POSITION PAPER OF THE NETHERLANDS ON THE REVIEW OF THE REGULATORY FRAMEWORK FOR ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES

General objectives and principles

Digital infrastructure has become a prerequisite for the performance and competiveness of Europe's economy due to the ongoing process of digitisation. The current regulatory framework for electronic communication networks and services has helped to foster competition, create an internal market and protect end users. A modernised framework will need to address many developments. Demand for reliable high capacity connections, anytime and anywhere, is growing rapidly. Fixed and mobile services converge as users expect services to work seamlessly on both networks. Telecom companies facing huge investments consolidate in search of economies of scale. New services and service providers are changing competitive dynamics of traditional markets. These ongoing technological and economic developments make it a huge challenge to keep the framework future-proof.

The revision of the framework will benefit from agreement on a clear overarching objective. In our view, this objective should be to realise reliable, high capacity connectivity for citizens and companies, for objects and devices – in the most efficient way – while protecting the rights of the connectivity users. Without efficient fixed and mobile infrastructures to provide connectivity, there is no Digital Single Market in which citizens, companies and governments communicate, trade and interact. This objective should also set the direction for regulatory measures to promote competition.

From this overarching objective we derive four underpinning principles. We want to see a framework that:

1. Supports investment and innovation in networks and services. This calls for improving regulatory certainty (e.g. of access regulation) and predictability (e.g. of the timing and duration of spectrum awards) and flexibility to adjust incentives for investment to local circumstances. It also calls for removing any unnecessary regulatory burden (e.g. when end user rights are sufficiently protected by generic rules).
2. Promotes fair and dynamic competition between and on networks, and between communication services using these networks. This means preserving market dynamics created by access regulation over the past years, and adapting to new market dynamics resulting from new services, convergence and consolidation.
3. Protects the rights of end users of communication services, whether these are provided by traditional or by new companies. Empowering end users will give them an important role in creating and maintaining the right market dynamics.
4. Strikes the right balance between harmonisation of rules and space for tailor-made solutions. Whereas harmonisation contributes to regulatory certainty and lower costs of cross border operations, space for tailor-made solutions is necessary to accommodate national circumstances, safeguard efficiency and set the right incentives for investment and competition. The framework should provide for regulatory options in order to make it work for all member states, for instance in the case of access regulation. It will also need to leave certain competences at national level, for instance when it comes to spectrum auction design and defining the scope of the universal service obligation. In those cases more subtle and bottom-up approaches should be found to coordinate and improve policy. Organisations of national authorities like the Body of European regulators of Electronic Communications (BEREC) and the Radio Spectrum Policy Group (RSPG) will play an important role in this.

Network Access Regulation

An important cornerstone of the regulatory framework is the ex-ante network access regime. National regulatory authorities decide on appropriate access regulation on the basis of a prospective analysis of relevant markets and the identification of market parties with Significant Market Power (SMP). The SMP-model has enabled market entry and has stimulated competition over the past decade, ensuring the delivery of electronic communication services for better prices and quality to both citizens and companies. Moreover, by enabling market entry and competition, the SMP model has been an important driver for investments in both fixed and mobile services and infrastructure.

The SMP-model is built on the notion that new entrants benefit from regulated access to the fixed infrastructure and climb the 'ladder of investment'. These competitors would in time become 'full' infrastructure competitors independent of regulated access. By then ex-post competition law would be sufficient to maintain effective competition between the infrastructure competitors, and ex-ante access obligations could be lifted. This blueprint for establishing effective competition in the telecoms markets has worked out differently in different Member States, depending on economic, social and political factors, regulatory choices and – foremost – by different infrastructural starting points. In some areas infrastructure competition has emerged, or might still emerge, as a result of regulated access. In other areas infrastructure competition between fixed networks will be more difficult to establish due to low population density. In these areas infrastructure might be characterised by a natural monopoly. Finally, some areas have seen infrastructure competition arise only thanks to the convergence of cable networks and telecommunications networks. One of the challenges of this review is to make the framework fit for providing solutions for all these situations. Regulatory intervention should ensure access to the inputs that allow operators to deploy NGA networks and compete effectively on a regional, national or European level. As operators may be active in several geographical areas, it will be important to recognize that intervention in one area might influence competition in other areas.

