

# Access to networks through competition law

Florence School of Regulation workshop

## **'Competition Policy in Network Industries'**

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# Introduction Dennis Hesseling

- Work experience
  - ❖ NMa since 2002
    - Energy regulation
    - Anti-trust enforcement
    - Merger control
  - ❖ Consultant McKinsey & Company
- Ph.D. Mathematics
- Trainer
  - ❖ Energy regulators in Romania, Bulgaria, Turkey and Ukraine
  - ❖ Competition authority in Vietnam



# Outline

Introduction: competition law and regulation

Case: *KPN - Reggefiber*

Conclusion

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# Sector-specific network regulation in the Netherlands

## Sector

Electricity & natural gas  
Transportation  
Telecommunications & post

## Regulator

NMa  
NMa  
OPTA

# Competition vs. regulation

## Competition

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- Generally ex post
- General oversight
- Prohibition of cartels and abuse of dominant position
- Merger control

## Regulation

- Ex ante
- Sector specific
- Regulated access with tariffs based on efficient cost
- Licenses, monitoring, ...

Introduction: competition law and regulation

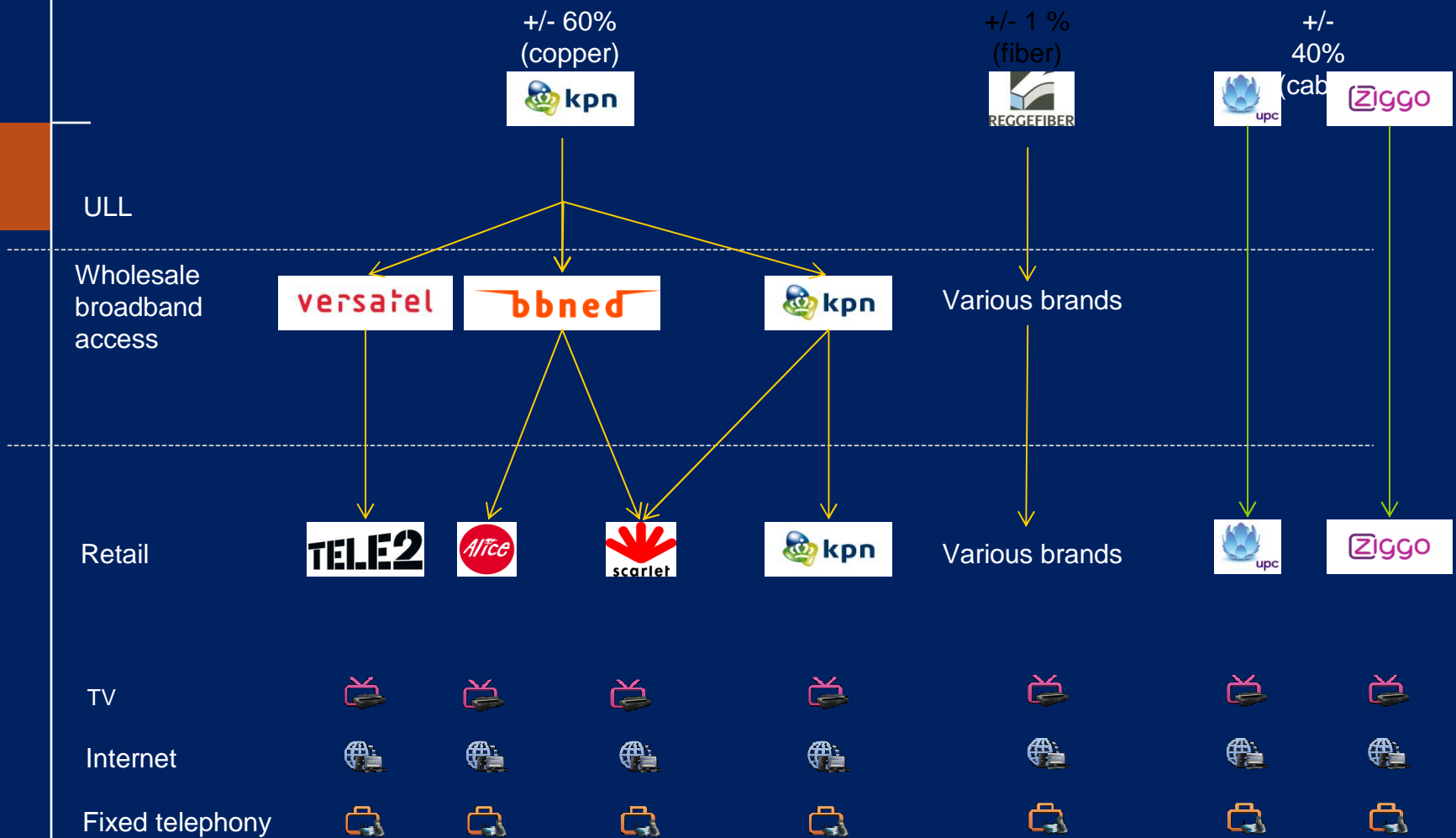
Case: *KPN - Reggefiber*

Conclusion

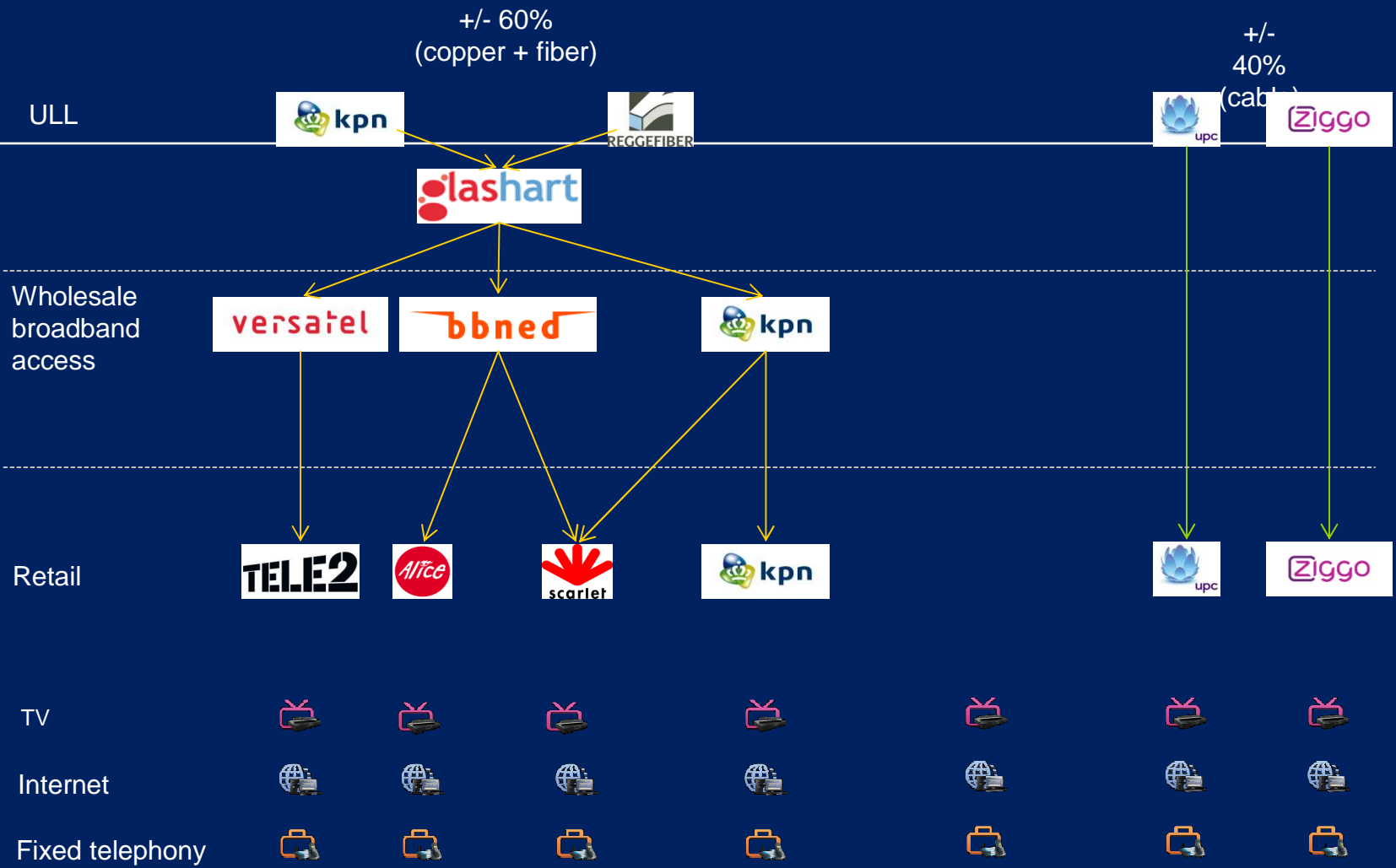
# Merger control case KPN - Reggefiber

- Roll-out next generation network in the Netherlands
- *KPN and Reggefiber*, joint venture July 2008; NMa authorised it in December 2008.
- KPN is the Dutch telecom incumbent
  - ❖ Current infrastructure consists mainly of copper
- Reggefiber is an entrant into the telecom industry
  - ❖ Has plans to roll-out a fiber optic network in NL
- Rationale
  - ❖ KPN brings customers, Reggefiber brings expertise

# Market situation before JV



# Market situation after JV



# Regulation

- KPN has a dominant position on ULL-copper
- KPN has a dominant position on retail market for broadband internet and fixed telephony
- Integrated cable networks have 40% of market in broadband internet and fixed telephony
- Telecom Regulator OPTA is in the process of designing a new regulation and involved in merger procedure

