National Report Netherlands[1]

PART I: REGULATORY PROCEEDINGS

A. WHICH AUTHORITIES ARE RESPONSIBLE FOR TELECOMMUNICATIONS REGULATION?

OPTA

The Dutch independent regulatory authority was established in August 1997 by the enactment of the *Wet Onafhankelijke Post- en telecommunicatie Autoriteit*[2](the 'OPTA-Act'). The regulatory body is referred to as OPTA. OPTA is an independent *College*, consisting of three members, headed by a President, currently Mr Arnbak.

OPTA has the competence to act if there is an explicit legal basis in the OPTA-Act and the Telecommunications Act ("TA 1998")[3]. As far as telecommunications is concerned, the tasks of OPTA can be divided in three main categories:[4]

(i) the management and the allocations of numbers;

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1 This study is based on two previous studies: A.T. Ottow, 'Het verschil tussen duivenhokken en telecommunicatie. De bestuurs(proces)rechtelijke obstakels bij het toezicht op de telecommunicatiemarkt.', In: prof. mr. B.M.J. van de Meulen en mr A.T. Ottow, *'Toezicht op markten'*, VAR-reeks 130, Den Haag: Boom Juridische Uitgevers, 2003, and a study on the case law of the Court of Rotterdam regarding the application of the TA, written by the Institute of Information Law (IvIR) of the University of Amsterdam on the assignment of OPTA, to be published in November 2003.

2 Act of 5 July 1997, *Stb.* 1998,610.

3 Act of 19 October 1998, *Stb.* 1998, 320.

4 For an overview of the activities of OPTA reference can be made to: A.P.W. Duijkersloot & F.C.M.A. Michiels, 'Taken en bevoegdheden van onafhankelijke toezichthouders: mogelijkheden en beperkingen.', in: De Ru e.a. (2000), p. 23-24 en P,J. Slot en Ch. R.A. Swaak (eindred.), *'De Nederlandse Mededingingswet in perspectief'*, Deventer: Kluwer 2000, p. 184-192. For an overiew of the decisions of OPTA during the first three years of its existence: Kroes & Visser, '3 Jaar toezicht op de telecommunicatiemarkt; een vette kluif', *Mediaforum* 2000-9, p. 272 e.v.

(ii) the registering of telecommunications companies offering infrastrcuture or services to the public, and;

(iii) taking decisions on registrations, assigments (SMP), control of tariffs and disputes.

This paper will focus on the role of OPTA regarding dispute settlement. It may give decisions in disputes relating to: site sharing (art. 3.11 TA), installation of infrastructure (art. 5.3 (2) TA), sharing of facilities (such as duct sharing) (art. 5.10 TA), interconnection (art. 6.3 TA), special access (art. 6.9 (2) TA), leased lines (art. 7.7 TA), conditional access (art. 8.6 TA) and access to cable TV infrastructure (art. 8.7 TA).

Following the implementation of the new European communication directives, new legislation is pending before Parliament to revise the TA 1998 ("the new TA")[5]. It has not been in place before 24 July 2003 (the implementation date). In the draft TA 2003, the same structure will be followed as far as the competence of OPTA is concerned. However, OPTA will have a more general authority to solve disputes (see chapter 12 of the new TA).

OPTA has no general competence to regulate the Dutch telecommunications market or to act on every complaint on unfair competition related to this market. Nor does it have the authority to perform a general check on the dominant position of the former monopoly operator KPN, for example, in order to ensure a level playing field for new entrants into the telecommunications market. For example, OPTA cannot act in a case related to the Internet, as the TA 1998 does not regulate it. Also, OPTA can only resolve disputes in cases where the dispute falls within the scope of issues explicitly stated in the TA 1998.

Dutch Competition Authority ('NMa')

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[5] Wijziging de Telecommunicatiewet en enkele andere wetten in verband met de implementatie van een nieuw Europees geharmoniseerd regelgevingskader voor elektronische communicatienetwerken- en diensten en de nieuwe dienstenrichtlijn van de Commissie van de Europese Gemeenschappen, *Kamerstukken II*, 28 851, nr. 1-21 (hereafter called the new TA).

The telecommunications regulator OPTA has no general authority to act in cases of unfair competition, without an explicit basis in the TA. Neither can it act on under the General Competition Act ("CA"). It may use general competition law to interpret rules from the TA,[6] but it has no concurrent powers with the NMa. The NMa exclusively applies the CA. It has the authority to regulate the telecommunications sector in cases where there is an infringement of the competition rules laid down in the CA. OPTA and the NMa have overlapping duties in certain circumstances, e.g. where there is a price squeeze situation - OPTA would act under the TA,[7] whereas the NMa would act under the CA (art. 24 CA: abuse of a dominant position).[8] It is intended that OPTA will be integrated within the NMa in the year 2005 and become a separate "Chamber" of it.[9] This can only be done once the NMa is given the same independent status that OPTA presently enjoys. The legalislative proposal[10] to achieve this has yet to go through the Senate, and until it does it remains uncertain whether the two authorities will actually merge. The government is currently investigating the NMa's proposed independent status and while this investigation is in progress the legislative process is 'on hold'.

On the basis of article 18.3, sub 3 TA, OPTA is obliged to consult the NMa and ask for its advice before it uses powers which overlap with the NMa (in this context, Article 24 CA (the abuse of a dominant position)). In the so called 'Cooperation Protocol' (*Samenwerkingsprotocol*),[11] OPTA and the NMa have formulated rules to coordinate their overlapping authority (to avoid forum shopping), and have formulated rules for the

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6 See for the application of general competition law by OPTA: A.T. Ottow & A.S.M.L. Prompers, 'De rol van het mededingingsrecht in de telecommunicatiesector', *Mediaforum* 2002-1, p. 7-14 en P. Kuipers & G-J. Zwenne, 'Marktafbakening ten behoeve van *ex ante*-regulering in de e-communicatiesector', *Mediaforum* 2003-1, p. 2-9.