Proposed changes in the SMP-model

The SMP-model seems suitable to address competition problems in (regions within) member states with one ubiquitous network, and no indication of infrastructure competition emerging. The Netherlands proposes a number of changes to simplify the SMP-model and make it more effective and efficient.

First of all, the regulatory period for static markets like the fixed and mobile call termination markets - where each operator is designated as having SMP on its own network - could be extended. From a harmonisation perspective, the European Commission could even consider a separate regulation as an appropriate tool for these markets.

Secondly, a decision on the imposition, maintenance and withdrawal of wholesale obligations should be based on the assessment of competition in the relevant retail market. The Framework Directive (article 16) links this decision to the market analysis of the relevant (wholesale) market. However, the ultimate aim of regulatory intervention is to create competitive retail markets. This principle should be more clearly established in the framework. This would simplify the framework and make it more efficient, as a separate analysis of the (hypothetical) wholesale market will no longer be necessary.

Thirdly, the focus on retail competition problems should be combined with more flexibility towards appropriate remedies. The approach taken in the current framework is to analyse

and regulate the wholesale market most upstream from the retail market. The level of access regulation should be more explicitly based on the competition problems observed in the retail market. This would make the framework more effective and also better equipped to deal with unexpected access demand, for instance caused by the virtualisation of communication networks.

Fourthly, a more flexible approach towards access remedies is needed to ensure technology neutrality in the future framework. This principle is becoming increasingly important in a time where different network technologies are used to provide comparable retail services (cable networks, copper networks, fibre networks and possibly also wireless networks). However, the fixed network topology of the telecom incumbents is still the starting point when it comes to (wholesale) market definition and access regulation. The future framework should be flexible enough to deal with the technological difference between the network operators, and if necessary impose remedies on different network access levels.

Finally, the European Commission raises the question of whether National Regulatory Authorities (NRA's) should have the possibility to address bottlenecks in relation to other inputs, for instance access to content, if these are considered to be decisive for the development of the retail market. Differentiation in (exclusive) content could enhance competitive dynamics in the market and is not necessarily anti-competitive. However, in light of the growing importance of content in competition between providers of electronic communication networks and services, it is appropriate for the European Commission to assess this development and carefully consider if it is necessary to include content within the scope of the framework.

The need for a symmetrical regulatory model

The changes proposed above would make the framework better equipped for dealing with cases of joint dominance, although the legislative text could still provide more guidance on this to NRA's. However, they do not provide a suitable answer to the most prominent challenge the Netherlands faces: a duopolistic market structure in fixed access networks (incumbent and cable) that also has implications for mobile markets. In this market structure long term competition concerns arise even if there is no clear case of joint dominance.

Access to fixed networks is an important input for maintaining competitive dynamics in a fixed/mobile connectivity market. Consumers, business and increasingly devices, require access to both fixed and wireless high-speed networks. Fixed-mobile convergence will accelerate and, indeed, be business-as-usual by the time the review of the framework is finalised. This leaves both fixed and mobile operators dependent on access to their respective networks in order to compete effectively with each other. However, in doing so they face different conditions. In the mobile market a Mobile Virtual Network Operator (MVNO) wholesale market has emerged as a result of competition. Also, market entry can be established, if needed, through spectrum licences. In the fixed network market no wholesale market has emerged on commercial grounds and network economics prevent market entry at the level of the access networks. This gives fixed network operators a significant strategic advantage over their mobile competitors. They can obtain mobile inputs, while mobile operators are dependent on access regulation to obtain fixed inputs. However, access regulation is uncertain in a duopolistic market structure. Regulatory certainty and predictability of access to fixed networks is needed to maintain investment incentives for mobile network operators.

Access to fixed networks for other network operators is also important to ensure future investment in fixed infrastructure. Over the past decade, regulated access in the Netherlands has proven that competitors on the network provide important investment incentives for network upgrades. 'Full' infrastructure competitors may push each other towards more investment, but can also be inclined to compete less and price above the competitive level. Less competition on quality (product innovations, capacities and broadband penetration) and (relatively) higher prices would lead to consumer harm.

Towards a more market-based approach

For these reasons the Netherlands proposes to introduce a complementary regulatory model, in order to maintain competitive dynamics and investment incentives in a duopoly. This model comprises of an ex-ante symmetrical access regime that would co-exist with the SMP model and apply to at least fixed networks. Whether it would also need to apply to mobile networks should be carefully considered in light of the existing MVNO-market and the possibilities spectrum licensing offers. A complementary (or parallel) regime means that specific ex-ante access obligations will - simultaneously - still be possible under the framework, in markets with a case of individual or joint SMP.

