judgment

DISTRICT COURT THE HAGUE *(RECHTBANK DEN HAAG)*

Trade team

Judgment of 29 January 2014

in the case under case/roll No.: C/09/434154 / HA ZA 13-7 of:

the company with limited liability

UPC NEDERLAND B.V. (hereinafter referred to as: UPC),

based in Amsterdam,

petitioner,

trial solicitor: W.H. van Baren of Amsterdam,

barrister: P. Glazener of Amsterdam,

and

as party joining the side of UPC:

the company with limited liability

ZEELANDNET B.V. (herinafter also referred to as: Zeelandnet),

based in Kamperland,

trial solicitor: C.B.M. Scholten van Aschat of Amsterdam,

barrister: A.R. Bosman and E. Oude Elferink of Utrecht,

AGAINST

the legal person under public law

THE STATE OF THE NETHERLANDS (Ministries of Economic Affairs and of Education, Culture and Science) (hereinafter also referred to as: the State),

residing in The Hague (*Den Haag*),

defendant,

barrister: B.J. Drijber of The Hague (*Den Haag*),

and as Party joining the side of the State:
the company with limited liability
TELE2 NEDERLAND B.V. (hereinafter also referred to as: Tele2),
based in Diemen,
trial solicitor: H. Lebbing of Amsterdam,
barristers: P. Burger and R.D. Chavannes of Amsterdam,

AND

in the case with case/roll No. C/09/434179 / HA ZA 13-10 of:

the company with limited liability
ZIGGO B.V. (hereinafter also referred to as Ziggo),
based in Utrecht,
Petitioner,
trial solicitor: D. Knottenbelt of Rotterdam,
barristers: W. Knibbeler, N. Lorjé and A.A.J. Pliego Selie of Rotterdam,

AND

as party joining the side of Ziggo:
The company with limited liability
ZEELANDNET B.V.,
based in Kamperland,
trial solicitor: C.B.M. Scholten van Aschat of Amsterdam,
barristers: A.R. Bosman and E. Oude Elferink of Utrecht,

AGAINST

the legal person under public law
THE STATE OF THE NETHERLANDS (Ministries of Economic Affairs and of Education, Culture and Science) (hereinafter also referred to as: the State),

residing in The Hague (*Den Haag*),

defendant,

barrister: B.J. Drijber of The Hague (*Den Haag*),

and

as Party joining the side of the State:

the company with limited liability

TELE2 NEDERLAND B.V. (hereinafter also referred to as: Tele2),

based in Diemen,

trial solicitor: H. Lebbing of Amsterdam,

barristers: P. Burger and R.D. Chavannes of Amsterdam.

UPC, Ziggo and Zeelandnet will hereinafter jointly also be referred to as 'the cable operators'.

1 The proceedings

1.1. The course of the proceedings under No. C09/434154 appears from:

- the writ by UPC
- the State's statement of defence;
- this court's judgment in the special inquiry of 27 March 2013 on the requests made to join the case on the side of one of the Parties;
- the acts of Zeelandnet and Tele2 of 24 April 2013;
- the acts in reply of UPC (with annexes) and of the State of 3 July 2013;
- the letter with annex from UPC of 13 November 2013;
- the minutes of the court hearing of 28 November 2013;
- the reaction from Tele2 on the minutes of 20 December 2013. This reaction will be attached to the minutes and be regarded as complementary to these minutes.

1.2. The course of the proceedings under No. C09/434179 appears from:

- the writ by Ziggo with annex;
- the counter-plea of the State

- this court's judgment in the special inquiry of 27 March 2013 on the requests made to join the case on the side of one of the Parties;
- the acts of Zeelandnet and Tele2 of 24 April 2013;
- the acts in reply of Ziggo (with annex) and of the State of 3 July 2013;
- the minutes of the court hearing of 28 November 2013;
- the reaction from Tele2 and Ziggo on the minutes of 20 December 2013. These reactions will be attached to the minutes and be regarded as complementary to these minutes.

1.3. At the court hearing of 28 November 2013, these cases were treated jointly and the judgment in the two cases was scheduled for today. This judgment applies to both cases.