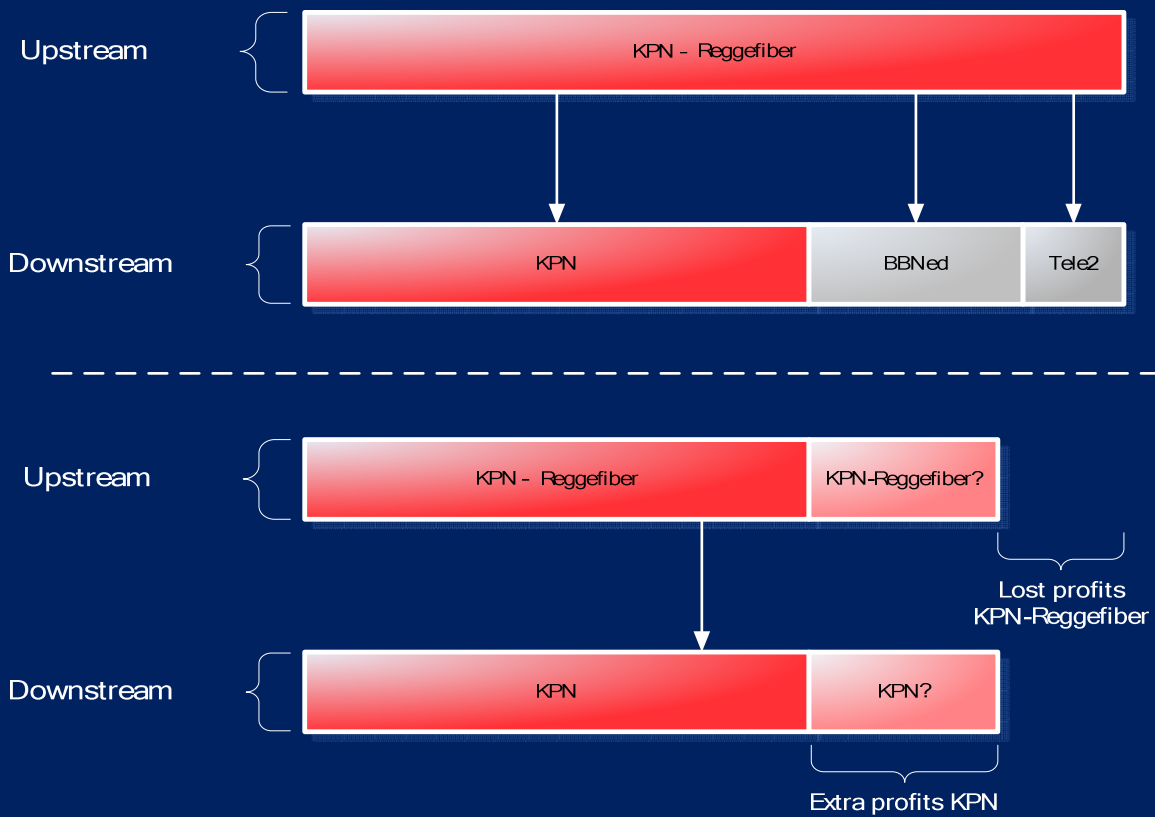
# OPTA – NMa: co-operation

- First step: OPTA joined the case team
  - ❖ Helps in coordination between OPTA and NMa
  - ❖ Helps in building understanding
  - ❖ More direct communication
- On specific issues: meetings at all levels of OPTA and NMa
- Result: enhanced co-operation

# Main effects of the concentration

- Horizontal
  - ❖ On the market for ULL Copper and ULL Glass competition concerns
- Vertical
  - ❖ Ability and incentive to foreclose *downstream* competitors of KPN
  - ❖ Incentive determined through a 'critical diversion' analysis. Only 10% of the retail clients of competitors of KPN on copper had to switch to glass in order for foreclosure to be profitable for the JV

# Effects: input foreclosure



## Behavioural remedies vs. structural remedies

- Structural remedies preferred over behavioural remedies
- Here structural remedies no option. Choice between:
  - ❖ Behavioural remedies
  - ❖ Prohibition of merger
  - ❖ Second phase investigation
    - Main question: is competition from cable-networks enough to avoid a SIEC?  
Is regulation still necessary?
- Remedies were offered during the first phase

# End result: conditions

- Joint-venture allowed under strict conditions:
  - ❖ Non-discriminatory
  - ❖ Tariff regulation (based on business model)
  - ❖ Information
  - ❖ Open access to network
- At the same time: OPTA regulation equal to conditions
  - ❖ Benefits for parties concerned and (downstream-)competitors
  - ❖ Commitments in NMa's decision equal to OPTA's regulation
  - ❖ OPTA as first stop for enforcement

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# Conclusion

- Fruitful cooperation between regulation and competition possible, even across different organisations
- Two decisions with (almost) identical requirements gives strong signal to market (and politics)
- Trust has to be built between authorities, this results in a better decision making for everyone in the end

## Epilogue: the court ...

- Both cable companies and alternative operators challenged the NMa decision in court
- OPTA's decision was also challenged in court
- NMa Session August 25, 2010: most questions about burden of proof in first phase and possibility of court to intervene in concentration that has already taken place
- Possibility that case may come back to NMa