In markets with no clear case of individual or joint SMP, more leeway can be given to market dynamics. However, this should not imply deregulation or relying on ex-post competition law to deal with access regulation. Intervention under competition law (article 201 TFEU) will not suffice because it is also based on the existence of single or joint dominance. Ex-ante, but more market-based, provisions are necessary, accompanied by regulatory provisions for lowering switching barriers.

The basis for such a more market-based model would be a general obligation for (at least fixed) network operators to negotiate on access arrangements with other fixed or mobile network operators. Operators would have the obligation to meet reasonable requests for access to their network under fair and reasonable terms and conditions. NRA's would have a dispute settlement competence and take binding decisions to resolve any disputes taking full account of the principle of proportionality (for instance, if access is unjustifiably refused or only offered on unreasonable conditions). More leeway for market dynamics means a shift in the role the NRA's will play. Instead of deciding on access obligations well in advance they would only intervene if problems arise in negotiations on access arrangements. Setting clear policy objectives in the framework would provide NRA's with means for dispute settlement.

Comparable symmetric obligations are already in place under European law. For instance in the provisions on co-location and sharing of network elements and associated facilities in the Framework Directive, or in article 3 of the Broadband Cost Reduction Directive. These obligations apply irrespective of the existence of SMP.

The proposed complementary regulatory model combines market-based incentives for competition and investment with an additional option of regulatory intervention. We believe this addition is necessary to face the challenges that different market structures pose for member states. As it is equipped to deal with technological innovations in network access and unexpected access demand, it would also help to make the regulatory framework future-proof.

Spectrum management and wireless connectivity

Harmonisation of the use of spectrum
Due to new users, devices and applications wireless data traffic is increasing rapidly. According to the Radio Spectrum Policy Programme every effort should be made to identify at least 1200 MHz of suitable spectrum by 2015. This figure has now been reached. Further demand for spectrum will depend on population density and user behaviour and will vary between member states. Therefore, we do not favour setting a new target for the amount of spectrum to be made available.

We support technical harmonisation of the conditions for using a spectrum band. Harmonisation of the use of additional spectrum should be done on a case by case basis and is only called for in the following circumstances:

- If the development of equipment for new services operating in a spectrum band relies on the creation of a European-wide market (economies of scale);
- If a lack of coordination in reallocation of the band could seriously limit the possibility of deployment of wireless broadband in a country if the neighbouring country continues to operate another application (Cross-border issues);
- If telecoms services that are provided EU-wide rely on the availability of a frequency band across Europe (EU-wide telecom services).

Most importantly, a scarce resource like spectrum will need to be used efficiently. Since not all frequency bands allocated to mobile broadband need to be available in all member states flexibility needs to be provided to deal with differences in market demand. When the amount of harmonised spectrum is more than the demand for spectrum for electronic communication services, part of that harmonised spectrum should be allowed to be made available for other purposes. This will prevent spectrum from being left unused. Flexibility can be provided for instance by allowing private use or governmental use.

In general, spectrum policy will have to rely more and more on the shared use of bands due to a more intensive usage of the spectrum by various sectors. This will optimise efficient use of a frequency band based on local circumstances. This is not a new approach; several examples exist where the use of spectrum is shared in time or in confined geographical areas**.** New technologies (sensing, geo-databases) can be used to optimise possibilities for sharing. Spectrum sharing will tend to become the norm in the years ahead and national trials and efforts are expected to increase in size and number.

The efforts made by Member States to ensure a proper implementation of new sharing approaches should be recognised and encouraged as a possible voluntary regulatory approach based on a common legal framework. Best practices of sharing should be actively stimulated. The new regulatory framework should recognise that sharing possibilities are not to be defined at an EU level but are to be left to the national or local radio environment.

Harmonisation of procedures and conditions

The regulatory framework can bring about further common political objectives for spectrum policy. Member States are best equipped to decide how these translate into the design of the spectrum award process. This depends to a large extent on specific national objectives, e.g. creating more competition in the mobile market, enhancing coverage in rural areas or improving efficient use of spectrum. National objectives may differ due to differences in national circumstances and preferences. The design of an auction and the conditions under which spectrum is licensed may therefore differ between member states.