2 The facts and the applicable Law

Analogue television – the parties' interest

2.1. The cable operators distribute through their own cable systems and against remuneration, packages of radio and television channels to subscribers. An analogue signal is transmitted through cable. UPC and Ziggo are the largest cable operators in the Netherlands. In addition, a number of smaller cable operators are active, often on a purely regional basis, including Zeelandnet.

2.2. Analogue television can only be offered through cable systems and – in a geographical area which is limited in scope due to the limited roll out – through fibre optic cable systems.

2.3. A significant part of the consumers is still interested in analogue television.

2.4. Tele2 is a major telecom provider, active in various countries. Since 1997, Tele2 is active on the Dutch market. Tele2 provides inter alia digital radio and television services to customers through its own DSL network (IP TV). Tele2 would also like to offer to its customers an analogue package of television channels, but it cannot do this because it does not have its own cable system.

European Law framework

2.5. The European Union has established regulations for electronic communications. The new regulatory framework for electronic communications (abbreviated as: NRF) consists of five harmonization directives:

1. Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ L 108, p. 33, hereinafter referred to as Framework Directive). Article 1 para 3 of the Framework Directive stipulates that,

"This Directive as well as the Specific Directives are without prejudice to measures taken at Community or national level, in compliance with Community law, to pursue general interest objectives, in particular relating to content regulation and audio-visual policy.";

2. Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (OJ L 108, p. 7, hereinafter referred to as Access Directive);

3. Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (OJ L 108, p. 21, hereinafter referred to as Authorisation Directive);

4. Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (OJ L 108, p. 51, hereinafter referred to as Universal Service Directive). Article 31 Universal Service Directive currently stipulates,

"'Must carry' obligations

1.Member States may impose reasonable 'must carry' obligations, for the transmission of specified radio and television broadcast channels and complementary services, particularly accessibility services to enable appropriate access for disabled end-users, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcast channels to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcast channels. Such obligations shall only be imposed where they are necessary to meet general interest objectives as clearly defined by each Member State and shall be proportionate and transparent.

The obligations referred to in the first subparagraph shall be reviewed by the Member States at the latest within one year of 25 May 2011, except where Member States have carried out such a review within the previous two years.

Member States shall review 'must carry' obligations on a regular basis.";

2. Neither paragraph 1 of this Article nor Article 3(2) of Directive 2002/19/EC (Access Directive) shall prejudice the ability of Member States to determine appropriate remuneration, if any, in respect of measures taken in accordance with this Article while ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks. Where remuneration is provided for, Member States shall ensure that it is applied in a proportionate and transparent manner.

5. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ L 201/37, hereinafter referred to as the Privacy Directive).

The Directives under 1 to 3 above were amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ L 337, p 37). The Directives under 4 and 5 above were amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ L 337, p 11).

2.6 The NRF - in short - aims to establish a harmonized framework for the regulation of electronic communications services and networks . The Framework Directive provides a comprehensive procedure for regulating such networks and services . The procedure involves *inter alia* that an independent national supervisory authority, following an extensive process of market definition and analysis, may impose ex ante regulation in markets where effective and sustainable competition is lacking. Thus it is contemplated that ex ante sector specific rules are increasingly scaled back as competition in the markets develops and that ultimately, electronic communications will be governed entirely by competition law. Considering that in the past years, the markets for electronic communications have shown strong competitive dynamics, it is essential that ex ante regulatory obligations should only be imposed where there is no effective and sustainable competition (cf. Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 [OJ L 337, p 37 , recital 5]) .

2.7. The work of the national regulatory authority (as defined in the Framework Directive and the Universal Service Directive) can be mapped out in a simplified form as follows. The abbreviation BEREC stands for Body of European Regulators for Electronic Communications.

Market analysis by OPTA	
Step 1	Identification of markets to be analysed If the market is not included in the Recommendation: test whether the market fulfils the three *criteria*
Step 2	Define the relevant market *Only after consultation Commission/BEREC*
Step 3	Determine whether the relevant market concerned is or is not effectively competitive
Step 4	Determine whether undertakings operate in this market which have significant market power
Step 5	Determine whether appropriate obligations need to be imposed on these undertaking(s)
Step 6	Imposition of appropriate obligations (remedies) *Only after consultation Commission/BEREC*

2.8. The NRF is based on Article 114 of the Treaty on the Functioning of the European Union (TFEU), published under No. 2012/C 326/01. The Articles 49 en 56 contain provisions concerning the freedom of establishment and the freedom to provide services.