7 Articles 35 and 35 ONP Decree on Telephony and Leased Lines.

8 Policy rules Price Squeeze of OPTA and NMa of 28 February 2001, *Stcrt*. 2001, nr. 44, p. 7.

9 See about the Chamber-construction: A.T. Ottow & I.M. Schong, 'De sectorspecifieke toezichthouders en het kamermodel NMa', *Markt & Mededinging,* 2002/nr. 4, p. 128 - 134.

10 Wijziging van de Mededingingswet in verband met het omvormen van het bestuursorgaan van de Nederlandse mededingingsautoriteit tot zelfstandig bestuursorgaan (gewijzigd voorstel van wet d.d. 5 februari 2002), *Kamerstukken I* 2001/02, 27 639, nr. 228.

11 Samenwerkingsprotocol OPTA/NMa *Stcrt.* 2000 249.

application of article 18.3, sub 3 TA. As a result of the Cooperation Protocol, the authority of OPTA prevails in cases where it has powers under the TA 1998. If not, the NMa may decide to take up the matter. In practice, the NMa will only act in exceptional cases.

The Courts

OPTA's decisions can be reviewed by an internal administrative appeal (the so-called *bezwaarschriftprocedure*) before OPTA itself. Only if this obligatory phase has been followed, can a party to the dispute bring an appeal before the specialised administrative Court of Appeal (*Rechtbank*) in Rotterdam. The court is exclusively competent in cases based on the TA 1998. A judgement of the court can be appealed to the highest administrative court, the *College van Beroep voor het Bedrijfsleven* ('CBB'). The Court of Rotterdam and the CBB are, together, exclusively competent to review decisions of the NMa acting under the CA.

B. GENERAL ASSESSMENT OF THE ROLE AND COMPETENCES OF THE NRA IN THE NATIONAL REGULATORY REGIME

OPTA is a so called 'zelfstandig bestuursorgaan' ("independent administrative body"), which operates indepently from the Ministry involved (The Ministry of Economic Affairs) and Parliament. Although, from an organisational point of view, OPTA falls within the scope of business of the Minister of Economic Affairs, the Minister has only limited powers to intevene with its activities. Mainly, the Minister can set the budget of OPTA and give only *general* instructions under certain circumstances. So far as known, the Minister has never done so.

However, with reference to the administrative law principle of legality (*het legaliteitsbeginsel*), the legislator (read the Minister of Economic Affairs, previously the Minister of Transport and Communications) has always taken the view that OPTA cannot be given too wide powers to set (policy) rules. This should be a task of the

Ministry. The Ministry takes the view that the concept of the European Directives of 'national regulatory authority' ("NRA")can also mean the Ministry involved. As the Minisrty of Economy Affairs does not control the shareholding of the State of the Netherlands (this task is executed by the Minister of Finance) it has been argued that the Minister of Economic Affairs can also be the NRA in the sense of the definition of the directives. This view has been disputed in literature on the grounds that the Minister cannot be considered as an independent authority, as required by the directives (see section C.4 in Chapter II).[12] As a result, limited policy and regulatory (in the meaning of making rules) powers were given to OPTA, which caused problems in practice. The omissions in the law had to be repaired in many cases by the legislator to include new rules in the TA, which caused enormous delays. In some cases the problems were not solved (e.g. with internet or cable infrastructure access for service providers).

Under Dutch administrative law, OPTA may set policy rules in those cases where there is a legal basis in the TA (and, OPTA is required to set the rules for the interpretation of the legal concepts used in the TA). However, it may not "regulate" the market without such an explicit basis. In some cases, the legal basis was so vague or uncertain that the court decided that OPTA did not have the authority to do so.[13]

C. THE INITIATION OF CASES

OPTA can handle disputes only on the basis of a complaint. The complainant must be able to prove that there is a *dispute*. Therefore, the complainant must give evidence that it has negotiated in good faith and that no results could be achieved. Under the new TA, this requirement will be applied more strictly, as there is a stronger obligation upon the parties to negotiate (the terms of the interconnection agreement).

In practice, OPTA relies mostly on its dispute resolution powers and does not act on its

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[12] A.T. Ottow, 'Review van het toezicht', *Computerrecht* 2003/1, p. 12-18.

[13] E.g. Vz. Rb. Rotterdam 3 juni 1999, *KG* 1999, nr. 245 and Rb. Rotterdam 26 februari 2003, *Mediaforum* 2003/4, p. 46-152, m.nt. N. van Eijk.

own initiative, nor enforces legislation on market powers. This route is only followed in exceptional cases. As OPTA describes it:

> OPTA's policy guidelines are often difficult to enforce because of its nature; policy guidelines only bind the authority that has set them up. They are not material legislation which can be enforced. OPTA has all the necessary powers and legal instruments to enforce legislation and it can also act on its own initiative as well as respond to complaints and disputes. In cases where OPTA does not feel confident about the strenght of the legislation, or where the legislation seems open to interpretation, it prefers to rely on its dispute resolution powers, which are clearer. It therefore occasionally needs disputes to provoke speedier solutions.14

The question has arisen whether OPTA has the authority to take enforcement measures outside the scope of a dispute in those cases which could fall within the scope of a dispute. Or to state it differently: whether OPTA is obliged to follow the dispute resolution route or whether it can enforce the law (e.g. special access obligations) *ex officio* outside the dispute procedures. As far as is known, OPTA has in only one case initiated a procedure *ex officio*. For that reason OPTA has been qualified as an "*ex post* dispute oriented regulator".[15] In the case *KPN vs. OPTA and Versatel and MCI*,[16] the President of the Court considered that the actions of OPTA outside the scope of the dispute procedures (concerning the enforcement of collocation tariffs) were *prima facie* acceptable. It has to be seen whether the full court will follow this position.