In order to enhance predictability for market operators, various mechanisms (each designed for a specific circumstance) could be set out in a "toolbox" of policy options, from which spectrum authorities can choose. Of course, it is important that Member States are transparent and involve stakeholders in the decision making process.

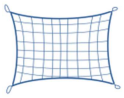
In addition, predictability could be enhanced if Member States would be mandated to periodically publish a long term strategy of spectrum policy and awards. Such a strategy should include spectrum bands to be awarded, timing of the award procedure and duration of the licences.

In order to further harmonize spectrum policy we are in favour of sharing best practises and performing friendly peer reviews. Members of the Radio Spectrum Policy Group (RSPG) have a broad expertise in designing award processes and could be tasked with defining best practices. The RSPG could also play a role in performing peer reviews of intended spectrum award designs of Member States. This could best take the form of an input to the normal public consultation process.

Standardization and interoperability of DAB(+) and DOCSIS

The encouragement of standards by the European Commission would play a positive role in the creation of economies of scale which would in turn create benefits for European businesses and consumers. The Framework Directive provides options for the Commission to stimulate the harmonisation of standards across Europe. This opportunity should be used. For instance when it comes to ensuring interoperability of radio devices across Europe. With regard to digital terrestrial radio, DAB and DAB+ are already the 'de facto' standards in Europe. These need to become more widespread. Ideally, provisions are also made to promote the inclusion of both analogue (FM) and digital (DAB / DAB+) capability in all new radio receivers (automotive and domestic) in Europe. This will ensure the interoperability of receivers across Europe – especially as Member States start to switch-off FM signals.

With regard to the development of DOCSIS cable standards, the Netherlands would like to stress the important role the European Commission and NRA's play in the process of incentivising suppliers and operators of the DOCSIS community to develop a standard allowing Virtual Unbundled Local Access. As the European Commission points out in its decision on the notification of the wholesale local access market (NL/2015/1794), technical considerations do not appear to be the main obstacle to offering local access products on cable networks, but rather economic and strategic considerations. The European Commission points out the possible role of NRA's in incentivising suppliers and operators in developing an open standard. The Netherlands invites the European Commission to consider how the review could facilitate such a role of NRA's, and how the European Commission itself could incentivise the DOCSIS community into developing such a standard. The question will need to be addressed of whether the current policy tools of the European Commission provide a sufficient solution or whether the framework needs additional provisions.



The Universal Service Regime

The universal service regime is still needed as a safety net, to ensure that a minimum set of electronic communication services is made available to all end users at an affordable price at a fixed location. It should allow flexibility to cope with different national situations; for example to withdraw obligations when services are satisfactorily delivered by the market or have become obsolete. The universal service regime should also be technology-neutral.

The current scope of the universal service, targeted at the provision of a connection to an electronic communications network at a fixed location, is adequate. The provision of telephony services at a fixed location is still important and should be kept within the scope of the universal service regime. Public payphones, directories and directory enquiry services could however be removed from the scope of the universal service .

Due to market, technological and social developments, functional internet access has gained more importance compared to telephony. Any universal service obligations with regard to internet access should remain limited to the provision of a basic safety net, to avoid any disruptive effects. The need to guarantee internet access for the sake of social and economic inclusion should be distinguished from the objective to reach more ambitious broadband targets. The term "functional internet access" is therefore still valid in the future universal service regime. Other public policy tools are better suited to foster broadband deployment in case the market fails or the outcome is unsatisfactory.

The objective of a universal service obligation for functional internet access is to ensure social and economic inclusion. It is most appropriate to define the scope and characteristics of functional internet access at a national level.

Sector specific regulation for communication services

Technological and commercial innovations have given rise to new players that offer communication services that are not in the scope of the regulatory framework, such as "Over-The-Top" services. Simply broadening the current definitions to include the variety of services and players would not make the framework future-proof and would be too crude. The new framework will need to be structured differently. A distinction could be made between the regulation of the services that are offered via/over the different networks and the regulation of the networks itself. New definitions will be necessary, such as a definition of "communication services". However it is important to note that even within the category of "communication services" differences in characteristics may require differences in regulation.