2.9. The NRF has direct effect in the Dutch legal system, now that the NRF includes unconditional and sufficiently precise provisions that individuals can rely upon against the State. For example, the NRF includes concrete legal provisions concerning matters by whom and how electronic communication services can be regulated.

The Dutch situation

2.10. The Netherlands has transposed the NRF in its national law in the Telecommunications Act (Official Gazette (*Staatsblad*) 2004, 189), which entered into force on 19 May 2004 (Official Gazette (*Staatsblad*) 2004, 207. In the Explanatory Memorandum it is stated that the EU legislator opted for full harmonization (*Kamerstukken II* 2002/03, 28 851, No. 3, p. 2).

2.11. In the Netherlands, the Independent Post and Telecommunications Authority (OPTA), now the Authority for Consumers and Markets (ACM), has been designated as a national regulatory authority under the NRF.

2.12. OPTA examined the Dutch TV market on competition in December 2011. Then, OPTA saw no reason to take on the television market because it was considered sufficiently competitive. The Industry Tribunal (*College van Beroep voor het Bedrijfsleven*) confirmed this view in its judgment of 5 November 2012.

Currently contested statutory provisions, objective and history

2.13. On 1 January 2013, Articles 6.14a Media Act and 6a.21a Telecommunications Act entered into force. These Articles stipulate that,

Article 6.14a Media Act:

"1. The provider of a broadcasting network, referred to in Article 6.13, paragraph 1 makes its programme offering at wholesale level available at cost-oriented rates for resale purposes.

2. By order in Council, rules may be fixed on the level or on the determination of the rate and the other terms on which the provider of a broadcasting network, referred to in Article 6.13, paragraph 1 makes its programme offerings available for resale."

Article 6a.21a Telecommunications Act:

"1. Pursuant to Article 6a.21, paragraph 3, the Authority for Consumers and Markets may also impose access obligations within the meaning of Articles 6a.6 to 6a.10 on an undertaking that has significant market power as regards the provision of programme services.

2. The Authority for Consumers and Markets shall impose, pursuant to Article 6a.21, paragraph 3, the obligation on an undertaking that has significant market power as regards the provision of programme services to provide programme services and associated facilities at wholesale level for resale to end-users at a rate determined by the Authority for Consumers and Markets, unless the limited extent of the broadcasting network or the limited potential demand for resale does not justify this"

2.14. From the history of the legislative process it appears that these provisions aim to "break open" cable, i.e. to require that cable operators make available the channel package which they offer

to their subscribers, for resale purposes, to third parties, in order to promote competition on their cable systems and give consumers more choice (*Kamerstukken II*, 2010-11, 32 549, No. 18 and *Kamerstukken II*, 2010-11, 32 549, No. 28).

2.15. The statutory obligation to offer the analogue cable package for resale purposes is also referred to as Wholesale Line Rental-Cable (WLR-C).

2.16. During the parliamentary debate on these provisions, the Minister of Economic Affairs, Agriculture and Innovation repeatedly expressed doubts about the compatibility of WLR-C with European law. This concerned in particular Article 6.14a Media Act (see, for example, *Kamerstukken I*, 2011-12, 32 549, E. p. 16-17).

Infraction procedure

2.17. Meanwhile, the European Commission launched a so-called infraction procedure against the State for acting in breach of European law. To this end, the Commission has sent a formal notice to the State. Its content is confidential. The minutes of parliamentary proceedings stipulate, however, the following (*Kamerstukken II*, 2012-13, 32 549, No. 49):

"The notice relates to access to cable as it is governed by Article 6a.21a of the Telecommunications Act and Article 6.14a of the Media Act 2008. The Commission considers that the European telecommunications framework applies to these provisions and that both provisions are contrary to that framework.