Under Article 5 (4) of the Access Directive (Directive 2002/19/EG), the regulator must be given the authority to initiate cases on its own initiative, relating to access and interconnection. So far OPTA has no such authority. Under the new TA, such authority

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[14] Communication from the Commission to the Council, the European Parliament, The Economic and Social Committee and the Committee of the regions, Eight Report on the Implementation of the Telecommunications Regulatory Package, COM (2002) 695 def., Annex 3.10, p. 121.

[15] Dommering e.a, '*Toezicht en regulering in de Telecommunicatiemarkt. Een analyse van sectorspecifiek en algemeen mededingingstoezicht*', Amsterdam: Universiteit van Amsterdam, (IViR), 2001, p. 84.

[16] Vz. Rb. Rotterdam 29 juli 2003 (VTETEC 03/1803-MES en VTELEC 03/1804-MES), not published.

will be introduced. In the new proposed Article 6.2 (2) TA, it is stated that OPTA may only do so if justified in the light of the objectives of Articles 8 of the Framework Directive (Directive 2002/21/EC). In the explanatory Note to the new act it is stated that OPTA may only do so in very exceptional circumstances. This seems to be too limited an implementation of the Directive.

Parties to the dispute can be telecommunications undertakings registered with OPTA (infrastructure and service providers) for interconnection. Cases include special access, MDF disputes and TV programe providers in relation to access to TV cable infrastructure. In addition, disputes about the installation of telecommunications infrastructure can be initiated before OPTA by land owners (mostly municipalities) and telecommunications companies.

Due to a judgement of the Court of Rotterdam in the *Versatel* case[17], third parties cannot intervene. They must initiate their own (interconnection) disputes.

D. HOW IS THE DISPUTE RESOLVED

During the first three years of its existence OPTA had problems in organising its procedure which it subsequently reorganised in 2001 by publishing the Procedural Rules on Disputes (the so called *Procedureregeling geschillen OPTA*[18]). There are three types of procedures:

(iv) the normal procedure;
(v) the quick procedure;
(iii) the simple procedure.

The normal procedure consists of a written defence of the responding party, a hearing, internal investigation of OPTA and finally the decision. The quick procedure is used for

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17 Rb. Rotterdam 28 februari 1998, Versatel vs. OPTA, reg. nr. VWTV 97/42S5-S1, *Mediaforum* 1998-5, Jur. nr. 28 en *Computerrecht* 1998/2, p. 89-97, m.nt. P. Burger.

18 *Stcrt*. 2001, 138.

urgent cases, where the whole procedure is done in a shorter period of time. In the simple procedure a hearing is not held. This procedure is used for those cases which are straightforward, e.g because similar cases have already been handled by OPTA. This new structure works efficiently, although OPTA should focus more on the legal and procedural aspects of the case. The procedural rules include deadlines, but in practice OPTA is not very strict in adhering to them.

Often, during new disputes, OPTA may need to set policy rules to decide on the subject matter of the case. In which case, it will suspend the dispute procedure and organise a consultation with the market. This consultation causes enormous delays in the decision making process.[19] OPTA will in that case prepare a so called consultation document and invite market parties to submit comments. In most cases a public hearing is organised by OPTA. Finally, OPTA will issue guidelines on the basis of this consultation procedure. The guidelines will be used to make a decision in the dispute.

In addition, the informal procedures should be mentioned, as a method of OPTA of dealing with a case. In the Eighth Implementation report of the European Commission, OPTA mentions:

> "Attempts are being made to find a solution outside the formal process, which can be time-consuming, and are welcomed by market players. Such solutions can be problematic as they are not based on formal decision-making."[20]

As a conclusion, one could say that the dispute procedure can be characterised as exemplifying the requirements of "due process".[21]

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[19] A.T. Ottow, 'De procedures bij OPTA: geen sinecure', *M&M* 2000/nr. 1, p. 3-10.

[20] Communication from the Commission to the Council, the European Parliament, The Economic and Social Committee and the Committee of the regions, Eight Report on the Implementation of the Telecommunications Regulatory Package, COM (2002) 695 def., Annex 3.10, p. 121.

[21] See for a more detailed analysis on the procedures: A.T. Ottow, 'Het verschil tussen duivenhokken en telecommunicatie. De bestuurs(proces)rechtelijke obstakels bij het toezicht op de telecommunicatiemarkt.', In: prof. mr. B.M.J. van de Meulen en mr A.T. Ottow, *'Toezicht op markten'*, VAR-reeks 130, Den Haag: Boom Juridische Uitgevers, 2003 , paragraph 4.3.3, p. 182-188.

For completeness sake, reference is made to the new procedure for the assignment of significant power under the new TA, as the implementation of the new EC Directives. In the draft of the new act sent to Parliament, in the article 6b, sub 1 the consulation procedure is laid down. In article 6b.2-6b.5 of the new TA, the procedure of the coordination with the European Commission and other national regulatory bodies are mentioned. These rules follow those set out in the European Directives.[22]

E. TIME FRAMES

In 2002, OPTA dealt with 87 disputes and issued 53 decisions. Most of them concerned interconnection and special access matters (54 and 11 respectively). 45 decisions were issued in interconnection disputes related to mobile services compared to 2 interconnection decisions related to fixed services. [23]

According to Article 6.3 (3) (a) TA 1998 OPTA is obliged to take a decision within **6 months** (in relation to disputes). Under the new TA 2003, this term will be shortened (as a result of the implementation Article 20 of the Framework Directive) to **4 months**.

