

Antenne



MINISTER FOR FOREIGN TRADE

Ms Viviane Reding
Member of the European Commission

The Hague, 30th January 2008
8004912



Dear Commissioner,

Please find enclosed supplementary information with regard to the Dutch position on the Commission's proposals of November 2007 to review the EU regulatory framework for the telecom sector. In addition to an earlier Dutch position, which was sent to you in November 2006 as a reaction to the Commission's policy proposals of June 2006 on the telecom review, this supplement focuses on the following four new elements in the latest Commission's review proposals:

- establishing a European Electronic Communications Market Authority
- extending Commission competences concerning market regulation
- strengthening the independence of national authorities
- introducing functional separation.

We could discuss these and other issues during our forthcoming meeting at your office on Thursday 10th April.

Frank Heemskerck

Frank Heemskerck

Supplement to the Netherlands' position on the Commission's proposals to review the EU regulatory framework for the electronic communications sector.

1. Establishment of a European Authority for the electronic communications sector

- The Commission's proposal

1. The Commission has identified a lack of consistency in the application of the EU regulatory framework for the electronic communications sector and fragmentation in the regulation of the sector as a result of inadequate harmonisation. For this reason, the Commission has proposed that a European Authority for the electronic communications sector (hereinafter: European Authority) be established to promote the development of a single internal market for telecommunications.
2. The European Authority will have an advisory and executive function, particularly in the area of market regulation, frequency management, number management, consumer protection and security. In addition, the European Authority will also be responsible for managing European business numbers with decision-making powers. As far as market regulation is concerned, the Commission will make the decisions and the European Authority will provide advice. In the case of spectrum management and other matters, the harmonisation measures required will be determined via comitology. These measures may lead to executive tasks at the EU level that will be carried out by the European Authority.
3. The Commission has proposed that ENISA (European Network and Information Security Agency)¹ should be incorporated into the European Authority.
4. The Commission envisages a permanent staff of 134 FTE and a budget of €28 million per year for the European Authority once fully established.
5. National regulatory authorities (NRAs) will only be able to exert limited influence on the decision-making process within the European Authority.

The Netherlands' position

6. The Netherlands does not support the establishment of a European Authority.
7. Market conditions within the EU vary widely in some cases and therefore require tailor-made solutions as far as supervision is concerned. For this reason, the NRAs must continue to bear the primary responsibility for implementing the EU regulatory framework, in terms of both form and content. Only then can there be effective and efficient regulation that takes sufficient account of specific national market conditions.
8. The establishment of a European Authority will lead to extra bureaucracy, which will adversely affect the strength of regulation on the basis of the EU regulatory framework.
9. The tasks in the area of market regulation are in principle temporary in nature. The intention is to fall back on general competition policy in due course, once competition has got properly into its stride in the electronic communications sector. Establishing a European Authority will give these tasks in the area of market regulation a more permanent character, which means a slower transition to general competition law.
10. The Netherlands has indicated that it will only support more extensive harmonisation measures requiring implementation at the EU level if these are really necessary. This is only the case in

¹ ENISA functions as a knowledge centre providing Member States and the Commission with advice on questions relating to network and information security.

respect of genuine pan-European services, that is, services that are necessarily offered in a number of Member States. To date, there are only a limited number of examples: frequency-sharing for satellite networks, mobile communication in aircraft and boats, European numbers (116, ETNS²). These matters often still involve national implementation as well. It is therefore to be expected that the resulting executive functions at the EU level will also remain limited. The Commission currently carries out a number of these functions as part of its scrutiny of the implementation of the EU regulatory framework. It is not necessary to establish a European Authority for this. The Commission can continue carrying out these tasks, if necessary in collaboration with the European Regulators Group (ERG), which is composed of the heads of the relevant national authorities.