As I (the Minister of Economic Affairs , Agriculture and Innovation , *Distr.Crt.*) already indicated in the discussions on the Implementation Act in the Senate it is possible to think differently about whether the European framework applies in this case. Both the provision in the Telecommunications Act and the provision in the Media Act 2008 concern a resale obligation with respect to programme services . The telecommunications framework applies to services consisting wholly or mainly in electronic transport. In the programme service here at issue, it concerns a service which exists in both the electronic transport as well as the content (the programmes) delivered via this transport.

Unlike the Dutch Government, the European Commission comes to the conclusion that the European regulatory framework for telecommunications applies, now that both statutory provisions, at least partially, control electronic transport (transmission).

During the discussions in the Senate , I indicated that the Dutch government will defend both provisions."

2.18. The infraction procedure has for some time been deterred pending the judgment of the Court of Justice of the European Union (ECJ) in the case of UPC / Hilversum (see below, 2.19). The infraction finds currently in the final stage of the administrative phase, which precedes any litigation procedure before the ECJ.

Case UPC/the municipality of Hilversum

2.19. In the UPC / municipality of Hilversum case the parties disagree as to whether UPC is free to unilaterally raise its tariff in deviation of the agreement concluded on the issue with the municipality of Hilversum (under which UPC guaranteed that it would offer a basic package of radio and television programmes via cable and would annually adapt its rate, in principle, only to the consumer price index). In its judgment of 7 November 2013 under No. C-518/11, on questions referred to it by the Amsterdam Court of Appeal, the ECJ, in substantial accordance with the Opinion of the Advocate-General, considered and decided the following:

"35 By question 1, the national court asks, in essence, whether Article 2(c) of the Framework Directive must be interpreted as meaning that a service consisting in the supply of a basic cable package, 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 both of that directive and of the Specific Directives constituting the NRF applicable to electronic communications services.

36 In this connection, it must be observed that, under Article 2(a) and (c) of the Framework Directive, 'electronic communications service' means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but excluding services providing, or exercising editorial control over, content transmitted using electronic communications networks, including cable television networks, and services. That article of the Framework Directive also specifies that the concept of 'electronic communications service' does not include information society

services, as defined in Article 1 of Directive 98/34, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.

37 That definition of electronic communications services was reproduced in equivalent terms in Article 1(3) of the Competition Directive.

38 As is apparent from recital 5 in the preamble to the Framework Directive, the convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework and in the establishment of that framework, it is necessary to separate the regulation of transmission from the regulation of content. According to that same recital, the NRF does not cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at European Union or national level in respect of such services, in compliance with European Union law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism.

39 Likewise, recital 7 in the preamble to the Competition Directive, which states that the terms 'electronic communications services' and 'electronic communications networks' have been used in preference to 'telecommunications services' and 'telecommunications networks' in order, specifically, to take account of the convergence phenomenon, indicates that those definitions bring together all electronic communications services and/or networks which are concerned with the conveyance of signals by wire, radio, optical or other electromagnetic means, in order to cover fixed, wireless, cable television or satellite networks. That same recital states that the transmission and broadcasting of radio and television programmes should be recognised as an electronic communication service.

40 Furthermore, Article 1(1)(a)(i) of the Audiovisual Media Services Directive states that an 'audiovisual media service' means a service as defined by Articles 56 TFEU and 57 TFEU which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of the Framework Directive.

41 It follows from the foregoing that, as the Advocate General observed in point 33 of his Opinion, the relevant directives, in particular the Framework Directive, the Competition Directive and the Audiovisual Media Services Directive, make a clear distinction between the production of content, which involves editorial responsibility, and the transmission of content, which does not entail any editorial responsibility. Content and transmission are covered by different measures which pursue their own specific objectives, without referring to customers of the services supplied or to the structure of the transmission costs charged to them.

42 In the present case, it is apparent from the order for reference and the written and oral submissions made before the Court that UPC's principal business is the transmission of radio and television programmes via cable to its subscriber customers. UPC confirmed at the hearing before the Court that it does not produce those programmes itself and that it does not exercise any editorial responsibility over their content.