Deadlines are in many cases not met. There is no penalty for not meeting the time frame. In theory, a party could ask the administrative court to oblige OPTA to come to a decision, but in practice – as far as known - this is never done (in relation to the decision making process of a dispute).

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22 Described in A.T. Ottow, 'Review van het toezicht', *Computerrecht* 2003-1, p. 12-18.

23 See OPTA Annual Report (2002) Annex 3.6.

According to the data available from the study performed by the Institute for Information Law (Amsterdam) dispute procedures take **on average 192 days (6 months)** (with a minimum of 52 days and a maximum of 648 days).[24]

OPTA has used the argument in the past (with some legal basis in Dutch administrative law) that the legal term can be extended in cases where parties need to deliver (on request from OPTA) information/documents. OPTA deducts this time from the overall period (the counting is suspended). However, it is questionable whether OPTA can still use this argument in the context of Article 20 of the Framework Directive.

It must be said that parties do tend to ask for extra time to submit documents and answer questions, which is causing delays. However, the delay works in favour of the incumbent, as the former monopolist is mostly favoured by any delay. In addition, one could say that OPTA is too lenient in providing parties extra time. OPTA should stick more to the formal rules and terms it laid down in the Procedural Rules for Disputes.

F. TESTS FOR DECISION-MAKING

In principle, the burden of proof is on the party initiating the dispute. However, the other party will have to submit financial data to the regulator in cases where the dispute relates to tariffs which OPTA must be able to verify. There is also a heavy burden on OPTA itself to justify its decisions by solid reasoning and evidence.[25] Some decisions of OPTA have been nullified by the Court of Rotterdam as OPTA had not - in their view - given solid evidence to build its case (e.g. not provided actual and accurate economic data).[26]

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[24] These figures relate to the period 1 August 1997 – 1 August 2003 and relate only to those disputes which have resulted in court cases.

[25] Based on articles 3:2 and 3:46 of the General Act on Administrative Law.

[26] See e.g. Vz. Rb.Rotterdam 24 december 1999, Libertel/OPTA, reg. nr. VTELEC 99/2547-SIMO, *Mediaforum* 2000-2, Jur. nr. 13, m.nt. E. Loozen & K. Mortelmans and Vz. Rb. Rotterdam 29 november 2002, O2 e.a. vs OPTA, reg. nr.: VTELEC 02/2675 RIP, www.rechtspraak.nl. (LJN-nr. AF1538).

OPTA has not enough power to obtain data from the parties, which might cause the lack of information. In the new TA this right of OPTA will be extended.

There are no specific rules available on the use of experts or witnesses.

G. THE TREATMENT OF BUSINESS SECRETS

The treatment of business secrets forms an important obstacle in dispute resolution cases. There are no special rules in the TA 1998 in relation to the treatment of business secrets (with one exception) and no special case law available (there are only some technical cases relating to the submission of files to the courts by OPTA). Therefore, it depends on OPTA's policy which is at its own discretion. OPTA's policy is not transparent. In general, one could say that OPTA is rather lenient in qualifying information as 'confidential'. Compared to, for example, the way OFTEL publishes information, it follows a very conservative position in favour of the incumbent (only very limited financial information is made public). However, OPTA is bound by the general rules of the '*Wet Openbaarheid van Bestuur*' (Act on the transparency of government).

The basic principles in this act state that everything must be made public, unless the information can be qualified as a business secret. Three recent interesting court cases can be mentioned regarding the publication of information and business secrets in telecommunications matters. In the case of *KPN vs. OPTA and Nera*[27] KPN tried via a court action on the basis of the Act on the transparancy of government to get hold of a (soft) copy of the cost calculation model, developed by Nera on comission of OPTA. KPN argued that it could not verify the decisions of OPTA without the full insight in the model. The court refused this request on the basis of the copyrights of Nera protecting its model. In the case *Yarosa*[28] this company argued that OPTA was prohibited from publishing on the website of OPTA a (full) decision in a dispute between Yarosa and KPN, as by publishing the desicion competitors would be given insight in the business

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[27] Afd. Bestuursrechtspraak RvS 16 juli 2003, Yarosa vs. OPTA, *Mediaforum* 2003-9, Jur. Nr. 43.

[28] Rb. Den Haag 2 juli 2003, KPN vs. OPTA en Nera, *Mediaforum* 2003-9, Jur. Nr. 39.

strategy of Yarosa and Yarosa would lose its first mover advantage, as the decision included a new service developed by Yarosa. The court did not come to a judgement on the material arguments of the case, as it concluded that OPTA had refused the request from Yarosa on the wrong formal grounds. Another interesting (civil) case is the case of *KPN vs. OPTA*[29], where KPN argued that OPTA was committing a tort by publishing comparative tariff data on its website. KPN argued that publishing such data did not fall within the legal tasks of OPTA and therefore OPTA did not have the authority to do so. The court rejected this argument by considering that an independent regulatory body, such as OPTA, have public resposabilities, which require transparancy of their decisions and actions.

In most circumstances the complainant is placed in an adverse position, insofar as much material remains behind the curtain (qualified as business secret from the other party). OPTA itself, in some cases lacked the required information from the parties and in many cases tariffs are not verifiable. As a consequence, OPTA has once described the lack of information has the 'black box'. In this context it should be mentioned that not all decisions of OPTA are published. Although disputable, OPTA takes (appararently) the view that it is to the discretion of OPTA to decide which decisions are published. OPTA publishes many (but not all) decisions on its website. Since this summer pending cases can be followed through a register on the website of OPTA.