11. The European Authority will also have an advisory function in all kinds of areas, including market regulation and spectrum policy. It is not necessary to establish a European Authority for these tasks either. After all, the ERG already fulfils an advisory role, particularly in the area of market regulation.
12. The ERG has the necessary expertise to be able to provide the Commission with sound advice in the area of market regulation. It is however necessary for the ERG to take a number of steps to enable it to function better and more effectively. A limited staff, more effective decision-making (decisions to be taken by majority vote) and more transparency are necessary to strengthen the role of the ERG.
13. As far as spectrum management is concerned, there are already various institutions with the necessary expertise, such as the European Conference of Postal and Telecommunications Administrations (CEPT). To ensure the provision of effective advice about harmonisation measures and the proper implementation of these measures, it is important for the CEPT to pay more attention to the economic aspects of spectrum management. A European Authority would not have any added value in this regard either, in terms of achieving the objectives in the area of spectrum management, in particular increasing flexibility.
14. None of this detracts from the fact that the regulatory framework must be applied in a consistent and harmonised way within the EU by NRAs to ensure that entry to markets is not hampered by regulation. This requires cooperation, coordination and review by and between the Commission, Member States and NRAs, but not, in most cases, any far-reaching harmonisation that requires central implementation at the EU level. In by far the majority of cases, implementation can take place more effectively and more efficiently at the national level.
15. One of the points for improvement that came out of the ENISA evaluation was the reduction of general costs for staffing. The Commission refers to this as an argument for having ENISA incorporated into the European Authority. The establishment of a European Authority must however be assessed on its own merits. The points for improvement arising from the ENISA evaluation can also be dealt with without incorporating ENISA into a new European Authority and cannot as such be regarded as a reason for establishing such a European Authority.

² European Telephony Numbering Space (ETNS).

2. Expansion of the Commission's powers in respect of market regulation

- The Commission's proposal

16. Based on the existing EU regulatory framework for the electronic communications sector, NRAs must report their market regulation decisions to the Commission for review before these can be adopted. Based on the existing framework, the Commission can only block decisions by NRAs ("veto right") if the delimitation of the market or the designation of which undertakings have significant market power would, in its opinion, create a barrier to the single market or if it has serious doubts about the compatibility of such decisions with Community law.
17. In line with previous policy proposals, the Commission is now proposing that the Commission also be given a veto right for those obligations imposed by NRAs on parties with significant market power. This relates in particular to different forms of access regulation and the regulation of end-user tariffs.
18. Before vetoing a decision, the Commission will ask the advice of the new European Authority.
19. The Commission has proposed that, once a decision has been vetoed, a NRA will be required to make a new decision within a specific period. If the NRA fails to do so, or if the Commission once again vetoes the new decision, the Commission can require the NRA to impose certain obligations, based on advice from the European Authority.
20. The proposals put forward by the Commission specify that an NRA must complete a market analysis within a certain period. Existing market decisions must be renewed within two years. A period of one year applies to new markets on the list of relevant markets or if the market analysis has not already been carried out previously. If the NRA does not make a decision within the set period, the Commission can ask the European Authority to carry out a market analysis. The Commission can then make a market regulation decision based on this.
21. The Commission may designate a specific market as a so-called 'transnational market'. The Commission has proposed that in such a case, it will be able to make a market decision based on advice from the European Authority. The existing regulatory framework allows NRAs to make these market decisions.

- The Netherlands' position

22. The Commission's proposals lead to a further expansion of the powers of the Commission. The Netherlands will not support these proposals.
23. The Netherlands believes that the NRAs know the specific market conditions the best and that their assessment of the measures to be taken must in principle be decisive. The market regulation decisions can be reviewed by the national court or, as part of infringement proceedings, by the European Court of Justice.
24. In its response to the Commission's policy proposals, the Netherlands stated that it was important for the market regulation decisions of NRAs to be assessed by the Commission. This assessment should not however be carried out on the basis of veto powers. A more restrained prior assessment (written comments), with the Commission being able to have the decision rectified via the European Court of Justice at a later stage if necessary (infringement proceedings), will suffice. The cable case has shown that the Commission uses its veto powers in such a way that the Independent Post and Telecommunications Authority of the Netherlands, OPTA, has insufficient scope to take those measures, based on its own market analysis, that OPTA deems necessary in the specific context of the Dutch market.

25. The Commission must be more active in monitoring and tackling the problems that businesses experience in respect of entering markets in EU countries. In particular, the Commission should be much more active, for example with infringement proceedings, in cases in which NRAs do not make market analysis decisions or do not make these within the set period, or do not effectively enforce decisions that have been made. This would not require any weighty powers making it possible to block decisions made by NRAs in advance.
26. The Netherlands has said that the ERG's role in monitoring the consistency of market regulation decisions made by NRAs must be strengthened. This should lead to transparent peer evaluation, which the NRA must take into account when making a market decision. The court will check whether the NRA has done this.
27. The Netherlands has also said that, insofar as the Commission's veto powers remain in force, the Commission should be required to ask the ERG for advice before definitively exercising its veto. To this end, the ERG must however take a number of steps to enable it to function more effectively. If the Commission does not want to follow the advice of the ERG, the draft veto decision must be submitted to the Communications Committee via the regulatory procedure.
28. As the Netherlands also indicated in its response to the Commission's earlier policy proposals, it does believe that it is important for market decisions to be made as quickly as possible and for these to be repeated periodically in order to respond to current market developments as effectively as possible. For this reason, the Netherlands supports the Commission's proposal to introduce deadlines for making or renewing market decisions.
29. The Netherlands does not however support the proposal that the Commission be given the power to make a market decision itself if these deadlines are exceeded. The Netherlands believes that the Commission should institute infringement proceedings in such a case. Based on these proceedings, the European Court of Justice could then oblige the NRA to make a market decision within a certain period.
30. Nor does the Netherlands support the proposal that the Commission be given the power to make a market decision in the case of transnational markets. Such a decision can also be made based on cooperation between NRAs, as provided for in the current regulatory framework.

