regards the provision of transparent tariff information for premium rate numbers and the rights of end-users of Voice over Internet Protocol (VoIP) telephony services.

OPTA fine-tuned its view on the application of infringement prevention and "high-trust" principles. While market players were invited to adopt compliance programmes, OPTA defined policy rules for the determination of fines in March 2008. As in competition cases, the gravity and duration of the offence as well as the economic context and other circumstances will be taken into account. In some circumstances, attenuation of the sanction can be decided, for example when an effective compliance programme has been put in place or when the offender is willing to cooperate in the investigation. Wrongful functioning of such a compliance programme, however, would be taken into account as an aggravating factor when imposing penalties.

In this context the fixed incumbent was the first operator to conclude a compliance charter with the NRA in April 2008. This includes concrete elements, with measurable performance indicators and a specific timetable, to be transposed into the undertaking's business practice. The undertaking is also to report periodically on the effectiveness of the programme, and to inform the NRA of any rules of conduct found to be inadequate. Possible infringements of the Telecommunications Act will need to be promptly submitted to the NRA, which will continue to be legally charged with the examination of infringements.

Alternative operators believe that OPTA's high-trust approach is inappropriate to counteract the incumbent's illegal behaviour. They refer to the high fines repeatedly imposed in 2006 and 2007, and recently in October 2008, for offences against regulation in the business telephony market. According to OPTA, the implementation of the effective compliance programme is to be further developed and is not the answer to all infringements committed by the incumbent. With the compliance charter concluded with the incumbent, however, possible infringements could come to light at an earlier stage.

Decision-making

The self-regulatory approach, favoured by the NRA to address access and migration in the context of NGN did not produce conclusive results, meaning that regulation was still needed. After successfully conducting negotiations with the main operators of local loop unbundling (LLU), the incumbent had concluded memoranda of understanding in 2007. These were turned into a public, non-discriminatory offer containing conditions for phasing out MDF access and migration to other forms of access. An important result of the process was the commitment of the incumbent to keep MDF access operational for a longer period. The incumbent was, nevertheless, not able to formalise any agreement with alternative DSL operators.

Being legally obliged to adopt new market decisions before January 2009, the NRA started the new round of market analyses based on the new Recommendation. National consultations on the draft decisions began in August 2008. At the same time, the outcome of the previous negotiation process was taken into account.

The NRA again designated the incumbent as an SMP operator in most of the relevant markets. At the same time regulatory remedies in the wholesale markets would be reinforced. Retail markets, however, are expected to be deregulated. Alternative operators fear that regulatory safeguards against price squeezes would be completely removed. They have requested that, as a complement to any cost-orientation for wholesale services, retail services using regulated wholesale elements continue to be addressed by ex-ante imputation tests. Comments received in the public consultation exercise prompted the NRA to strengthen the non-discrimination remedy in order to avoid margin squeezes. Further clarification should be provided through policy guidelines expected for 2009.

In 2008, the Competition Authority had to assess a proposed concentration by which the incumbent would create a joint venture with a company specialised in the roll-out and exploitation of fibre networks. This separate company would then sell optical distribution frame (ODF) access to the incumbent and to other operators. These operators of the passive layer would in their turn sell wholesale broadband access to service providers. The Competition Authority finally approved the concentration in December 2008, taking into account the joint venture's commitment to providing non-discriminatory network access to other telecom companies. OPTA had been closely cooperating with the Competition Authority and its recently issued policy rules on tariffs for unbundled fibre access were taken into account in assessing the case.

MARKET AND REGULATORY DEVELOPMENTS

The total turnover of the telecommunications sector in the Netherlands was €12.09 billion as at 31 December 2007: the revenues from fixed markets were €5.89 billion, and the revenues from mobile markets were €6.19 billion. The total value of investments in the telecommunications sector was €1.5 billion (EITO data).