H. INTERIM MEASURES

Article 6.3 (3) (b) TA 1998 confers on OPTA the power to grant interim measures. From 87 filed disputes in 2002, only 2 interim decisions were issued by OPTA (in relation to disputes).[30] So far, OPTA has only issued about 10 interim decisions.[31] The total time of this procedure varies from 1 month to 1 year.

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29 Rb. Den Haag 2 juli 2003, KPN vs. OPTA, *Mediaforum* 2003-9, Jur. Nr. 40.

30 See OPTA *Annual Report* (2002) Annex .3.6.

31 This figure has been calculated on the basis of the information published by OPTA on its website (www.opta.nl). OPTA has not published an official figure regarding interim measures. As OPTA is not publishing all decisions on its website, it is not known whether more interim decisions are taken.

1. Tests to obtain interim measures

Tests for interim measures are unclear and depending on the specific circumstances of the cases. Financial factors and also the possibility of not being able to launch services have been taken into account by OPTA. OPTA did not publish guidelines to make its policy on interim measures transparent.

It is also not clear what kind of evidence needs to be produced. It is at least necessary to provide initial evidence of the (abusive) behaviour of the other party and the urgency of the matter. OPTA looks at these matters in a largely informal way. Cases may also be too complex to decide upon in an interim decision – if more information/investigation is needed, OPTA will refuse to grant such measures.

In general, interim measures will only be given in exceptional circumstances. However, compared to the practice of the NMa, OPTA is more willing to consider such matters. Within the remit of the NMa, those measures are only available if the undertaking concerned is almost bankrupt due to the (abusive) behaviour of a market party.

2. The effect of interim measures

Suspension could be the case, depending on the decision of OPTA (e.g. an obligation on KPN Telecom not to launch certain services). OPTA can also impose all sorts of obligations on parties (e.g. to launch certain services, to set interim tariffs, etc…). However, as to what measures OPTA may take in the interim, has been the subject of dispute. There is some case law suggesting that OPTA's authority to take measures in disputes is limited, as the TA 1998 does not specify the types of measures OPTA can take.[32] This issue remains unclear under the new act. It is suggested that this is contrary to Article 8 (1) Framework Directive, where it is stated that the national regulatory body must be able to take all "necessary measures".

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[32] Rb. Rotterdam 26 februari 2003, *Mediaforum* 2003/4, p. 46-152, m.nt. N. van Eijk. .

3. Review of interim measures

A party to a dispute can initiate an administrative internal revision procedure within OPTA against any formal decision it makes (also including interim measures). Pending this revision procedure, it is possible to ask for an interim measure (i.e. suspension of the interim decision of OPTA) with the President of the Court of Rotterdam. No appeal exists against this judgement. No appeal cases are known against interim measures of OPTA.

I. WHAT IS THE LEGAL STATUS OF SUCH DECISIONS?

In most cases the dispute is settled in a formal decision of OPTA, against which the parties to the dispute can initiate further legal action.

However, OPTA may also act as a sort of mediator between the parties by attempting to convince the parties to solve the dispute and conclude an agreement. OPTA may also decide to give only an informal view of the matters or to publish (policy) guidelines. No legal action can be initiated against such position of OPTA. Under administrative law, such a document is not considered as a 'decision' against which legal action can be initiated.

1. On what grounds will the NRA issue a decision? Competition law issues, interconnection disputes etc

OPTA is not competent to take decisions on the CA (it has no concurrent powers). This has lead to cases where action by OPTA should have been appropriate, but where it could not intervene. If the TA 1998 would have given a general legal basis to OPTA to act in case of 'unfair competition' by the incumbent, many cases could have been resolved. The NMa is less equipped to do so. Also in the new TA 2003 no such provision has been included. In the TA 1998 it is stated in Article 18.3 (3) that OPTA is obliged to ask the advise from the NMa in case it interpret legal notions from competition law when applying the TA 1998. In practice, OPTA asks the advice from the NMa in many cases. It lacks transparency for the parties involved. Which procedure is followed in those cases

and which documents are exchanged is unclear. So far the Court of Rotterdam has approved this process.[33]

This cooperation will be intensified under the new act, when the notion of significant market power will be equal to the notion of economic dominant position. The idea is that OPTA will become a "chamber" from the NMa in 2005. It is however not yet clear how this will work in practice.

2. Measures of OPTA

One can distinguish between different procedures: the assignment of significant market power, approval of tariffs and dispute resolution. Under Dutch Administrative Law a distinction is made between *ex ante* and *ex post* measures. The former are measures which OPTA will take as a result of a dispute, imposing on a party an instruction to behave in a certain manner. *Ex post* measures impose penalties on parties because of an infringement of the TA 1998. In both cases, OPTA may also impose a compulsory measure with a penalty (imposed on a daily basis in the case of non-compliance). To date OPTA has only imposed only once a penalty on the incumbent once.

With regard to disputes, it is unclear which kind of measures OPTA can take. In most cases, OPTA has set tariffs between parties without any difficulties, as well as imposed other obligations. In the *UPC case*, related to access to cable infrastructure, however, the court ruled that OPTA could not - in the context of a dispute - impose the obligation to set the tariff at zero.[34] In the *O2 case* the President of the Court disputed that OPTA was able to set cost orientated tariffs for mobile termination (see *case study* in Chapter I).

In the past, OPTA has used periodic penalties, which require a certain amount of money to be paid for every day of non-compliance. OPTA has however not felt encouraged to

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[33] Vz. Rb. Rotterdam 14 september 1999, LJN-nr.: AA3679.