43 Although UPC's customers take out a subscription for the purposes of gaining access to the basic cable package offered by that company, that does not mean that UPC's business, which consists in broadcasting programmes produced by the content editors (in this case radio and television channels) by transmitting those programmes to the connection point of its cable network in its subscribers' homes, must be excluded from the definition of 'electronic communications service' within the meaning of Article 2(c) of the Framework Directive and, consequently, from the scope of the NRF.

44 On the contrary, it follows from the observations made in paragraphs 36 to 41 above that the provision of a basic cable package falls within the definition of electronic communications service and, therefore, the substantive scope of the NRF, in so far as that service includes the conveyance of signals on the cable network.

45 Any other interpretation would considerably reduce the scope of the NRF, undermine the effectiveness of its provisions and therefore compromise the achievement of the objectives pursued by that framework. Since the purpose of the NRF, as is apparent from recital 5 in the preamble to Directive 2009/140, is to establish a genuine internal market for electronic communications, in which those communications must, eventually, be governed solely by competition law, the exclusion of the activities of an undertaking such as UPC from its scope, on the pretext that it does not restrict itself to conveying signals, would deprive the NRF of all meaning.

46 On the same grounds, the fact that the transmission costs charged to subscribers incorporate the payments made to broadcasting channels and the royalties paid to copyright collecting societies in connection with the transmission of programme content cannot preclude the service supplied by UPC from being characterised as an 'electronic communications service' for the purposes of the NRF.

47 Having regard to all of those considerations, the answer to question 1 is that Article 2(c) of the Framework Directive must be interpreted as meaning that a service consisting in the supply of a basic cable package, 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 both of that directive and of the specific directives constituting the NRF applicable to electronic communications services, in so far as that service entails primarily the transmission of television content on the cable distribution network to the receiving terminal of the final consumer."

3 The dispute

3.1. UPC, Ziggo and Zeelandnet claim, summarized: to the extent possible by a judgment which is immediately enforceable, to:

I. declare that Article 6.14a Media Act and Article 6a.21a Telecommunications Act violate Articles 6, 7, 7a, 7a, 8, 14, 15 and 16 of the Framework Directive, Article 8, paragraph 4 of the Access Directive and Articles 49 (freedom of establishment) and 56 (freedom to provide services) TFEU and are therefore not binding;

II. sentence that the State pays the costs of the proceedings.

3.2. UPC, Ziggo and Zeelandnet maintain for this purpose that the contested articles of law are violate the NRF and primary Community law, and that no justification exists for this.

3.3. The State and Tele2 conduct a reasoned defence.

3.4. The allegations of the parties will be discussed below, to the extent relevant.

4 Assessment

Introduction

4.1. The court finds that under Article 94 of the Constitution the court is entitled to review formal legislation under treaties and regulations which have direct effect in The Netherlands. If Dutch law is inconsistent therewith , this provides in principle unlawful legislation , a wrongful act committed by the legislator . In such a case, the relevant legislation under settled case law of the High Court (*Hoge Raad*) may be rendered ineffective by the court if so demanded (in the dispute). In this case , the cable operators intend to have declared ineffective the provisions of Article 6.14a Media Act and Article 6a.21a Telecommunications (hereinafter : The contested provisions), arguing that these provisions are contrary to secondary Community law (NRF) and to primary Community law (TFEU). They also argue that they have an interest thereby, now that they will have to make potentially large cost to make resale possible and furthermore that they will suffer customers and market share losses by the resale obligation to third parties who will resell their (the cable operators') packages to their (the cable operators') customers. This is expected to also affect the position of the cable operators in the markets for telephony and internet services, now that cable operators can only sell those services to customers who also purchase radio and television services.

4.2. The State and Tele2 argue, in short, that the contested provisions are not covered by the NRF and also that these do not violate the NRF, and further that there is no question of breach of primary Community law, as well as that there is a justification for the existence of the particular provisions.

Violation of NRF?