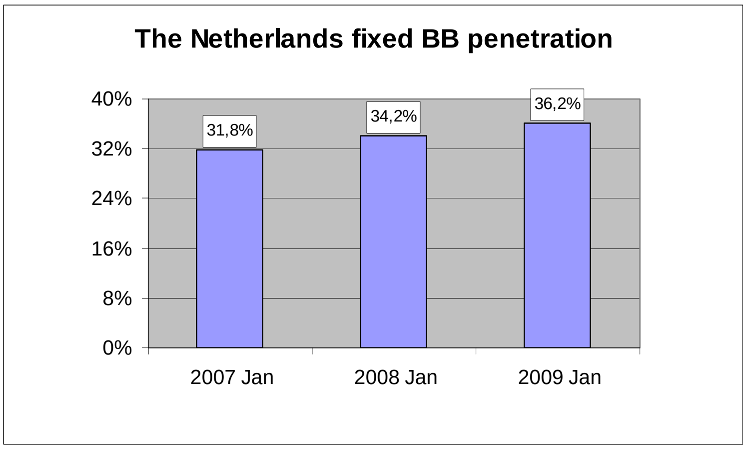
The uncertainty since 2005 surrounding the announcement of the incumbent's "All IP" plans, including the phase-out of MDF access, has had a big impact on the business cases of alternative operators. Further roll-out of local loop unbundling has almost been completely suspended. Delays and, in some cases, even a halt in roll-out of the announced VDSL network, suspension of migration plans and phasing out of MDF exchanges, further changed business plans in 2008. The incumbent recently announced a new business strategy combining roll-out of fibre to the home in certain areas with fibre to the street cabinet in others. Starting from mid-2010, MDF locations would be phased out and current LLU providers would have to migrate accordingly.

Although consolidation has taken place in the recent past, competition remains effective between DSL providers and cable providers. This has led to many offerings of VoIP telephony, high-speed Internet, digital television and content, often grouped in bundled offers. The Netherlands has one of the highest rates in take-up of bundles, mostly in double-play, combining broadband with another product (17% of the population) but also in triple-play (11% of the population). Penetration of digital television is well advanced (growth by 10 percentage points to 38% of all households), although analogue cable television remains widespread.

Broadband

Market situation

In the European ranking of broadband penetration, the Netherlands keeps a strong second position behind Denmark (36.2% in January 2008). This compares with 34.2% in January 2008. Growth has slowed down, but remains steady.



The fixed incumbent's and the alternative operators' market shares seem to have stabilised at almost 50% each since 2007. Cable networks account for 74% of all alternative operators' broadband retail connections. Within DSL retail lines, the incumbent maintains a very significant, slightly decreasing market share of 82%. The proportion of fully unbundled lines is still increasing (from 58% to 70%). With 1.7% of all retail broadband lines, fibre to the home remains marginal.

A large proportion of retail broadband connections are provided in a bundle (almost 70%). 95% of all bundles contain at least a broadband product.

Broadband coverage is very high in rural areas, with 99% for DSL and 43% for cable, in 2007. For the latter transmission platform, there remains however a gap of 49% with regard to national coverage average. .

Regulatory issues

OPTA carried out new analyses of the markets for LLU (physical network infrastructure access) and wholesale broadband access. The draft decisions entered into force on 1 January 2009. The incumbent was designated again as an SMP operator. Unbundled access was imposed on the copper network (access to both the main and the subloop distribution frame) and the fibre network (ODF access), including migration rules for phasing out MDF access and backhaul as an ancillary facility. The wholesale broadband access market was again broken down into markets for high-quality and low-quality broadband access. New regulation was introduced for the low-quality market, while the existing regulation for the high-quality broadband access market was extended to fibre access.

With the aim of striking the correct balance between encouraging fibre investments and fostering competition via open access, the NRA drew up policy rules on the principles of tariff regulation for fibre access, in conjunction with an explicit price proposal of the fibre company. After consultation, these were adopted together with the market decision on LLU. At the very core of these policy rules is a price cap on access tariffs established on a long-term basis by OPTA. While providing for a maximum tariff for access for entrants to the new fibre network, such a price cap would give long-term certainty for investments in fibre networks. Periodical review of the price cap should ensure that the fibre company does not make a profit on the access tariff not relating to the cost.

Mobile markets

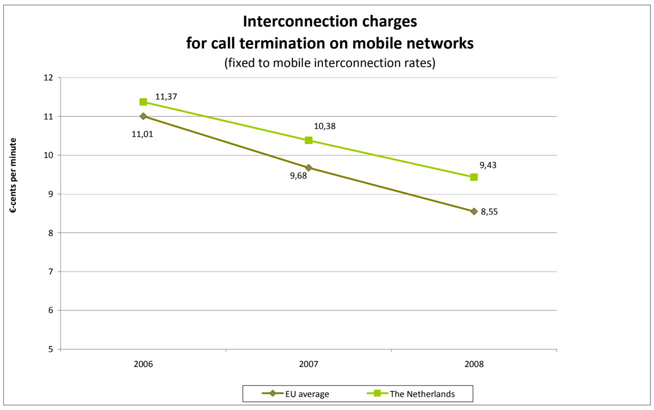
Market situation

With only three network operators left, one virtual mobile operator and a considerable quantity of resellers, competition is strong on the Dutch mobile market. The mobile branch of the fixed incumbent holds a large, but decreasing market share (between 30% and 40% of subscribers), the second and the third each holding between 20% and 30%.