[34] Rb. Rotterdam 26 februari 2003, *Mediaforum* 2003/4, p. 46-152, m.nt. N. van Eijk. .

use this instrument much, due to restrictive legal interpretations made by the court (which decides on the basis of criteria such as reasonableness, proportionality and whether there are sufficient grounds). In general, OPTA feels it lacks the power to enforce its decisions effectively.[35]

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[35] Communication from the Commission to the Council, the European Parliament, The Economic and Socoal Committee and the Committee of the regions, Eight Report on the Implementation of the Telecommunications Regulatory Package, COM (2002) 695 def., Annex 3.10, p. 122.

PART II: APPEALS PROCEDURE

J. APPEALS AGAINST A DECISION TAKEN BY THE NRA

1. Internal appeals

The revision procedure is obligatory. Under the new TA, if a consulation with the market and coordination at the European level has taken place, no internal revision procedure must be followed. In those cases a direct appeal to the court is possible.

The whole subject matter of the decision can fall within the scope of the internal revision procedure. Only incidently, around 10 % of the cases (and mostly after an interim decision of the President of the Court of Rotterdam), OPTA comes to another decision in the revision procedure:

Revision decisions 1997-2002	
Withdrawn by party	27
Without valid grounds	30
Partly valid, partly invalid	8
Admissable: valid grounds	3
Partly inadmissable, partly invalid grounds	4
Inadmissable	39
Not dealt with	1
Total	112

Source: OPTA, Annual report 2002

This obligatory adminstrative procedure delays procedures extensively. According to Article 7:10 of the General Administrative Law Act (the so called *Algemene Wet Bestuursrecht*) the administrative body must take its decision within 10 weeks (with one possible extension of 4 weeks). On average it took OPTA **243 days** (with a **minimum of 42 days** and a **maximum of 554 days**), more than 34 weeks, to take a decision in a

revision procedure.[36] Currently (September 2003) 170 cases are still pending before OPTA to decide upon in the revision procedure, where the term of 10 weeks has already passed.[37]

Currently there is a discussion whether to abandon the revision procedure. For the application of the CA, it has already been decided to do so (the revision procedure will no longer be an obligation but an option, although the Court may refer the case back to the NMa in case it considers this to be appropriate). This procedure is called the '*facultative bezwaarschriftprocedure'*. For OPTA this is still under discussion. Just recently, a new proposal is submitted to Parliament to abandon the internal revision procedure all together in dispute cases.[38] This would limit the length of procedures in an extensive way It has to be awaited whether this proposal is accepted by Parliament.

2. Appeals to a competition authority

This is not possible. Strictly speaking, a new complaint can be launched before the NMa, but due to the Cooperation Protocol, the NMa will not pursue the matter.

3. Appeals to Courts

As already described, appeals are to the Administrative Court of Rotterdam and the CBB. The appeal can only be based on those matters and grounds which formed part of the revision procedure before OPTA. Also just recently, it has been proposed by the Minister to Parliament to abandon the appeal procedure before the Court of Rotterdam.[39]

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[36] These figures come also from the study of the Institute for Information Law (Amsterdam), taking into account the decisions of OPTA over the period 1 August 1997 – 1 Augustus 2003. These figures do only take into account those decisions in the revision procedures which lead to a court decision.

[37] This figure is available from the case register of OPTA, published at their website www.opta.nl.

[38] *Kamerstukken II*, vergaderjaar 2003-2004, 28 851, nr. 22, Derde Nota van Wijziging, artikel 17.1 new TA.

[39] *Kamerstukken II*, vergaderjaar 2003-2004, 28 851, nr. 22, Derde Nota van Wijziging, artikel 17.1 new TA.

Consequently, after the decision of OPTA only a direct appeal to the CBB wil be possible.

K. WHAT ARE THE GROUNDS FOR APPEAL

In principle, the grounds are open. They include the infringement of the TA 1998 or general principles of (administrative) law, such as the principle of legal certainty, etc. However, arguments which have not been put forward in the internal revision procedure can no longer be brought before the court.

L. THE TIME FRAME OF APPEALS PROCEDURES

The time limit to lodge a so-called formal (higher) appeal is 6 weeks. In a later stage, the grounds for appeal can be submitted to the Court. There are no statutory limits which impose obligations on the courts to deal with an appeal within a specified period of time.

Not only the procedures with OPTA take a long period of time, also the court procedures take a long period of time. The appeals procedure in practice:[40]

- Appeal at first instance (Court of Rotterdam): **543 days on average** (minimum 103 – maximum 1163 days)
- Appeal at second instance (CBB): **344 days on average** (minimum 132 – maximum 504 days)

4. Locus Standi

Only the parties to the dispute can bring an appeal against decisions of the NRA. Against judgments of the Court of Rotterdam, not only the parties involved, but also the regulator may bring an appeal to the CBB.

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[40] These figures come from the study of the Institute of Information Law and refer only to appeal cases related to disputes.

As mentioned, third parties cannot be involved in procedures regarding disputes. They will have to initiate their own dispute. However, with regards to the interconnection tariffs of the incumbent, KPN Telecom is bound to the principle of non-discrimination, as a result of which, the outcome of the case will also be binding towards other parties in the same circumstances.

The situation is different in cases where the regulator takes a decisions in matters other than disputes (such as the decision to assign a party as having significant market power or the approval of retail tariffs from the incumbent). It took several years until the Court of Rotterdam finally accepted that competitors of KPN Telecom, the incumbent, were considered as ‘interested parties’; as result of which they had *locus standi* in those procedures and could appeal against decisions of OPTA in those matters.[41] For example, pre-select carriers could not react against a decision of OPTA to approve the retail tariffs of KPN Telecom, although it was proved that these retail tariffs led to a price squeeze situation. This position has created a delay in the development of competition in the Netherlands.