4.3. The ECJ , eminently qualified and equipped to the interpretation of European legislation, has held in the UPC / municipality of Hilversum Case that the services UPC supplies consisting of the provision of a basic package through cable, for the supply of which transmission costs and an amount in respect of the payments to the broadcasters and the collective rights organizations in connection with the communication to the public of their content remitted rights are charged, are placed under the concept of "electronic communications service" and thus fall within the scope will be both of that Directive and of the specific Directives forming

the NRF which applies to electronic communications services. Also in that case it was argued - by the municipality of Hilversum - that the services of UPC see mainly on content and that the NRF therefore did not apply , but the ECJ has rejected this on the in a substantiated argument. In the opinion of the District Court , it follows from the judgment, in particular from paragraph 44 thereof, that the services referred to fall under the NRF now that this service includes the transfer of signals from the cable television system . Now it has been shown sufficiently that in this case it concerns the same services, delivered to subscribers by cable operators, the currently contested provisions fall, in the opinion of the court, in principle, within the NRF, unless Tele2 and the State are successful in their claim based on Article 1, paragraph 3 of the Framework Directive which did not play a role in the case of UPC / municipality of Hilversum

4.4. The State and Tele2 have set the following in this regard. The contested provisions pursue specific objectives of audiovisual policy. The purpose of assessment is that consumers can choose from whom they purchase their television package. Freedom of choice should lead to competition, lower prices and better services. The law aims to ensure that the citizens can get a better and more affordable television package. That cannot be understood in any different way than as audiovisual policy. Moreover, the general interest objectives are not listed exhaustively. Therefore, the present contested provisions fall under the exception of Article 1, paragraph 3 Framework Directive.

4.5. The cable operators have challenged this argument in a motivated way.

4.6. The District Court considers that in the present case the contested provisions cannot be seen as an audiovisual policy, now that these provisions are only intended to achieve that a standard package is forcefully offered for resale. This forced resale (WLR - C) will not result in more content to choose from for the consumer. At most , consumers can purchase the same standard packages for a lower price from a competitor. It is true that the currently contested provisions insofar serve the public interest, but the State may in this respect not rely on the exception in Article 1 paragraph 3 Framework Directive. After all , with these provisions the State seeks to encourage competition on the cable, while it is the role of the European competition law framework to promote competition and serve consumer interests. Under the NRF there is no place for a separate role of the national legislator, in addition to OPTA , currently ACM. This appears especially from section 5 of the preamble to Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ L 337, p

37) , which held that the NRF is intended to gradually scale back ex ante regulation in the telecommunications sector, so that the sector will finally be fully governed by general competition law. Finally, it is important that OPTA previously did not consider intervening in the Dutch TV market and that the Industry Tribunal (*College van Beroep voor het bedrijfsleven*) confirmed this view . Given all of this, the argument based on Article 1, paragraph 3 of the Framework Directive is rejected.

Violation of NRF?

4.7. The State and Tele2 argue that, even if the currently contested provisions fall under the NRF, it does not conflict. They rely for this purpose, first, on Article 31 of the Universal Service Directive. The State and Tele2 argue that Article 6.14a Media Act builds on the "must carry" obligations (reasonable must-carry obligations, *Distr.Crt.*) in Article 6.13 of the Media Act. This statutory provision is covered by the "must carry" provision of Article 31 Universal Service Directive and is therefore permitted under the NRF. The cable operators have disputed in a motivated way that the State and Tele2 cannot rely on this provision.

4.8. With the cable operators, the Court considers that the use of this Article fails. This article provides the space to impose “must carry” obligation on operators of broadcast where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcast channels. Member States may only impose such obligations if they are necessary to meet general interest objectives as clearly defined by each Member State and they are proportionate and transparent. However, in the present case the contested provisions are at the discretion of the court no "must carry" obligation but rather a "must resell 'obligation. This goes beyond merely securing the receipt of the intended programme package by the end users. For this purpose, there is no basis in Article 31 Universal Service Directive. Furthermore, the aim of the currently contested provisions is to bring about further competition on the cable in order to obtain in that way, in the interest of consumers, lower prices and better service. Promoting competition and consumer interests are - as already discussed - goals which EU competition law itself pursues and guarantees. From the NRF it follows that the national legislator on this point has no powers anymore. Finally, the provisions do not comply with the requirement of Article 31 that the obligation must be in the general interest , since it only pursues a purely economic interest. Given the scope of the NRF a purely

economic interest cannot justify an exception to this rule (see also in this line the ECJ cases of 5 June 1997, SETTG , C-398/95 , part 23; ECJ 4 June 2002, Commission / Portugal , C-367/98 , part 52; ECJ 2 June 2005, Commission / Italy, C-174/04 , ECJ part 37 and 8 July 2010 , Commission / Portugal , C 171 / 08 , section 71) .