Mobile penetration rose further from 113% to 121% and is slightly above the European average of 119%.

Regulatory issues

Mobile termination rates, based on an agreement among operators (after the first decision was annulled by the Court in August 2006) and established by the NRA decision of July 2007, are following a glide path until July 2009; they are currently set between €0.09 and €0.104.



This market decision was appealed by one of the fixed telephony operators, which challenged the level of fixed-to-mobile termination. The Court concluded by an interim decision that the NRA had not sufficiently substantiated its market decision by basing the termination tariffs on the common agreement of the operators and not on the results of the bottom-up long run incremental cost model (BULRIC). The Court did not annul the decision but reopened the investigation, asking the NRA to take a position. Should OPTA decide to adopt tariffs agreed upon by the mobile operators, or to base the tariffs on the results of the BULRIC cost model, the revised decision would again be subject to the current appeal procedure, unless the appeals were withdrawn.

Fixed

Market situation

Bundling of connection and calls for flat fees (65% of all fixed telephony connections), together with the sharply increasing uptake of voice over broadband (32% of traffic volume) are the main characteristics of the fixed telephony market in the Netherlands. More than 30% of VoIP connections are provided by the fixed incumbent. Its market share in fixed connections, however, has decreased to between 70% and 80%. Wholesale line rental operators have achieved a market share of over 5%.

The incumbent's market share (in terms of revenue) has also been further decreasing to approximately 65%, whereas it still maintains a share of 70% for international calls. Two smaller operators holding market shares of respectively less than 20% and 10% and a high number of very small operators are also active in the market.

Regulatory issues

In 2008 the incumbent received again a heavy fine of €1.5 million and an official warning, for offering illegal discounts to business customers, contrary to its non-discrimination obligation. In two administrative appeals against fines imposed in 2007, the NRA reduced the amount of the fine. In determining the level of the sanction, the NRA took into account the repetition of this practice, the incumbent's willingness to cooperate in the investigation procedure and the fact that the incumbent and the competitors involved had reached an agreement to make available an amount of €8 million to the prejudiced parties.

In November 2008 OPTA notified new market analyses for the wholesale and retail fixed telephony markets. While maintaining regulatory obligations for the wholesale markets, it would withdraw existing obligations for the retail market, but in the case of the retail business market, not until new wholesale remedies had been effectively implemented. In contrast, alternative operators claim that, given the incumbent's bad record of illegal action, the regulator should reintroduce ex-ante regulation and supervision through strong price controls and price-squeeze tests.

Broadcasting

Market situation

While cable remains the main infrastructure for broadcasting subscriptions, other platforms are increasingly used instead of, and also in addition to, cable. The cable companies' joint market share (in number of subscriptions) has been steadily declining from 83% in 2007 to 80% in July 2008. Digital television continues to expand, mainly via cable (close to 1.8 million connections), but also via digital terrestrial, satellite and IP connections (almost 1.5 million connections by July 2008). DTTV takes a market share of between 5% and 10%. Viewing broadcasts via exclusively analogue cable transmission, though still very significant (in 68% of cable subscriptions), has been steadily declining over the years. Cable customers increasingly combine their digital package, mainly used for their primary television set, with the analogue signal, which is always provided together with the digital signal.

It has to be recalled that the Netherlands deviate in transition speed from other EU countries due to the high penetration of cable and the continued importance of analogue transmission over cable.

A growing number of Dutch households (22%) are using triple or quadruple bundled packages, including broadcasting services.

Regulatory issues

OPTA started to carry out new analyses of the wholesale markets for broadcasting transmission services within the coverage areas of the different cable operators. Draft decisions were consulted with market players as of August 2008, and were expected to be notified to the Commission in January 2009. New market decisions prolonging existing, or imposing new, obligations are scheduled to enter into force in March 2009.