The same is now true for decisions of OPTA on SMP, against which third parties (competitors) can now – due to a court decision - act against.[42]

5. The Effect of Appeals

There is no (automatic) suspensive effect. Only the President of the Court of Rotterdam or the President of CBB may grant suspensive effect to a decision of OPTA. Suspensive effect is granted regularly and decisions of OPTA are critically judged by the (President of the) Court of Rotterdam, especially in interim procedures.

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[41] Rb. Rotterdam 7 januari 2002, Versatel vs. OPTA, zaaknr. TELEC 00/1010-SIMO, *Mediaforum* 2002-3, Jur. Nr. 9, m.nt. M.J. Geus en *Computerrecht* 2002/3, p. 182-187, m.nt. A.T. Ottow.

[42] Rb. Rotterdam 19 maart 2002 , Versatel vs. KPN (WTV 98/2144-SIMO en WTV 98/2188-SIMO), not published.

M. THE USE OF INTERIM MEASURES DURING THE APPEALS PROCEDURE

The President of the Court of Rotterdam (in the revision or appeal procedure) or the President of the CBB in higher appeal can grant interim measures. It should be noted that an interim measure against a revision decision of OPTA can only be requested from the President of the Court of Rotterdam if an appeal with the full Court is launched at the same time. The same is true for the procedure before the CBB. There are no possibilities to appeal against interim measures of the President of the Court of Rotterdam. This aspect has lead to discussion. In many telecommunications cases important issues of legal principle are decided upon in interim cases, where only the President of the Court takes the decision. As the judgement in the main procedure is only rendered a year or more later (or not at all, in case the appeal has been withdrawn by one of the parties because of lack of interest), the interim judgement is *de facto* almost definitive. On the other hand, it gives legal certainty within a short period of time.

N. THE APPEAL PROCEDURE AND DECISION-MAKING

In general one could say that the courts have the tendency to limit themselves to a rather formal review or procedural issues. In many cases, the court of Rotterdam focused on the question whether OPTA had a legal authority to act and at the same time interpretating the legal basis in the TA *restrictively*. The court did follow a formal approach and does not play an active role. As a result, in those cases it was decided that OPTA did not have the legal powers to intervene. This can be best illustrated by the decisions of the (President of the) Court of Rotterdam in the mobile terminating tariff cases of *O2* (see *case study* in Chapter I). The Court of Appeal (the CBB), however, decided in the *Dutchtone case*[43] that the articles of the TA must be interpreted in the light of the objectives of national and European telecommunications law. This interpretation methodology leads to a broader interpretation of the rules of the TA. Although the Court

[43] CBB 25 april 2001, KPN vs. OPTA en Dutchtone , *Mediaforum* 2001-6, Jur. nr. 28, m.nt. A.T. Ottow en *Computerrech*t 2001/4, p. 207, m.nt. E. J. Dommering.

of Rotterdam followed this methodology in the *Denda case*[44], it did not followed this line of reasoning in other cases, such as the *O2 case* (see *case study* in Chapter I) on mobile terminating tariffs. In other cases, (due to the principles of administrative law) procedural issues formed the core of the judgement, without dealing with material telecommunications law.[45] For example, in the *Kerktelefonie*[46] case, it was decided that competitors did not have standing in one of OPTA's proceedings, where it controlled the end user tariffs of KPN. In the *Libertel* case[47], it considered that competitors of the SMP company could not be involved in the proceedings. Only in a later stage was this overruled by the court (see section on locus standi).

According to the judgement of the CBB in the *Wegener* case[48] (dealing with a decision of the Nma on the basis of the CA), the courts must be reluctant to deal with the evaluation of complex economic evidence performed by the authority (in this case the NMa). In this case, the CBB followed the jurisprudence of the European Court of First Instance.[49] This case law seems to apply to telecommunications. However, there are no cases yet where the Court of Rotterdam had (or wanted) to deal with material economic issues.

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44 Rb. Rotterdam 21 juni 2001, KPN en Denda vs. OPTA, nrs. TELEC 01/066-SIMO, TELEC 01/111-SIMO en TELEC 01/191-SIMO, *Actualiteiten Mededingingsrecht*, september 2001, nummer 7, p.180-184, m.nt. RM.

45 See A.T. Ottow, 'Het verschil tussen duivenhokken en telecommunicatie. De bestuurs(proces)rechtelijke obstakels bij het toezicht op de telecommunicatiemarkt.', In: prof. mr. B.M.J. van de Meulen en mr A.T. Ottow, *'Toezicht op markten'*, VAR-reeks 130, Den Haag: Boom Juridische Uitgevers, 2003, chapter 4.

46 Vz. Rechtbank Rotterdam 31 maart 2000, Landelijke Organisatie Kerktelefoon/OPTA, reg. nr. VTELEC 00/0083-SIMO, *Mediaforum* 2000-6, Jur. Nr. 42, m.nt. W. Hins.

47 Vz. Rb.Rotterdam 24 december 1999, Libertel/OPTA, reg. nr. VTELEC 99/2547-SIMO, *Mediaforum* 2000-2, Jur. nr. 13, m.nt. E. Loozen & K. Mortelmans.