4.9. The State and Tele2 rely on the fact that the contested provisions do not give competitors physically access the cable, but only the administrative right to resell the analogue standard package. This requirement is far less than the obligations imposed by the ACM on KPN the framework of its regular market analysis decisions to give its competitors physical access to its copper network or its fibre optic networks. Thus, there is no violation of the NRF. The cable operators have contested this argument. Cable operat4ors.

4.10. From the preceding considerations it follows that this argument of the State and Tele2 also fails, now that within European legal framework there is no place for the imposition of obligations to promote competition.

4.11. The court therefore comes to the conclusion that currently contested provisions conflict with the NRF. As the government has argued during the discussions in the parliament, the obligations imposed by the contested provisions should be imposed by the national regulatory authority as defined in the NRF, but only after an analysis of the relevant market conducted in accordance with the applicable regulations (compare the above listed under 2.7, simplified overview), and not by the national legislator. Under the current contested provisions, the ACM cannot decide whether imposing the obligations is appropriate; this would also be contrary to the provisions of the NRF (see for example the cases ECJ 3 December 2009, Commission / Germany, C-424/07, section 74; CJEU 11 March 2010, Telekomunikacja Polska, C-522/08, in particular the parts 21-27, and CJEU 5 May 2011, Deutsche Telekom, C 543/09, section 46).

Which provisions are to be declared non-binding?

4.12. The cable operators did not indicate on which basis Article 6a.21a, paragraph 1 of the Telecommunications Act should be declared as rendered ineffective. To this extent the claim of the cable operators will be rejected. The remaining currently contested provisions will be rendered ineffective as they violate the NRF.

Violation of primary Community law?

4.13. In this situation, the cable operators have no separate interest in an answer to the question whether the currently contested provisions are in conflict with the TFEU. Therefore there is no need to further discuss this point here.

Costs

4.14. The State and Tele2, as unsuccessful parties, are sentenced to bear the costs of the proceedings

The costs on the part of UPC, Ziggo and Zeelandnet are estimated at:

	UPC	Ziggo	Zeelandnet
- writ	€ 76,17	€ 76,17	€ 76,17
- registry fee	€ 589	€ 589	€ 575
- attorney's salary (2x tariff II)	€ 904	€ 904	€ 904
- total	€ 1.569,17	€ 1.569,17	€ 1.479

4.15. On the application of UPC it is also provided that, if the court fees are not paid within seven days after the judgment, legal interest will be due from the eighth day.

5. The decision

The District Court:

in the case under No. C09/434154:

5.1. declares that Article 6.14a Media Act and paragraph 2 of Article 6a.21a Telecommunications violate the NRF and therefore are not binding;

5.2. sentences the State and Tele2 in the costs of the proceedings, on the part of UPC and Zeelandnet, to date, successively and respectively, budgeted at € 1,569.17 and € 1479, -;

5.3. provides that if the court costs of UPC are not paid to her within seven days after the judgment the legal interest rate will be applied as from the eighth day;

5.4. declares the requirements of 5.2 and 5.3 enforceable with immediate effect;

5.5. rejects what has been claimed in addition or in a different way.

in the case under No. C/09/434179:

5.6. declares that Article 6.14a Media Act and paragraph 2 of Article 6a.21a Telecommunications violate the NRF and therefore are not binding;

5.7. sentences the State and Tele2 in the costs of the proceedings, on the part of Ziggo and Zeelandnet, to date, successively and respectively, budgeted at € 1,569.17 and € 1479,--;

5.8. declares the requirements of 5.2 and 5.3 enforceable with immediate effect;

5.9. rejects what has been claimed in addition or in a different way.

This judgment was delivered by H.F.M. Hofhuis, M.J. Alt-van Endt and M.E. Honée and publicly pronounced on 29 January 2014.