3. Strengthening the independence of 'regulatory authorities'

- The Commission's proposal

31. The EU regulatory framework for the electronic communications sector makes a distinction, as far as tasks and powers are concerned, between Member States and NRAs. In general, provisions to bring regulations into force are directed towards Member States and provisions relating to the performance of tasks and enforcement towards NRAs. In some cases, however, policy and regulatory tasks (laying down generally binding provisions) are assigned to the NRAs.
32. The Member States themselves can specify which organisation acts as the NRA. In the Netherlands, both OPTA and the Minister of Economic Affairs (including the Agentschap Telecom (Radiocommunications Agency Netherlands), hereinafter referred to as the Agency) act as NRAs. The executive functions have been assigned to OPTA and the Agency, and the policy and regulatory functions to the Minister.
33. In the Commission's proposals, the requirements in respect of the independence of an NRA have been tightened, to guarantee that an NRA, when carrying out its tasks, is protected against external intervention and political pressure that could threaten its independence. For this reason, it has been stipulated that an NRA may not receive any instructions from third parties and that the management of the NRA may only be dismissed in the event of serious dereliction of duty. In the

Netherlands, this would in practice mean that an NRA would have to have the status of an independent administrative body (hereinafter IAB) in order to comply with the requirements laid down by the Commission.

The Netherlands' position

34. As far as the regulation of markets is concerned, in the sense of applying sector-specific competition rules, the Netherlands supports the proposal. The Netherlands does not support the proposal for policy-related and regulatory tasks.
35. Only OPTA currently meets these requirements in respect of independence. The Minister (including the Agency) does not.
36. The Commission's proposal would mean that the tasks to implement the regulatory framework, including a number of policy-related and regulatory tasks (laying down generally binding provisions) could no longer be carried out by the Minister, but would have to be assigned to an IAB.
37. In the administrative structure in place in the Netherlands, an IAB does not in principle have any regulatory powers. It is the central government that has the power to lay down generally binding provisions. Policy and regulations must come into effect under political direction and control. Politicians must be able to give instructions in respect of topics of general interest (such as allocating frequencies for broadcasting, defence and security).

4. Functional separation

The Commission's proposal

38. The Commission believes that functional separation can be an important instrument for guaranteeing equivalent access to networks for competing providers. With functional separation, a vertically integrated company is obliged to establish the network and the services as operationally separate business entities.
39. The Commission has therefore proposed that functional separation be included in the standard package of obligations that NRAs can impose. The Commission's approval will be required in order to impose functional separation as an obligation.

The Netherlands' position

40. The Netherlands supports the Commission's proposal to give the NRA the power to impose functional separation as an obligation. As already indicated previously, the Netherlands objects to the Commission having the power to oblige NRAs to impose functional separation.
41. Particularly in countries where the regulatory measures that have a substantial impact on the behaviour of parties with significant market power are not effective enough in structural terms, and it is likely that a market will remain insufficiently competitive for a long time, a structural measure such as functional separation may be a useful and proportional measure.
42. OPTA cannot currently impose functional separation as an obligation. The Dutch Telecommunications Act contains an exhaustive list of the obligations that OPTA can impose on parties with significant market power. New executive legislation could however give OPTA the power to impose other obligations. The Commission's proposal gives OPTA the power directly and additional regulations are no longer needed for this.

43. Making it possible for the NRA to be able to impose functional separation, could be necessary for some markets. It is however up to the NRA to make this assessment based on a thorough market analysis. An NRA will always have to provide good reasons for why functional separation is an appropriate and proportional measure. The court will be able to verify this. The imposition of an obligation is covered by enough legal guarantees to ensure that such an obligation is only imposed in situations where this is really necessary and proportional.