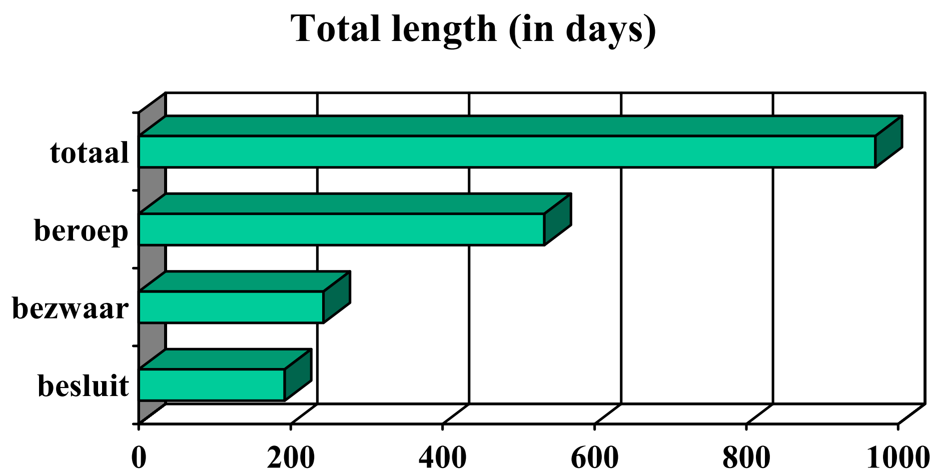
48 CBB 5 december 2001, d-g NMa en Wegener, *Mediaforum* 2002-4, Jur. nr.15, p. 131-145, m.nt. F. Leeflang & K. Mortelmans.

49 HJEG arrest van 30 januari 2002, Max. Mobil telekommunikation Service GmbH vs. Commissie, zaak T-54/99, r.ov.58-59.

O. THE OVERALL DURATION OF REGULATORY PROCEEDINGS

The main problem is the lengths of the procedures, caused by the obligatory internal revision procedure; the fact that the Court of Rotterdam is understaffed and the position of the parties concerned during the legal procedures.

This leads to the following length of the dispute procedures:[50]



Concerns about the time frame of appeal procedures have been raised (see, for instance, OPTA's Annual Report 2002). The conclusion of the European Commission in the Seventh Implementation Report is illustrative, where it states:

> 'In a fast-moving market, players look to the NRA to resolve disputes rapidly. There is, however, clearly a trade-off between the quality of decisions on the one hand and rapid decision-making in line with market developments on the other. In some Member States the incumbent (and in some cases its subsidiaries) has been able to seize first mover advantage in the roll-out of DSL services while entrants have been engaged in lengthy proceedings with regulators and the courts.(...)

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[50] This table is taken from the study of the Institute of Information Law (Chapter 3).

> In a related matter, it appears that incumbents have, as a matter of strategy, continued the practice of appealing systematically against NRA decisions (...). While due process is a fundamental legal principle, NRAs need to put in place disincentives for excessive delaying measures. Operators are concerned at lengthy appeal procedures in Belgium, Germany and the Netherlands, Austria and Finland.'[51]

The length of the procedures has been to the advantage of the incumbent and to the disadvantage of the development of competition. The Court has not been given enough resources to deal with complicated cases as telecommunications cases. Although the Court of Rotterdam has been assigned as the specialised court for telecommunications, post and competition cases, they were not given proper resources and education.

In case, the new proposals on the new TA will be accepted by Parliament, the total length of the procedures will be reduced dramatically, by leaving out the internal revision procedure and a direct appeal to the CBB.

P. EFFECTIVE IMPLEMENTATION OF EUROPEAN LAW

The new European Directives have not been implemented in time. Furthermore, it is uncertain whether the new TA will enter into force before 1 January 2004. Complicated questions of European law (e.g. interpretation, direct effect,..) will therefore arise in pending procedures and litigation.[52] Under the old system, these aspects also played a role. In the *Versatel* case[53] the court had to consider whether OPTA was competent to evaluate new tariffs of KPN, where the legislator did not yet properly implemented the Interconnection Directive and provide for the approval of a cost accounting methodology. The court refused to give direct effect to the articles of the directive. In the recent *Yarosa*

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51 Zie Zevende Implementatierapport van de Europese Commissie: Communication from the Commission to the Council, the European Parliament, The Economic and Social Committee and the Committee of the regions, Seventh Report on the Implementation of the Telecommunications Regulatory Package, Brussels, COM(2001) 706, p. 15.

52 See C. Borba Lèfevre, 'Doorwerking van de nieuwe richtlijnen voor elektronische communicatienetwerken en –diensten in het Nederlandse telecommunicatierecht', *Mediaforum* 2003-7/8, p. 232-239.

53 CBB 28 mei 2003, OPTA vs. KPN, Mediaforum 2003-10, Jur. Nr. 50, m.nt. K. Mortelmans.

case[54] the President of the Court considered that OPTA was (still) competent to resolve a dispute, although the new directives where not yet implemented. The president said that the coming into force of the directives did not take away the authority of OPTA as existing under the current (old) TA, although the President doubted whether such authority would exist once the directives would have been implemented by the new TA. Whithin the context of general rules on implementation of European directives this judgement can at least be qualifies as "doubtful".

[54] Vz. Rb. Rotterdam 3 oktober 2003, KPN vs. OPTA and Yarosa (VTELEC 03/2259-HRK), not published.

PART III: OVERALL ASSESSMENT OF THE REGULATORY SYSTEM

Strengths of the Regulatory System

- OPTA is an independent and efficient organisation, although it should focus more on legal issues.

Weaknesses of the Regulatory System

- OPTA has not been given enough space to act in the telecommunications sector: the legislator (the Ministry of Economic Affairs) has given OPTA limited grounds for action, as they consider too broad authorities to be in conflict with the legal principle of legality (no sufficient democratic control on an independent body). This view is in conflict with the European Directives which require an independent regulator with sufficient control.

Policy Recommendations

- Concurrent powers for OPTA (this can easily be done, once OPTA becomes a Chamber of the NMa).
- Take measures to reduce the lenght of procedures dramatically.