Just like traditional communication services, OTT-services may affect public interests. This calls for a re-assessment of the regulatory framework to see if public interests are protected sufficiently and to see if traditional communication services face an unnecessary regulatory burden compared to newcomers. The overall objective should be to empower end-users in the EU in order to make them a driving force for competition and innovation. Creating a level playing field between all services can be too far-reaching, as there may be good reasons for taking a different regulatory approach to services that have different characteristics. The new regulatory framework should be as simple and proportionate as possible.

As a starting point, the Netherlands prefers general regulation over sector specific regulation. General regulation can better encompass future developments and offers more stability. It also offers the same level of empowerment and protection for all end-users, regardless of the category of service that is involved: a traditional ECS or a competing OTT-service. The European Commission should look closely at where general regulations offer sufficient protection to end-users and where specific provisions can be (partially) removed. Examples are article 20 of the Universal Services Directive on contract requirements and article 34 on alternative dispute resolution. They could, at least, be made leaner and refer to the Alternative Dispute Resolution Directive (2013/11/EU) and the Directive on Consumer Rights (2011/83/EC). Transparency for end-users on the protection of their personal data is needed for all services, whether traditional or OTT. Once the European Data Protection Regulation is finalised the Directive on privacy and electronic communications (2002/58/EC) should be checked for overlap and consistency. A focused and proportionate E-privacy-regulation should remain.

Sector specific regulation should be continued where a level of empowerment and protection is needed that cannot be provided by general regulation. Sector specific provisions are needed, at least, for switching. Increasing bundling of services may have lock-in effects for end users. Provisions for provider switching should apply to all elements of a bundle that contains at least one electronic communication service. Rules on the control of consumption and contract termination in case of the tacit extension of contracts are need (the latter can also be regulated generally).

Currently, several obligations and rights in the framework are linked to the use of telephone numbers. We propose to evaluate if certain rights and obligations, such as the interoperability obligations of Article 28 of the Universal Service Directive, can be linked to certain services or specifications rather than being linked to the mere use of numbers.

The Commission should take into account the impact of specific market developments such as OTT services and M2M on the usage of numbers. The Commission's focus regarding numbering should be on the availability of adequate numbers, access of emergency services, number portability (including maximum throughput times and including the relationship between number portability and contract duration) and the extra-territorial use of numbers. In this context any changes to the current framework should be closely coordinated with CEPT.

National number resources serve applications for national markets and can also – in addition to global number resources – be used in specific cross-border situations, facilitating e.g. M2M. National resources can be managed most efficiently at the national level, also in the case of cross-border use. A European number range to facilitate M2M communication should only be considered if there is a clear need for it and if industry supports it. International management of such resources (e.g. by BEREC) may be the most viable option.

In the future, the obligation to provide access to emergency services (112) for providers of electronic communication services and networks could be broadened to other market players. In principle, all emergency calls need to be identifiable (for call back). They also need to be accompanied by accurate location information, since location information is of increasing importance to emergency services. Minimum requirements (e.g. standards for data formats and interfaces) are desirable for emergency apps.

Institutional set-up and governance

BEREC plays an important role in the harmonised application of the telecommunication framework by delivering opinions on draft measures of NRAs concerning market definition, the designation of undertakings with significant market power and the imposition of remedies, and by advising the Commission and individual NRA's. In order to realise a more harmonised application of the framework the role of BEREC should be strengthened.

This can be accomplished by giving BEREC a role in assessing the aforementioned draft measures earlier on in the process, prior to any second phase investigation by the European Commission. It can also be accomplished by mandating BEREC to issue guidelines on specific subjects. A good example is set by the Telecom Single Market Regulation on net neutrality and roaming. It stipulates that in order to contribute to the consistent application of the Regulation, BEREC shall, after consulting stakeholders and in close cooperation with the European Commission, issue guidelines for the implementation of the obligations of national regulatory authorities.

According to the Framework Directive "Member States shall ensure that the goals of BEREC of promoting greater regulatory coordination and coherence are actively supported by the respective national regulatory authorities" and that "national regulatory authorities take utmost account of opinions and common positions adopted by BEREC when adopting their own decisions for their national markets" (article 3b). In case BEREC takes an opinion on spectrum policy not all member states are represented, as spectrum management sometimes lies outside the NRA. This situation can be improved by giving the RSPG a more prominent and formal role in EU spectrum management issues. In the RSPG all member states are represented by the appropriate spectrum authorities of their choice.