Considering that triple-play packages, including analogue broadcasting, are taking an increasing share of the market, OPTA proposes a new type of remedy. Cable operators would be obligated to resell their analogue television connection and signals, in order to allow other operators to complete their offer by including a television service. Cable operators have doubts about the proportionality of the measure, and fear that further regulation would have a heavy negative impact on the broadcasting market. Alternative distributors on the other hand welcome the measures.

Until 2017 most of the spectrum delivered by the digital dividend has already been allocated to broadcasters (public service broadcasters and commercial DTV). As to the technical possibilities, a political choice is expected to be made in 2009.

Horizontal regulation

Spectrum management

The 2.6 GHz band is expected to be auctioned for mobile electronic communications services in 2009. After public consultation of market players and additional opinions provided by OPTA and the Competition Authority, some elements of the authorisation procedure were amended regarding the maximum amount of spectrum to be granted, and the obligation to use spectrum. The draft rules for participation in the auction were made public in November 2008. Furthermore, in December 2008, the Dutch parliament accepted a proposal to allocate a certain percentage of the spectrum to a new player on the market. Implementation of this proposal might delay the auction.

An amendment to the Telecommunications Act, introducing more flexibility in spectrum policy, is under discussion in parliament.

Implementation of spectrum decisions

According to the Netherlands, the Commission spectrum harmonisation decisions have been fully implemented.

THE CONSUMER INTEREST

Tariff transparency

Excessive pricing for calls to premium rate numbers, and dissatisfaction of consumers in this regard, was addressed by an amendment to the Ministerial Regulation on universal service and end-user interests. Service providers are obliged to indicate maximum tariffs for certain categories of expensive premium rate calls, while mobile operators will have to provide suitably clear information on the traffic charges that customers will be billed besides other charges. OPTA has been instructed to monitor and enforce these rules.

Number portability and switching

OPTA's policy rules for number portability were amended in order to improve the porting system, and to better protect the consumer's number during one month, in case of a porting mistake. Over the last few years the porting time of ten days has in most cases been reduced to a shorter period of five or so days.

Switching between Internet services, frequently signalled as a problem by the consumer association, was addressed on the basis of self-regulation. After negotiations with the sector, the largest ISPs covering more than 90% of the consumer market now adhere to a uniform switching system and follow clear rules, which are published on their website. Switching requests should be addressed in 95% of cases on the agreed day, and interruption of service should not be longer than 24 hours.

A new provision of the Telecommunications Act provides for specific contractual arrangements for telecommunications, thereby facilitating further switching between providers. Contracts of indefinite duration, as well as contracts with a definite duration prolonged after automatic renewal, can always be terminated with a month's notice.

Consumer complaints

In order to facilitate the handling of consumer complaints about switching problems and other matters, Internet service providers have been urged to voluntarily affiliate with the dispute committee for electronic communications. OPTA has also launched specific actions to remind VoIP telephony providers of their legal obligations.

The joint consumer information portal of the regulatory, competition and consumer authorities has made available a special online complaint form about telemarketing and the abuse of premium rate numbers.

Emergency services (112)

On 9 October 2008 the Court declared that the Netherlands had not fulfilled its obligations under the Universal Service Directive by not having ensured that, to the extent technically feasible, mobile caller location information is made available for mobile calls to the emergency number 112. The Dutch authorities claim that this information will be made available by early 2009 to the centralised 112 exchange of the national police services, which would be able to process the calls.

Must-carry

In December 2008 the new Media Act was adopted. While the earlier must-carry rules will remain applicable to analogue broadcasting transmission, new provisions applicable to digital broadcasting will further reduce the scope of the must-carry obligations applying to the public service broadcasters.

Data protection

In March 2008, OPTA published new policy rules for enforcement of the spamming prohibition. OPTA imposed several high fines on spam distributors (up to €500 000). The NRA is also investigating options to increase Internet security by enforcing other provisions of the Telecommunications Act.

The prohibition on sending unsolicited communications to natural persons was further extended by law and has been made applicable to legal persons. Furthermore, for calls made by telemarketers a formal "don’t call me" register was introduced by law, giving consumers the opportunity to register for no further telephone contacts. Telemarketers are obliged to consult this register.

By December 2008, the Netherlands had not yet communicated measures for transposing the Data Retention Directive. Infringement proceedings were ongoing.